

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY

_____	:	
RAYMOND L. FLYNN and	:	CASE NO. SJ 2004-0232
THOMAS A. SHIELDS	:	
	:	
Plaintiffs,	:	
	:	PLAINTIFFS' MEMORANDUM
vs.	:	IN OPPOSITION TO
	:	DEFENDANT RUSHFORD'S
DOUGLAS JOHNSTONE,	:	MOTION TO DISMISS
JOHN J. LONG,	:	
DAVID J. RUSHFORD,	:	
SUSAN FLOOD and	:	
CAROL VALCOURT,	:	
	:	
Defendants.	:	
_____	:	

I. INTRODUCTION

Defendant David J. Rushford has moved the Court to dismiss Plaintiffs' claim for mandamus for failure to state a claim upon which relief may be granted, and their claim for declaratory judgment for lack of subject matter jurisdiction. For the reasons that follow, Defendant's motion is not well taken.

II. ARGUMENT

A. Rushford has a clear, non-discretionary duty to deny a marriage license to a same-sex couple if at least one of the applicants is a non-resident and does not intend to reside in Massachusetts.

1. The marriage certificate application process

Persons intending to be married in Massachusetts are required to jointly file a written notice of intention of marriage in the office of the clerk or registrar of any city or town in the Commonwealth. G.L. c. 207, § 19, § 20. The form of the notice of intention of marriage is furnished by the state registrar of vital records and statistics.¹ It must contain "such information as is required by law and also a statement of absence of any legal impediment to the marriage," to be given before the town clerk under oath by both of the parties to the intended marriage. G.L. c. 207, § 20.²

¹ The Massachusetts Department of Public Health oversees the registry of vital records and statistics, which enforces all laws relative to the issuance of marriage licenses and the keeping of marriage records, and promulgates policies and procedures for the issuance of marriage licenses by city and town clerks and registers. See G.L. c. 207; see, also, *Goodridge v. Dep't of Public Health*, 440 Mass. 309, 314, 798 N.E.2d 941 (2003).

² The oath or affirmation "shall be to the truth of all the statements contained therein whereof the party

2. Impediments to marriage for non-residents of Massachusetts

The commissioner of public health is required to furnish to the clerk or registrar of every town "a printed list of all legal impediments to marriage," which list the clerk or registrar is required to post (forthwith) and thereafter maintain in a conspicuous place in his office. G.L. c. 207, § 37. The statute at issue herein, G.L. c. 207, § 11, prohibits marriages in the Commonwealth if one of the parties to the marriage resides and intends to continue to reside in a state where such marriage would be prohibited. Any marriage entered into in violation of this section is null and void. *Id.*

To ensure proper enforcement of Section 11, G.L. c. 207, § 12 establishes a clear legal duty on the part of the clerk or registrar, "before issuing a license to marry a person who resides and intends to reside in another state," to "satisfy himself, by requiring affidavits or otherwise, that such person is not prohibited from intermarrying by the laws of the

subscribing the same could have knowledge, and may be given before the town clerk or before a regularly employed clerk in his office" *Id.*

jurisdiction where he or she resides.”³ It is this statute which Plaintiffs allege Defendants have failed to follow, and request an order in mandamus compelling them to do so. In response, Rushford asserts that any duties he may have as a clerk concerning enforcement of Section 11 are discretionary, and mandamus is therefore inappropriate. In support of this assertion, Rushford primarily relies on G.L. c. 207, § 35 and, to a lesser degree, Section 12. Each of his arguments is addressed in turn.

3. The limited discretion afforded to Defendant in Section 35 and Section 12 does not serve to bar mandamus in this case.

Rushford's contends that G.L. c. 207, § 35 “eviscerates” Plaintiffs' claim for mandamus, because it affords discretion to clerks to dispense with the requirement for applicants to indicate their residence on the notice of intention of marriage form. According to Rushford, if the clerk may in his discretion dispense with the requirement that the applicant provide his residence, and the applicability of Sections 11 and 12 is contingent upon the

³ Sections 11 and 12 are to “be so interpreted and construed as to effectuate their general purpose to

applicant's (non-)residence, the clerk therefore has no duty to comply with Section 12. So the argument goes. However, as elaborated below, Section 35 is utterly irrelevant to the narrow issue before this Court, which is whether the clerks have a clear legal duty to deny a marriage certificate to same-sex couples who do not reside and do not intend to reside in Massachusetts.

Particular attention is given in Rushford's memorandum to the last sentence of Section 35, which provides that the Clerk

may also dispense with the statement of any facts required by law to be given in a notice of intention of marriage, if they do not relate to or affect the identification or age of the parties, or a former marriage of either party, if he is satisfied that the same cannot with reasonable effort be obtained.

Id. Pursuant to this section, if the applicant fails to provide his or her residence on the notice of intention of marriage, the clerk must satisfy himself that such information cannot with reasonable effort be obtained by the applicant.⁴ In such circumstance, one

make uniform the law of those states which enact like legislation." G.L. c. 207, § 13.

⁴ Of course, if the applicant provides his or her residence, Section 35 is inapplicable, at least with respect to residence.

of two things will happen: either the Clerk will determine to his satisfaction that the applicant's residence can be obtained with reasonable effort (in which case the applicant must provide his residence or the marriage certificate will be rejected), or the Clerk will determine to his satisfaction that the applicant's residence cannot be obtained with reasonable effort (in which case the applicant is not required to provide his residence).⁵ The fact that the statute affords the Clerk some measure of discretion in making the determination of whether the applicant can obtain his or her residence with "reasonable effort" is inapposite to the discussion of whether the clerk has a clear legal duty to ensure that non-residents do not have any legal impediment to marriage.⁶ Section 12, as discussed below, is not triggered until it is determined that at least one of the applicants is a non-resident and intends to remain

⁵ It is hard to conceive of a situation where an applicant would with reasonable effort be unable to obtain such information.

⁶ Obviously, the clerk's duty under Section 12 does not arise until it has been determined that the applicant is a nonresident that intends to continue to reside in another state. If the clerk has *properly* dispensed with the applicant's requirement to identify his or her residence (pursuant to Section 35), Section 12 is not applicable.

a non-resident. Obviously if the applicant's residence is unknown, Sections 11 and 12 do not apply.

That brings us to the crux of the matter: does Section 12 afford "discretion" to a city or town clerk to issue a marriage license to a same-sex couple, when at least one of them resides (and intends to continue to reside) outside of the Commonwealth. Although relegated to a short footnote in his memorandum, Rushford asserts that it does, for the reason that the statute provides that he is "to satisfy himself" that non-resident applicants are not prohibited from intermarrying. According to Rushford, the statute's use of the phrase "satisfy himself" translates into "discretion," which allows the clerk to ignore the facts and the law if he so desires. This is an incorrect (not to mention self-serving) interpretation of the statute, and one which collides with its legislative purpose, which is "to make uniform the law of those states which enact like legislation." G.L. c. 207, § 13.

In considering non-resident applicants, Section 12 establishes an affirmative duty on the part of the clerk to make the necessary *factual* inquiry ("by requiring affidavits or otherwise") to allow him to

determine whether the non-resident is prohibited by any legal impediments in his state of residence (as provided to the clerks by the commissioner pursuant to Section 37) from marrying in Massachusetts.⁷ Certainly the legislature did not intend by inclusion of the "to satisfy himself" language that a clerk has discretion simply to ignore the legal impediments to marriage in the applicant's state of residence, or to ignore undisputed facts (such as the gender or residence of the applicants) which are plainly evident from the face of the completed notice of intention of marriage. Such an interpretation would render the statute meaningless.

G.L. c. 207, § 50 further derails any notion that clerks are afforded discretion under Section 12 to issue certificates to non-resident same-sex couples. Section 50 provides that any official that issues a certificate of notice of intention of marriage "knowing that the parties are prohibited by section eleven from intermarrying" shall be guilty of a

⁷ The clerk is required to make findings of fact, and then apply the law (which in this case is provided to him by the commissioner). Just because the clerk has discretion in the means he utilizes to make his factual findings, and in the particular findings he

misdemeanor. *Id.* To suggest that Section 12 authorizes a clerk to essentially ignore the law and issue a marriage license to a same-sex couple that resides and intends to reside in a state which does not allow same-sex marriage, yet while doing so the clerk would subject himself to criminal prosecution for exercising that discretion, is an absurd proposition to say the least, and certainly not one that is countenanced by proper rules of statutory construction. The proper interpretation of Section 12, read in *pari materia* with Section 50, is that the clerk has no such discretion, and is thus subject to mandamus to compel him to deny a same-sex marriage license to non-resident couples.

4. Rushford's position in this case is contrary to the position he has asserted in a separate lawsuit.

In this lawsuit, Defendant argues that mandamus is not appropriate because the aforementioned statutes governing issuance of marriage licenses to non-residents "provide [him] with a considerable measure of discretion." Yet in a *separate* lawsuit filed against the Attorney General and Commissioner of

makes, does not also give him discretion to ignore the undisputed facts or the law.

Public Health by thirteen city and town clerks, including Rushford, Rushford asserts the exact opposite, i.e., that he has been specifically instructed by the Department of Public Health (which promulgates policies and procedures for the issuance of marriage licenses by city and town clerks)

not to accept Notices of Intention of Marriage from any same-sex couple who reside outside of Massachusetts and who state that they do not intend to reside in Massachusetts, or from any same-sex couple when one member of the couple resides in Massachusetts and the other resides in a different state.

(See Complaint Seeking Declaratory and Injunctive Relief in *Johnstone v. Reilly*, Suffolk County Superior Court Case No. 04-2655-G, at 5, ¶ 22.⁸) It is certainly disingenuous for Defendant to assert in one lawsuit that he has discretion whether or not to issue same-sex marriage licenses to non-residents, yet at the same time (and on the same day) assert in a different lawsuit that he does not. For this reason alone, Defendant's motion should be denied.

⁸ A copy of the Complaint, which was filed in Superior Court the same day Rushford's Motion to Dismiss was filed in this Court, is attached as Exhibit A.

B. Defendant has failed to cast any doubt on Plaintiffs' standing to assert a claim for declaratory judgment.

Defendant's motion to dismiss Plaintiffs' claim for declaratory judgment for lack of standing is based solely upon his unsustainable assumption that he has discretion whether or not to issue a marriage license to a same-sex couple when one or both of the applicants resides and intends to continue to reside in another state. As shown above, the clerks of the Commonwealth owe a specific duty to the public to fulfill the obligations of Sections 11 and 12. Therefore, Defendant's attack on Plaintiffs' standing to seek a declaratory judgment is unavailing.

III. CONCLUSION

For the foregoing reasons, Defendant Rushford's Motion to Dismiss should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

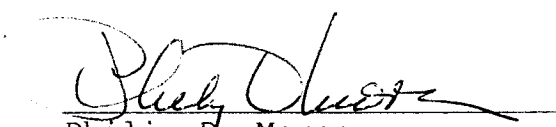
The undersigned does hereby certify that a true and accurate copy of the foregoing Memorandum was served by regular U.S. mail, postage prepaid, this 6th day of ~~June~~^{July}, 2004, upon the following:

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