

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH
No. SJC-08860

HILLARY GOODRIDGE, *et al.*,

Plaintiffs-Appellants,

v.

DEPARTMENT OF PUBLIC HEALTH, and
HOWARD KOH, COMMISSIONER,

Defendants-Appellees;

REPRESENTATIVE MARK CARRON, *et al.*, as
Members of the General Court,

Prospective Interveners.

**ATTORNEY GENERAL'S AMICUS MEMORANDUM IN OPPOSITION TO
PROSPECTIVE INTERVENERS' MOTION TO VACATE
COURT'S JUDGMENT FOR LACK OF SUBJECT MATTER JURISDICTION**

The Attorney General of the Commonwealth, as *amicus curiae*, opposes the prospective interveners' motion to vacate this Court's judgment for lack of subject matter jurisdiction. The interveners' argument that jurisdiction over this case lay with the Governor and Council pursuant to Mass. Const. pt. 2, c. 3, art. 5, is erroneous.¹ This case was not a "cause[] of marriage" within the meaning of that provision. Even if it were, the Legislature has made sufficient provision for a case such as this to be heard in the Superior Court and resolved on appeal by this Court. The

¹ That article provides: "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."

Governor and Council retained no authority in the matter.

The Attorney General, representing the defendant Department of Public Health and its Commissioner, vigorously defended this case from the outset. As a part of that defense, the Attorney General considered the jurisdictional argument now presented by the interveners and determined that it was unmeritorious and should not be raised to the Superior Court. The issue was nevertheless presented to the Superior Court in an amicus brief filed by the Massachusetts Citizens Alliance and the Massachusetts Citizens for Marriage dated December 27, 2001. The Superior Court, presumably mindful of its obligation to satisfy itself of its own jurisdiction even if no question thereof was raised by the parties, must be presumed to have considered that amicus brief, yet the Superior Court's May 7, 2002 summary judgment decision for the Department found no need even to comment on any jurisdictional question. On appeal, the same amicus presented the same argument to this Court by amicus brief filed on December 20, 2002. This Court, likewise no doubt aware of the need to satisfy itself of its own jurisdiction, presumably considered the argument, yet the neither the majority nor the dissenting Justices found any need to comment upon it.² For the reasons explained below, the Court should now expressly reject the argument.

I. THIS CASE WAS NOT A "CAUSE OF MARRIAGE."

As used in pt. 2, c, 3, art. 5, the phrase "causes of marriage, divorce, and alimony" is "equivalent to 'controversies' or 'cases[.]'" Sparhawk v. Sparhawk, 116 Mass. 315, 317 (1874). A "cause of marriage" is an action between two parties, who are or may be married to each other,

² The argument was also raised at pp. 14-20 of the amicus brief filed by the Massachusetts Family Institute, et al., in connection with the related Opinion of the Justices, 440 Mass. 1201 (2004).

to annul, or conversely to affirm the validity of, that marriage. Jurisdiction of such cases was expressly conferred on this Court by Rev. St. c. 76, §§ 3, 4 (1836). Likewise, a “cause of divorce” is an action between two parties, who ascertedly are married to each other, to end the marriage by divorce. Jurisdiction of such cases was expressly conferred on this Court by St. 1795, c. 69 (penultimate para.). The instant case was not a “cause of marriage.” Rather, it was a challenge by persons who wish to marry to the constitutionality of statutes that denied them the ability to do so.

The interveners’ sweeping construction of the phrase “causes of marriage,” to encompass any litigation of whatever sort involving marriage, is erroneous. Rather, the phrase has been applied, and should be construed, more narrowly. The word “causes” must be read against the historical background of pt. 2, c. 3, art. 5. “[T]he terms, as well as the position of this article in the Constitution, manifest the intention of the people, in establishing a frame of government, to commit the hearing and determination of all cases of divorce and probate appeals to the judiciary only. The reason for temporarily entrusting the jurisdiction of these matters to the Governor and Council doubtless was that it had been vested in them under the Province Charter.” Sparhawk, 116 Mass. at 317 (emphasis added). But the Governor and Council’s power in such cases was judicial in nature, *id.*, and (as alluded to in Sparhawk) pt. 2, c. 3, art. 5 appears in that portion of the Constitution (pt. 2, c. 3) entitled “Judiciary Power.” Thus the Legislature, after formally recognizing this Court, St. 1782, c. 9, enacted various statutes giving the Court jurisdiction of causes of marriage, divorce, and alimony, thereby depriving the Governor and Council of jurisdiction over such cases.

That the power to decide such cases is inherently judicial, and was always intended to be

exercised by the judiciary as soon as the Legislature made provision therefor, is confirmed by Sparhawk, which concluded, after reviewing the history of pt. 2, c. 3, art. 5, that “[t]he Legislature has no power under the Constitution of Massachusetts to grant divorces.” Sparhawk, 116 Mass. at 318. In other words, notwithstanding the apparently open-ended phrasing of pt. 2, c. 3, art. 5, authorizing the Legislature to “make other provision” as to causes of marriage, divorce, and alimony, the Legislature could not itself grant a divorce. Id. Such a function is inherently judicial. The Constitution prohibits the Legislature from exercising judicial powers. Sparhawk, 116 Mass. at 318; see Mass. Const. pt. 1, art. 30. Thus, the grant of power to the Legislature in part. 2, c. 3, art. 5, must be read to the extent possible to harmonize with the separation of powers requirements of art. 30.³

Likewise, the grant of power to the Governor and Council in pt. 2, c. 3, art. 5, must be read so as to minimize conflict with art. 30, which prohibits the Executive from exercising judicial powers. The point is that pt. 2, c. 3, art. 5, was intended as a limited and temporary exception to the provisions of art. 30. Exceptions to constitutional provisions should be narrowly construed.⁴ The word “causes” in pt. 2, c. 3, art. 5, thus cannot be read as conferring broad judicial powers on the Governor and Council.

³ Cf. Opinion of the Justices, 314 Mass. 767, 773 (1943) (“The amplitude of these grants to the Legislature [in pt. 2, c. 1, § 1, arts. 3 and 4] of power over courts is bounded by the other provisions of the Constitution,” among which is art. 30; quoting Commonwealth v. Leach, 246 Mass. 464, 471 (1923)). See also First Justice of Bristol Juvenile Court v. Clerk-Magistrate of Bristol Juvenile Court, 438 Mass. 387, 396 (2003) (recognizing that constitutional provisions may create some overlap between functions of separate branches, but reiterating that art. 30 forbids other branches from interfering with judiciary’s core functions).

⁴ E.g., Commonwealth v. Yee, 361 Mass. 533, 537 (1972); Christian v. Secretary of the Commonwealth, 283 Mass. 98, 101-02 (1933); Opinion of the Justices, 254 Mass. 617, 620 (1926).

In particular, the phrase "causes of marriage" should not be construed as extending to cases that challenge the constitutionality or validity of statutes relating to marriage. The interveners cite no instance in which the Governor and Council ever purported to adjudicate such a matter, either under the Province Charter or after ratification of the Constitution that included pt. 2, c. 3, art. 5.⁵ Rather, judicial review of the constitutionality of statutes is at the core of the judicial function, Marbury v. Madison, 1 Cranch 137 (1803) (Marshall, C.J.), and art. 30 forbids interference with that function. See supra n.3.

Accordingly, this Court has on numerous occasions adjudicated the constitutionality of statutes relating to marriage or divorce, despite the absence of any statute (such as the interveners argue is necessary) specifically authorizing the Court to do so. In Sparhawk itself, the Court ruled unconstitutional a general statute that altered the effect of previously-granted divorces and that granted the Court the power to authorize the affected parties to marry again. 116 Mass. at 316, 318, 320. In White v. White, 105 Mass. 325, 327 (1870), the Court ruled unconstitutional a special statute that declared two persons to be husband and wife. In both cases, the Court extensively discussed the provisions of pt. 2, c. 3, art. 5. The Court could conceivably have held that, absent a statute specifically authorizing it to decide the constitutionality of marriage and divorce statutes, it had no jurisdiction of such constitutional questions and that such jurisdiction remained with the Governor and Council. Or the Court could have held that the statutes at issue

⁵ Indeed, it is questionable whether, even in the Colonial era, the Governor and Council would have had jurisdiction of a dispute over whether two persons could marry. Although by Province Laws 1692-93 c. 25, § 3, the Governor and Council were given jurisdiction of "all controversies concerning marriage and divorce," a subsequent statute authorized two justices of the peace to determine, when objection was filed to a certificate of intention to marry, whether the certificate should issue. Province Laws 1695 c. 2, § 5.

constituted an exercise (perhaps even an unreviewable exercise) of the Legislature's power under pt. 2, c. 3, art. 5, to "make other provision" regarding "causes of marriage [and] divorce[.]" The Court did neither, and instead decided the constitutional questions itself. Other cases where the Court has adjudicated the constitutionality of statutes relating to marriage or divorce include Commonwealth v. Stowell, 389 Mass. 171 (1983) (adultery statute was constitutional); Fiorentino v. Probate Court, 365 Mass. 13, 18 (1974) (statute establishing 2-year durational residency requirement for obtaining divorce in Commonwealth violated equal protection clause); Simonds v. Simonds, 103 Mass. 572 (1870) (Maine statute authorizing court to grant divorce to named couple was unconstitutional); Wales v. Wales, 119 Mass. 89 (1875) (statute altering remedies available in divorce cases was constitutional).

In sum, there is no basis in the text of the Constitution, its history, or the precedents of this Court for treating a constitutional challenge to a statute relating to marriage as a "cause of marriage" within the meaning of pt. 2, c. 3, art. 5. That provision therefore did not bar the courts from exercising jurisdiction in this case.

II. EVEN IF THIS CASE WAS A "CAUSE OF MARRIAGE," THE LEGISLATURE HAS MADE SUFFICIENT PROVISION FOR IT TO BE HEARD BY THE COURTS.

Even if this case was a "cause of marriage," the Legislature has made sufficient provision for it to be heard by the Superior Court and resolved on appeal by this Court. This was a declaratory judgment action under G.L. c. 231A, § 2, which authorizes actions in the Superior Court "to enjoin and to obtain a determination of the legality of the administrative practices and procedures of any municipal, county or state agency or official which practices or procedures are alleged to be in violation of the Constitution of the United States or of the constitution or laws of

the commonwealth” Contrary to the interveners’ contentions, this Court has specifically rejected the notion “that another statute must expressly provide jurisdiction before a declaratory judgment action may be brought.” Villages Development Corp. v. Secretary of Executive Office of Environmental Affairs, 410 Mass. 100, 110 (1991). “It is true that courts may only grant declaratory relief ‘within their respective jurisdictions.’ G.L. c. 231A, § 1. However, this limitation principally refers to organic statutes which define the jurisdiction of the respective courts, . . . and to statutes that provide for exclusive jurisdiction over certain subjects in certain courts” Villages, 410 Mass. at 109-10 (citations omitted). If any other basis for the exercise of declaratory judgment jurisdiction were needed here (*cf. id.* n.7), it could be found, for example, in the mandamus statute, G.L. c. 249, § 5, which would have authorized the Superior Court or this Court, upon ruling the prohibition on same-sex marriage unconstitutional, to direct local clerks to issue certificates of intention of marriage to the plaintiff couples, and to direct the Department to take such non-discretionary actions within its authority to enforce the marriage laws (see Goodridge, 440 Mass. at 314) as would be necessary to enable local clerks to do so.⁶

Contrary to the interveners’ contentions, this Court has never held that a statute must grant a court jurisdiction over a “cause of marriage” with any particular degree of specificity before the statute would be sufficient to deprive the Governor and Council of jurisdiction under pt. 2, c. 3, art. 5. None of the cases cited by the interveners so holds.⁷ Although several cases state that the

⁶ See also G.L. c. 212, § 4 (Superior Court’s “original jurisdiction of all civil actions, except those of which other courts have exclusive original jurisdiction”); G.L. c. 214, § 1 (general equity jurisdiction of Superior Court and this Court).

⁷ See Interveners’ Memo at 10-11, citing Loring v. Young, 239 Mass. 349, 366 (1921); Kelley v. Kelley, 161 Mass. 111, 111 (1894); White v. White, 105 Mass. 325, 327 (1870); Bernatavicius v. Bernatavicius, 259 Mass. 486, 488 (1927); Adams v. Holt, 214 Mass. 77, 78

courts' powers in cases of marriage, divorce, and alimony are those provided by statute (Kelley, 161 Mass. at 111; Adams, 214 Mass. at 78), that is far from a holding that statutes conferring jurisdiction over such cases must satisfy some special "clear statement" rule.

Indeed, numerous of the interveners' cases show the contrary. As discussed above, in both the Sparhawk and White cases, the Court, after citing pt. 2, c. 3, art. 5, found statutes concerning marriage and divorce unconstitutional, despite the absence of any statute expressly authorizing the Court to review the constitutionality of such statutes. Sparhawk, 116 Mass. at 316, 318, 320; White, 105 Mass. at 327. In another case relied upon by the interveners, the Court "assumed that the Legislature, in conferring upon it jurisdiction to grant divorces from the bond of matrimony, although the statutes make no provision respecting connivance, collusion, condonation, or recrimination, intended to adopt the general principles which had governed the ecclesiastical courts of England in granting divorces from bed and board, so far as these principles are applicable, and are found to be reasonable." Robbins, 140 Mass. at 529-30 (emphasis added). Such an approach is obviously inconsistent with the clear statement rule proposed by the interveners. In yet another case, not cited by the interveners, this Court, after noting that pt. 2, c. 3, art. 5, applies to probate appeals (as well as causes of marriage, divorce and alimony), held that a general statute (regulating the Court's own sittings in the various counties) applied to authorize the hearing of a probate appeal in a county other than the county where the case originated--even though no statute specifically authorized probate appeals to be so heard. Ripley v. Collins, 162 Mass. 450, 452-53 (1894). Again, this demonstrates that statutes conferring jurisdiction on the courts over the matters mentioned in pt. 2, c. 3, art. 5, need not do so with any

(1913); Robbins v. Robbins, 140 Mass. 528, 529-30 (1886).

special degree of particularity. A general statute, such as G.L. c. 231A, § 2, is sufficient.

The interveners also err in relying (Memo at 11) on Loring v. Young, 239 Mass. at 366, apparently for the proposition that pt. 2, c. 3, art. 5, continues to confer jurisdiction on the Governor and Council in cases such as this. Loring held that the "Rearrangement of the Constitution" drafted by the 1917-18 Constitutional Convention and approved by the voters in 1919 did not constitute the Constitution of the Commonwealth. In reciting the history of the "Rearrangement," Loring noted that the drafters had included the language of pt. 2, c. 3, art. 5, in their "Rearrangement" on the ground that it "constituted an operative article, still in force, which should remain in the Constitution." Loring, 239 Mass. at 366 (citing 4 Debates in the Constitutional Convention, 1917-18 at pp.74-80 (1920)). Of course, the views of the members of the 1917-18 Convention are of questionable value in interpreting a provision of the Constitution of 1780. But, to the extent they are of any value, they directly contradict the interveners' position.

Specifically, the Debates plainly show that the member who proposed retaining the language, Mr. Morton of Fall River, did so on the sole ground that it was an express source of the Legislature's "power to pass laws in regard to matters of marriage, divorce, and alimony," and that deleting it from the Rearrangement might possibly diminish the Legislature's powers in that regard. 4 Debates at 76-78 (remarks of Mr. Morton, including colloquy with Mr. Anderson of Brookline). Mr. Morton, it may bear noting, was a Justice of this Court from 1890 to 1913,⁸ and he advised the Convention that two other former Justices of this Court had independently agreed

⁸ His full name was James M. Morton, see 1 Debates at xii (listing members of Convention), and he served as a Justice of this Court from September 17, 1890, to December 15, 1913. See 152 Mass., page after title page (1891); 216 Mass., page after title page (1914).

with his interpretation of pt. 2, c. 3, art. 5. 4 Debates at 77. Most significantly for present purposes, Mr. Morton readily agreed that the portion of pt. 2, c. 3, art. 5, relating to the Governor and Council was “obviously obsolete” and should be omitted from the “Rearrangement.” 4 Debates at 79 (colloquy between Mr. Morton and Mr. Lummus of Lynn). For reasons not shown by the Debates, this suggestion was never formally presented by motion for the Convention’s action. Id. at 79-80. But it remains clear that nothing in the Debates (or for that matter Loring) indicates anyone’s view that the Governor and Council had any continuing authority under pt. 2, c. 3, art. 5.

Finally, the interveners incorrectly contend that the Legislature has never conferred on the judiciary the power to decide whether any two persons could marry. In 1836, the Legislature authorized any person to file with a town clerk an objection to the issuance of a certificate of intention of marriage, and thereafter to apply to two Justices of the Peace for a hearing and decision on the matter. Rev. St. c. 75, §§ 10, 11 (1836). Cf. supra n.5 (discussing similar provision enacted in 1695). The Justices were to decide “the truth and sufficiency of the reasons assigned for forbidding the banns,” and if the determination was in favor of the couple, the clerk was required to issue the certificate. Id. § 12. If the decision was adverse to the couple, they could appeal to the Court of Common Pleas or to this Court for the relevant county, and the decision of the Court was “final.” Id. § 13. As noted supra, this Court held marriage statutes unconstitutional in three separate cases in the 1800s (Sparhawk, White, and Simonds), so there is no reason to think that a judicial decision on the constitutionality of denying marriage to a same-sex couple would have been unavailable at that time.

Thus, in 1836, a same-sex couple could have attempted to obtain a civil marriage and, if

denied, could have obtained a judicial determination of their right to marry. These provisions were apparently repealed by St. 1850, c. 121, § 5,⁹ but there is no evident reason why such a couple could not have sought essentially the same relief by means of a mandamus action against a town clerk to enforce the clerk's asserted obligation to issue the certificate. See Rev. St. c. 81, § 5 (1836) (authorizing this Court to issue writs of mandamus to individuals as necessary to the furtherance of justice and the regular execution of the laws); Gen. Stat. c. 112, § 3 (1860) (same); id. c. 145, §§ 13-15; see G.L. c. 249, § 5 (2002 Official Ed.) (current mandamus statute).

Accordingly, even assuming that, prior to 1836, the Governor and Council could have determined two persons' claim that they were entitled to marry, but see supra n.5, such jurisdiction continued only "until the Legislature shall, by law, make other provision," pt. 2, c. 3, art. 5, which the Legislature expressly did in 1836. The Governor and Council were only "temporarily entrust[ed] with the jurisdiction of these matters" until they could be transferred to the judiciary. Sparhawk, 116 Mass. at 317 (emphasis added). Thus the Legislature's action in 1836 terminated the jurisdiction of the Governor and Council. That the Legislature subsequently repealed Rev. St. c. 75, §§ 10-13 (1836) indicated no intention to return jurisdiction of such matters to the Governor and Council (even assuming it were within the Legislature's power to do so), particularly where similar judicial relief would still have been available to a couple under the mandamus statute.

⁹ That statute established new requirements for obtaining a certificate of intention to marry, id. §§ 1-4, not including any procedure for objecting to such a certificate or obtaining a judicial determination on such objection, and the statute repealed "so much of [Rev. Stat. c. 75] as is inconsistent with this act," without specifying which sections were repealed. The General Statutes of 1860 show that the sections cited in the text were treated as repealed. See Gen. Stat. c. 106 (1860).

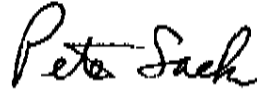
In sum, even if a challenge to a statute limiting marriage to opposite-sex couples, or a challenge to a clerk's refusal to authorize the marriage of a same-sex couple, were a "cause of marriage" within the meaning of pt. 2, c. 3, art. 5, the Legislature transferred jurisdiction of such cases to the judiciary by means of G.L. c. 231A, § 2; the mandamus statutes; and Rev. St. c. 75, §§ 10-13 (1836), thus ending the jurisdiction of the Governor and Council.

CONCLUSION

For the foregoing reasons, the interveners' motion to vacate the judgment for lack of subject matter jurisdiction should be denied.

Respectfully submitted,

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