

COMMONWEALTH OF MASSACHUSETTS.

Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS.

No. 08860.

SUFFOLK COUNTY.

HILLARY GOODRIDGE AND JULIE GOODRIDGE,
DAVID WILSON AND ROBERT COMPTON, MICHAEL HORGAN AND
EDWARD BELMELLI, MAUREEN BRODOFF AND ELLEN WADE,
GARY CHALMERS AND RICHARD LINNELL, HEIDI NORTON AND
GINA SMITH, AND GLORIA BAILEY AND LINDA DAVIES,
PLAINTIFFS-APPELLANTS,

v.

DEPARTMENT OF PUBLIC HEALTH, AND DR. HOWARD KOH,
IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF
THE DEPARTMENT OF PUBLIC HEALTH,
DEFENDANTS-APPELLEES.

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT.

**BRIEF OF *AMICI CURIAE*, MASSACHUSETTS CITIZENS ALLIANCE
AND MASSACHUSETTS CITIZENS FOR MARRIAGE
IN SUPPORT OF THE APPELLEES.**

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INTEREST OF THE *AMICI*

Each of the *amici* has been involved in the current struggle over the definition of marriage here in the Commonwealth. This battle has been fought in the media, in public debates, and through the democratic process (in the form of legislation and ballot initiatives, recently argued before this Honorable Court). The appellants brought this case in an effort to move this debate out of the democratic process and into the Courts. Through this memorandum, the *amici* point out that the Court is the wrong forum to address the definition of what constitutes a marriage.

Massachusetts Citizens Alliance (MCA) is a Waltham-based not-for-profit corporation. MCA has been involved in efforts to enact legislation defining marriage within the Commonwealth. See House Bill 3375.

Massachusetts Citizens for Marriage is a Ballot Question Committee currently seeking to amend the Massachusetts Constitution to define marriage as the union of one man and one woman.

ARGUMENT

I. INTRODUCTION

The Superior Court correctly rejected the appellants' arguments at trial and noted that "the Commonwealth's elected representatives, not the courts" should determine the legal definition of marriage. Goodridge v. Department of Health, 14 Mass. L. Rptr. 591. Rule 12(h)(3) of the Massachusetts Rules of Civil Procedure states, "Whenever it appears by suggestion of a party or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Mass. R. Civ. P. This Brief further develops the argument that the Court lacks subject matter jurisdiction to decide the appellants' claims.

The appellants argue that the Massachusetts Constitution implicitly grants homosexual couples the right to marry and that the Court has jurisdiction to determine the nature of this right. In their complaint, they submit that the Massachusetts Constitution's Declaration of Rights, articles I, VI, VII, X, XII and XVI, and Pt. II, c. 1, sec. 1, art. 4, supports the granting of marriage licenses to same-sex couples. This novel interpretation runs contrary to the long-standing

understanding of marriage as reserved to a single man and single woman. The 1810 case of Inhabitants of Milford v. Inhabitants of Worcester, of which the appellants take note in their complaint, clearly defines the nature of marriage at the time the Massachusetts Constitution was adopted: “[Marriage] is an engagement, by which a single man and a single woman, of sufficient discretion, take each other for husband and wife.” 7 Mass. 48, 51 (1810).

II. THIS COURT LACKS SUBJECT MATTER JURISDICTION

A. The Massachusetts Constitution

Unlike the appellants’ claim, which seeks to extrapolate a right of same-sex couples to marry from general provisions in the Massachusetts Constitution and General Laws, the argument against subject matter jurisdiction of the Massachusetts court system is plainly present in the text the Massachusetts Constitution itself. Unlike the Federal Constitution, the Massachusetts Constitution expressly deals with the subject of marriage and specifically provides for jurisdiction in all causes of marriage. Part the Second, Chapter 3, article 5 of the Constitution states: “All causes of marriage, divorce, and alimony,

and all appeals from the Judges of probate shall be heard and determined by the Governor and Council, until the Legislature shall, by law, make other provision." From this article, it is clear that unless the legislature makes an express transfer of jurisdiction concerning marriage, jurisdiction to determine all causes of marriage, divorce and alimony resides with the Governor and Council. As will be apparent from the history presented below, the Supreme Judicial Court has consistently recognized restrictions on its subject matter jurisdiction in the past, and has deferred to the Legislature the power to grant subject matter jurisdiction over cases or controversies involving the institution of marriage. See Kelley v. Kelley, 161 Mass. 111, 111 (1894) (acknowledging the limits on court jurisdiction contained in Mass. Const. Pt. 2, C. III, Art. V); Shannon v. Shannon, 68 Mass. 285, 286 (2 Gray 285) (1854) ("Since the time of the province charter, however, thus much is plain: ... that all controversies concerning marriage and divorce should be heard and determined by the governor and council"); Coffin v. Dunham, 62 Mass. 404, 405 (8 Cush. 404) (1851) ("The court ha[s] heretofore declined making interlocutory orders, requiring the husband to advance

money, for the necessary expenses of the wife, in prosecuting or defending a suit for divorce, until the authority was vested in them" by statute); Davol v. Davol, 13 Mass. 264 (1816) ("there was no statute in force, authorizing the allowance of alimony in cases of divorce"); West v. West, 2 Mass. 223, 227 (1806) (the powers of courts over marriage is limited to those granted them by statute).

B. Statutory grant of jurisdiction

The sole basis for this Court's jurisdiction alleged in the appellants' Verified Complaint (¶ 12) is Mass. Gen. L. c. 231A, § 1 (Declaratory Judgments). This statute, however, specifically states that it does not grant subject matter jurisdiction. The act provides, "[t]he supreme judicial court, the superior court, the land court and the probate courts, **within their respective jurisdictions**, may on appropriate proceedings make binding declarations of right." Mass. Gen. L. c. 231A, § 1 (emphasis added). "The appellants are incorrect in their assertion that G. L. c. 231A provides an independent statutory basis for standing or subject matter jurisdiction. General Laws 'c. 231A, § 1 ... does not expand the jurisdiction of the courts upon

which it confers power to render declaratory decrees.'" Pratt v. Boston, 396 Mass. 37, 43 (1985); Sisters of Holy Cross v. Brookline, 347 Mass. 486, 491 (1964) (Chapter 231A, § 1 "does not expand the jurisdiction of the courts upon which it confers power to render declaratory decrees; the statute makes it clear that this power is conferred on the courts 'within their respective jurisdictions'"). The appellants have failed to allege a basis for subject matter jurisdiction, and none exists. Because the Court lacks general subject matter jurisdiction over cases involving causes of marriage (other than those specifically granted) it therefore also lacks jurisdiction to hear the case at bar.

C. The case law

History and case law supports the conclusion that Massachusetts courts do not have general jurisdiction to decide cases relating to marriage absent a specific grant of jurisdiction from the Legislature. See Loring v. Young, 239 Mass. 349, 366 (1921); Ripley v. Collins, 162 Mass. 450, 452 (1894); Kelley, 161 Mass. at 111. It is significant that in England divorces were not generally available until the late seventeenth century.

Before that time, those who sought a divorce would have to petition Parliament. A brief survey of the history of the early court system is given in Peters v. Peters, 62 Mass. 529 (1851):

"By the province charter of William and Mary, in 1691, although an authority was given to the general court to erect and constitute judicatories and courts of record for the purpose of hearing, trying and determining all crimes, actions and causes whatever, yet an authority was given, in terms, to the governor for the time being, with the council or assistants . . . The government did establish judicatories, for all cases civil and criminal, to wit, a supreme court, courts of common pleas, courts of sessions and justices of the peace, but none for probate jurisdiction. It is understood that an act was passed by the provincial legislature for erecting county courts of probate, which was negatived by the king, and no statute establishing such courts ... was enacted until since the adoption of the constitution. Thus the jurisdiction of these subjects, remaining exclusively with the governor and council, became wholly distinct from that of the common law courts."

Id., 62 Mass. at 540-541.

More recent decisions have also taken notice of the structure of the colonial courts and its importance. The Supreme Judicial Court has noted that the colonial legislature "vested jurisdiction over all questions of marriage and divorce in the Governor and Council." Gottsegen v. Gottsegen, 397 Mass. 617, 621

(1986). "Under the provisions of law prior to the adoption of the constitution, all cases of marriage, divorce, and alimony were heard by the governor and council... St. 4 Wm. & M. (Ancient Charter, p. 243)." Bucknam v. Bucknam, 176 Mass. 229, 230 (1900). Far from abandoning the colonial model,

"[t]he constitution of 1780 to some extent contemplated a similar separation. It provided, in c. 1, § 2, art. 3, for the establishment of all judicatories; in c. 3, art. 4, for the regulation of times and places for holding of probate courts; and then provides, c. 3, art. 5, that "all causes of marriage, divorce and alimony, and all appeals from the judges of probate, shall be heard and determined by the governor and council, until the legislature shall by law make other provision."

Peters v. Peters, 62 Mass. 529, 541 (1851).

As noted above, the Legislature has, over the years, transferred various aspects of the Governor and Council's original jurisdiction to the courts, but it has never entirely transferred original jurisdiction in such matters to the judiciary. See id. As the court held in Kelley, "[i]t is not necessary to make special reference to later statutes, which have always, since 1785, contained such provisions upon these subjects [i.e. cases relating to marriage] as seemed expedient to the legislature; and the authority of the court to

decree alimony and counsel fees has always been considered to rest exclusively upon the statutes." Kelley, 161 Mass. at 112.

As the court noted in Kelley, the first legislative act transferring jurisdiction relating to marriage or divorce was passed in 1785. Id. at 111. The second to last provision of that act, *An Act for regulating Marriage and Divorce*, provides "Be it therefore enacted by the authority aforesaid, that all questions of divorce and alimony shall be heard and tried by the Supreme Judicial Court holden for the county where the parties live, and that the decree of the same Court shall be final." 1785 Mass. Acts 69. In 1836, jurisdiction relating to questions of affirmation or annulment of marriage was added to the Court's jurisdiction. The Revised Statutes of 1836 provide that if the validity of a marriage was doubted, a libel for annulment was to be filed as for divorce. Mass. Revised Statutes 76, §§ 3-4 (1836). The Supreme Judicial Court's jurisdiction thereafter included all cases of divorce, alimony, affirmation of marriages and annulments.

The Supreme Judicial Court has consistently recognized the constitutional restriction on its

jurisdiction in cases of marriage and divorce and that an express transfer of jurisdiction by the legislature is necessary before it has authority to hear such cases. In 1854, the Court stated

"that by the state constitution, c. 3, art. 5, it was declared that this jurisdiction of the governor and council, in causes of marriage, divorce and alimony, should continue, until the legislature should, by law, make other provision; that no other provision was made, until the legislature, by St. 1785, c. 69, § 7, directed that all questions of divorce and alimony should be heard and tried by the supreme judicial court; and that this court has ever since had exclusive jurisdiction of those questions."

Shannon, 68 Mass. at 286. The court clearly acknowledges the constitutional provision relating to jurisdiction and notes that its jurisdiction in divorce and alimony is wholly dependant upon the legislature. Notably, the court does not declare that it has jurisdiction over *all* causes relating to marriage.

Similarly, in 1870, in the case of White v. White, 105 Mass. 325 (1870), the Court asserted its jurisdiction over cases of divorce and affirmation of marriage while recognizing the constitutional provision and the statutory transfer of jurisdiction by the legislature. In ruling upon the case, the Court found that the libellant had never in fact been married to

the woman from whom he was seeking a divorce despite a special legislative act of 1869 declaring them to be married. 1869 Mass. Acts 377. The court responded that the St. of 1869, c. 377 was unconstitutional stating, "No jurisdiction in cases of marriage, any more than in cases of divorce, alimony or appeals from the judges of probate, had been conferred by any law upon the legislature, nor did the Constitution give them any power to hear and decide each particular case." White 105 Mass. at 327 (an action for divorce on the grounds of desertion). In recognizing the lack of jurisdiction by the legislature to hear and decide causes of marriage, the Court also acknowledged that jurisdiction in such cases was vested in the Governor and Council until the legislature made other provision, stating:

"Other provision was made as to some of these subjects soon after the Constitution was adopted; and when the special act of 1869 was passed all such cases, including petitions for leave to marry again were, by the General Statutes, within the jurisdiction of this court... They had exercised their power to take away the jurisdiction of the governor and council, and confer it upon another tribunal; and until the general law by which they had done this should be altered or repealed, their power in such a case as the present was exhausted, as much as in a case of divorce, alimony or probate appeal."

Id. at 325 (footnote omitted). See also Bernatavicius v. Bernatavicius, 259 Mass. 486, 488 (1927); Adams v. Holt, 214 Mass. 77, 78 (1913); Robbins v. Robbins, 140 Mass. 528, 529 (1886); Sparhawk v. Sparhawk, 116 Mass. 315, 318 (1874).

The Supreme Judicial Court further recognized the limitations of its jurisdiction in 1894. "In this commonwealth, no power exists in any court ... in a matrimonial cause of any description, except under provisions of statute conferring such power. By the constitution of Massachusetts (part 2, c. 3, art. 5) it was provided that 'all causes of marriage, divorce and alimony ... shall be heard and determined by the governor and council until the legislature shall by law make other provision.'" Kelley, 161 Mass. at 112.

When the Massachusetts Constitution was rearranged in 1919, there was talk of removing the provision that granted the Governor and Council the power to hear "All causes of marriage, divorce, and alimony, and all appeals from the judges of probate, shall be heard and determined by the Governor and Council, until the Legislature shall, by law, make other provision." Loring, 239 Mass. at 366. Although it appears from the debate that this clause was originally to be removed

from the rearranged Constitution, the Legislature subsequently determined it to be a vital part of the document. Id. It plainly decided, "that the words constituted an operative article, still in force, which should remain in the Constitution." Id.

Further historical evidence that the legislature properly has jurisdiction to determine this matter comes from the New Hampshire Constitution, which likewise grants only limited authority to the judiciary to hear marital causes of action. Part II, article 76 of the New Hampshire Constitution provides in part that "All causes of marriage, divorce and alimony ... shall be heard and tried by the superior court until the legislature shall by law make other provision." Interpreting the significance of this explicit grant of jurisdiction and explaining the jurisdictional limitations historically placed on the judiciary in marital cases, the New Hampshire Supreme Court stated:

Part II, article 76 was included in the Constitution of 1784 in order to invest the judicial branch with jurisdiction over separation and divorce....In England, prior to our Revolution, the civil courts of common law and equity possessed no marital jurisdiction; what we would now regard as jurisdiction over separation and annulment was vested in the ecclesiastical courts, 1 W. Holdworth's A History of English Law 621 (3d. ed. 1922), and jurisdiction to grant divorce

following a valid marriage resided in Parliament. *Id.* at 623. See Chase's Blackstone, 141-42 (4th ed. 1914). During New Hampshire's provincial and revolutionary periods preceding the adoption of the 1784 Constitution, the legislature granted divorces... As a consequence, no judicial jurisdiction over marital cases would have been implied merely by the recognition of the judicial power under part I, article 37, or by the provision for the appointment of judicial officers under part II, article 46 (Supp.1985). Part II, article 76 did confer such judicial power, however. Opinion of the Justices, 509 A.2d 746, 749 (1986) (internal citations omitted).

In other words, even the broad language granting general jurisdiction to the courts in Part II, Article 72a¹ of the New Hampshire Constitution cannot be properly understood as containing an implicit grant of jurisdiction over marital cases. Rather, history supports the understanding that jurisdiction over causes of marriage, whether in New Hampshire or Massachusetts, must be explicitly granted by the legislature.

This historical understanding of the distinct roles of the legislature and the judiciary in determining causes of marriages is further supported by

¹ The judicial power of the state shall be vested in the supreme court, a trial court of general jurisdiction known as the superior court, and such lower courts as the legislature may establish under Article 4th of Part 2. N.H. Const., Part II, art. 72a.

the courts of Massachusetts. This Court has recognized that marriage "is a social institution of the highest importance. The Commonwealth has a deep interest that its integrity is not jeopardized." French v. McAnarney, 290 Mass. 544, 546 (1935). An important part of maintaining the integrity of marriage has been recognizing legislative limits placed on its definition. Thus in Davis v. Misiano, the court declined to extend the statutory definition of marriage to include mere cohabitants. 373 Mass. 261, 262-63 (1977).

Our sister states have also recognized that changes in marriage laws, particularly when they concern the very definition of marriage, are the province of the legislature, not the courts. In New Hampshire, for example, courts have refused to alter the statutory definition of marriage. Joan S. v. John S., 427 A.2d 498, 499 (1981) (stating that "If a common-law marriage is to be more broadly recognized in this State, a request for such a determination should be addressed to the legislature.") Id. Similarly, Rhode Island courts have acknowledged that the legislature's definitions of marriage, not those of the courts, are controlling. Souza v. O'Hara, 395 A.2d 1060

(R.I., 1978). New York courts have likewise deferred to their legislature's decisions with respect to the definition of marriage. See, e.g. Blake v. Stradford, 725 N.Y.S. 2d 189 (N.Y. Dist. Ct., 2001). The appellate court of Connecticut, in refusing to equate marriage with Vermont civil unions, has stated that "matters such as this which implicate significant issues of public policy are more properly within the domain of the legislature." Rosengarten v. Downes, 802 A.2d 170, 174. (Conn. App. 2002). Still further support comes from the 36 states that have adopted legislation regarding same-sex marriage.² Even the case most favorable to the appellants' contentions has recognized that the Legislature is the proper forum for making decisions about the nature of marriage. See Baker v. State, 744 A.2d 864, 881 (Vt. 2000).

There is also no indication that the Legislature is incapable of grappling with the debate about same-sex marriage. Ruling in Connors v. City of Boston, the

² These are Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Virginia, Washington, and West Virginia.

Supreme Judicial court noted, “[w]e recognize a family may no longer be constituted simply of a wage-earning father, his dependent wife and the couple’s children. Adjustments in the legislation to reflect these new social and economic realities **must come from the Legislature.**” 430 Mass. 31, 42-43 (1999) (emphasis added).

CONCLUSION

The appellants essentially argue that the courts, not the Legislature, should have the power to determine the nature and limitations of marriage, a contention that flies in the face of the Constitution and the case law of this Commonwealth. In Hanson v. Hanson, the court noted that, “A sovereign state has authority in general to decide what marriages between its own citizens it will recognize.” 287 Mass. 154, 157 (1934). As the Supreme Judicial Court noted in Commonwealth v. Stowell 389 Mass. 171, 175 (1983), “[t]he Commonwealth has extensively exercised this power to regulate numerous aspects of the marriage relationship. See generally G.L. c. 207. Given this broad concern with the institution of marriage, the State has a legitimate interest in prohibiting conduct that might threaten that institution.” Likewise, the Court noted in Green

v. Richmond, 369 Mass. 47, 51 (1975) that "Massachusetts has a strong public interest in ensuring that its rules governing marriage are not subverted."

Granting the appellants the right to marry, however, would essentially subvert a social and legal institution that is deeply-rooted in the history of our nation and our Commonwealth. The implications of such a change are far-reaching, without question, and should not be determined by judicial fiat. Instead, as the Massachusetts Constitution recognizes, legislative decisions on this weighty matter should be accorded the deference they deserve and, absent any statutes that grant general jurisdiction to redefine marriage to the court system, the decision of the Governor and Council in such matters should be binding. Essentially the appellants are asking the court to enact, by judicial decree, statutes that have failed to find favor with the public. In 1989, when the legislature extended its extensive civil rights law to include discrimination on the basis of sexual orientation, it was careful to state that "[n]othing in this act shall be construed so as to legitimize or validate 'homosexual marriage' so-called, or to provide health insurance or related

benefits to a 'homosexual spouse,' so-called." Acts of 1989, c. 516, § 19.

The present constitutional arrangement does not leave the appellants without redress. Appellants have three legitimate courses of action. First, they may bring their case before the proper tribunal, which in this case would be the Governor and council.

Secondly, they could seek a constitutional amendment defining marriage either through the legislature or, as others are currently doing, through a ballot initiative process.

Thirdly, appellants could bring a claim in federal court under the United States Constitution. Appellants should not be allowed, however, to bring a claim that alleges violations of the Massachusetts Constitution while at the same time asking the court to violate that same Constitution by exercising unauthorized jurisdiction over the subject matter of this case.

Respectfully submitted,

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