

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT

_____)	
RAYMOND L. FLYNN and)	Docket NO. 04-3136-A
THOMAS A. SHIELDS)	
)	
Plaintiffs,)	
)	PLAINTIFFS' MEMORANDUM
vs.)	REGARDING ISSUES OF
)	DISMISSAL AND CONSOLIDATION
)	
DOUGLAS JOHNSTONE,)	
JOHN J. LONG,)	
DAVID J. RUSHFORD, and)	
SUSAN FLOOD,)	
)	
Defendants.)	
_____)	

INTRODUCTION

This Court’s Procedural Order of August 17, 2004, instructed the parties that upon issuance of Judge Ball’s decisions in *Johnstone v. Reilly* and *Cote-Whitacer v. DPH*, they were to “examine those decisions and by memoranda report their respective positions (within 21 days of issuance of the decisions) to this court upon the issues of (a) dismissal and (b) consolidation.” (Emphasis original.) Judge Ball issued her decisions on August 18, 2004, and Plaintiffs have examined them. The *Cote-Whitacre* plaintiffs reportedly plan to appeal.

Plaintiffs Raymond Flynn and Thomas Shield hereby submit their position on dismissal and consolidation. Because an immediate decision on consolidation is necessary to protect Plaintiffs’ rights in the event of a *Cote-Whitacre* appeal, this memorandum will address consolidation first.

I. CONSOLIDATION IS NECESSARY TO PROTECT PLAINTIFFS' RIGHTS

Plaintiffs' complaint seeks to compel Defendants to comply with the requirements of the 1913 law that is at issue in *Johnstone* and *Cote-Whitacre*. The remedy sought includes a request that this Court rule that marriage licenses issued in violation of that law are invalid. As discussed in Plaintiffs' opposition to *Johnstone* and Long's renewed motion to dismiss (attached as Exhibit A), the remedy sought is appropriate in an action in the nature of mandamus.

The plaintiffs in *Johnstone* and *Cote-Whitacre* are seeking a declaration that the 1913 law is unconstitutional, and that town clerks have a duty to disregard it. Although Judge Ball rejected those claims, the *Cote-Whitacre* plaintiffs apparently intend to appeal. If they were to succeed on appeal without Plaintiffs' participation, Plaintiffs' claims would be decided against them without having had their day in court. Thus, the Court should order consolidation to enable Plaintiffs to participate as a party on appeal. Plaintiffs' participation on appeal will not prejudice the rights of any party.

As set forth in the Rule 9A Affidavit of Philip D. Moran (attached as Exhibit B), none of the parties in *Johnstone* filed or served an objection to the motion to consolidate that Plaintiffs filed in the Supreme Judicial Court ("SJC"), along with the motion to transfer. Moreover, none of the plaintiffs in *Cote-Whitacre* have filed or served an objection to the motion to consolidate that Plaintiffs filed in Superior Court and served on all parties.¹ The sole statements relating to objection are those raised by the State in its Response, and those raised by Defendants *Johnstone* and Long in their renewed motion to dismiss. Each of those parties simply stated that they objected, but chose not to respond substantively unless the Court denies the motion to dismiss.

Johnstone, Long, and the State's response that they would like an opportunity to object in the future is not a proper objection to consolidation.

Plaintiffs respectfully request that the Court immediately order consolidation, or set a hearing on the motion to consolidate at the Court's earliest convenience.

II. PLAINTIFFS' MANDAMUS ACTION SHOULD GO FORWARD

As set forth in Plaintiffs' opposition to the renewed motion to dismiss, attached as Exhibit A, Plaintiffs have standing under the "public right" doctrine to prosecute this action in the nature of mandamus. Plaintiffs responded to defendant Rushford's motion to dismiss while this action was pending in the SJC, and have timely objected to defendant Johnstone and Long's renewed motion to dismiss that was filed in this Court. If this Court feels that it is necessary to hear the motion to dismiss prior to ruling on the motion to consolidate, Plaintiffs respectfully request a joint hearing on the issues. But Plaintiffs object to granting the State and defendants Johnstone and Long time to file objections to consolidation following the hearing.

Respectfully submitted,

Philip D. Moran, Esq.
(MA Bar No. 353920)
265 Essex Street, Suite 202
Salem, MA 01970
Telephone: (978) 745- 6085
Facsimile: (978) 741-2572

David R. Langdon, Esq.*
(OH Bar No. 0067046)
Jeffrey A. Shafer, Esq.*
(OH Bar No. 0067802)

¹ As further set forth in the Moran Affidavit, Plaintiffs filed the motion with Judge Ball rather than solely serving it in accordance with Rule 9A because of Judge Ball's statement during the preliminary injunction hearing about filing papers on August 2, 2004.

LAW & LIBERTY INSTITUTE
11175 Reading Road, Ste. 103
Cincinnati, Ohio 45241
Telephone: (513) 577-7380
Facsimile: (513) 577-7383

Benjamin W. Bull, Esq.*
(AZ Bar No. 009940)

Glen Lavy, Esq.*
(AZ Bar No. 022922)

Dale Schowengerdt
(AZ Bar No. 022684)

ALLIANCE DEFENSE FUND
15333 N. Pima Road, Ste. 165
Scottsdale, Arizona 85260
Telephone: (480) 444-0020
Facsimile: (480) 444-0025

*Pending admission *Pro hac vice*

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and correct copy of the foregoing Memorandum was served by regular U.S. mail, postage prepaid, this ____ day of August, 2004, upon the following:

Gretchen Van Ness, Esq.
44 School Street, Ste. 510
Boston, MA 02108

Sarah Wunsch, Esq.
ACLU Foundation of Massachusetts
99 Chauncy Street, Suite 310
Boston, Massachusetts 02111

John G. Gannon, Esq.
City Solicitor
93 Highland Avenue
Somerville, Massachusetts 02143

David M. Moore, Esq.
City Solicitor
City Hall, Room 301
Worcester, Massachusetts 01608

Robert S. Mangiaratti, Esq.
VOLTERRA, GOLDBERG, MANGIARATTI & JACOBS
3 Mill Street
Attleboro, MA 02703

Thomas F. McGuire
Corporation Counsel
One Government Center
Fall River, Massachusetts 02722

Peter Sacks
Assistant Attorney General
One Ashburton Place, Room 2019
Boston, Massachusetts 02108-1698

Philip D. Moran