COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. 2011-P-0069

SJC - 11023

TODD ELIA - WARNKEN,
Plaintiff- Appellant,

v.

RICHARD ELIA,
Defendant-Appellee,

ON RESERVATION AND REPORT
FROM THE WORCESTER PROBATE AND FAMILY COURT

Brief for the Plaintiff-Appellant Todd Elia-Warnken

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Statement of The Case

On or about April 15, 2009, the Plaintiff filed a Complaint for Divorce in the Worcester Probate and Family Court on the grounds of irreconcilable differences/spousal abuse. RA 4. The Defendant duly filed an Answer and Counterclaim for Divorce, wherein he admitted that the parties' were married, and sought a divorce on the grounds of irretrievable breakdown of the marriage. RA 7.

On or about March 25, 2010 the Defendant filed a Motion to Dismiss the Complaint for Divorce in the Worcester Probate and Family Court, on the grounds that the marriage was invalid as a result of the failure of the Mr. Warnken to dissolve his Vermont Civil Union. RA 12-13. Additionally, the Defendant filed a Motion to Amend his Answer and Counterclaim for Divorce, to strike his admission that the parties' were married. RA 9.

A hearing on the Motion to Dismiss was held on April 6, 2010. RA 12. After hearing on the Motion, the court (King, J.) reported the question to the Appeals court for determination. RA 14 - 19.

STATEMENT OF FACTS

On April 19, 2003 the Plaintiff, Todd Elia-Warnken (hereinafter "Mr. Warnken") entered into a civil union in the state of Vermont with one Christopher Baker (hereinafter "Mr.

Baker"). RA 16. Mr. Warnken and Mr. Baker were never married, and that civil union was never dissolved. RA 14.

One October 17, 2005, Mr. Warnken and the Defendant, Richard Elia ("Mr. Elia") were married in Worcester, Massachusetts. RA 18. That was the first marriage for both parties'. RA 18. The parties' last lived together, in Worcester, MA on December 24, 2008. RA 4. There were no children of the marriage. RA 4. After more than three years of marriage, the Plaintiff filed the instant Complaint for Divorce. RA 4.

Summary of the Argument

The parties' are validly married according to the relevant portions of Massachusetts Law. G.L. c. 207, §1- 6. Neither Plaintiff nor the Defendant have a living Husband and Wife, G.L. c. 207, § 4, and therefore, there was no, and there continues to be no statutory impediment to their valid marriage in the Commonwealth of Massachusetts. G.L. c. 207, § 1-6.

While it is undisputed that the Plaintiff, Mr. Elia-Warnken entered into a Vermont Civil Union with Christopher Baker, and that that civil union was not dissolved prior to the Plaintiff's marriage to the Defendant, that fact does not render the civil union a marriage, and does not render Mr. Elia-Warnken's civil union partner a living Husband, which would invalidate his marriage to the Defendant, as a civil union is clearly not a

marriage. Vt. Stat. Ann. Tit. 15, § 1201., but instead a substantial equivalent to marriage. Salucco v. Alldredge, 12 Mass. L. RPTR. No. 21, 499 (2004).

Argument

I. The marriage between the parties' is valid.

c. The relevant statutes must be interpreted strictly, to carry out the legislature's intent.

The statutes of the Commonwealth are to be interpreted to carry out the legislature's intent, determined by the words of the statute interpreted to the "ordinary and approved usage of the language". Goodridge Department of Public Health, 440 Mass. 309, 319 (2003) citing with approval Hanlon v. Rollins, 286 Mass. 444, 447 (1934). The Defendant argues that the marriage is not valid, because of the Plaintiff's entry into a civil union with another man, before the marriage, in contravention of his interpretation of G.L. c. 207, § 4, the polygamy statute. Therefore, the starting place for any analysis of the validity of the parties' marriage is the relevant words of the statute that the Defendant claims renders the parties' marriage void. Hanlon at 447.

d. No statutory prohibitions exist that would render the marriage of the parties' not valid.

1. Massachusetts General Law c. 207 governs the entry into civil marriage.

The starting place for determining whether a marriage is valid is to first determine whether the parties' were freely able to enter into a civil marriage, which is governed by statute, known as the marriage licensing statute. G.L. c. 207. In fact our Supreme Judicial Court has determined that it is the marriage licensing statute that controls who may enter into civil marriage". Goodridge at 317.

The Goodridge court summarized the relevant provisions of the marriage licensing statute that govern entry into civil marriage as follows:

> "General Laws c. 207 is both a gatekeeping and a public records statute. It sets minimum qualifications for obtaining a marriage license and direct city and town clerks, the registrar and the department to keep and maintain certain vital records of civil marriages. The gate keeping provisions of of G.L. c. 207 are minimal. They forbid marriage of individuals with certain degrees of consanguinity, §§ 1 and 2, and polygamous marriages. See G.L. c.207, § 4. See also G.L. c. 207, §8 (marriages solemnized in violation of § 1,2 and 4, are void ab initio). They prohibit marriage if one of the parties' has communicable syphilis, see G.L. c. 207, § 28A, and restrict the circumstances in which a person under eighteen years of age may marry. See G.L. c. 207, § 7, 25, and 27. The statute requires that civil marriage be solemnized only by those so authorized. See G.L. c. 207, § 38-40."

Goodridge at 317-18.

Looking at the issue between the marriage of the parties' in the case at bar, and premised on the arguments raised by the Defendant in the trial court, the issue with respect to the

parties' marriage is void on the grounds of polygamy, as contained in G.L. c. 207, §4. Therefore, the appropriate place to start, is to apply G.L. c. 207, § 4, and to use the ordinary meaning of the words contained within G.L. c. 207, § 4. Hanlon at 447.

2. The parties'' marriage was not contracted while either party had a former Wife or Husband living.

G.L. c. 207, § 4 provides in relevant part, that "a marriage contracted while either party thereto has a former Wife or Husband living, except as provided in section six and in chapter two hundred and eight shall be void". G.L. c. 207, § 4. The section makes no reference to the existence of a former civil union partner. The question then, presented by the case at bar, is whether the existence of the Plaintiff's former civil union partner is a prohibition to the entry of marriage that would render the parties' marriage void.

Beginning our analysis as required by Hanlon, we first turn to the ordinary and approved use of the language. Hanlon at 447. Thus, we start with the definition of "husband" and the definition of "wife".

A Wife is defined as "a married woman; a woman who has a lawful spouse living". Black's Law Dictionary; Online Edition (9th ed. 2009). A Husband is defined as "a married man; a man who has a lawful spouse living". Black's Law Dictionary; Online

Edition (9th ed. 2009). The plain language of the words "husband" and "Wife" require then that there be a marriage. In the instant case, the parties fully acknowledge and agree, as the Record Appendix reflects that this was the first marriage for both parties, and that neither party has been previously married. RA at 18. Therefore, it is clear that neither the Plaintiff nor the Defendant have a living former Husband and/or Wife, consistent with G.L. c. 207, § 4.

In the instant case, the Plaintiff does not have a living Husband or Wife, as defined by the plain and ordinary use of the words. Indeed, as the marriage certificate of the parties correctly states, this is the first marriage for both the Plaintiff and the Defendant. RA 18, which would therefore render it impossible to have a former living Wife or Husband.

Instead, the Defendant seeks to create a rule that would essentially take a Vermont Civil Union, which is not a marriage pursuant to Vermont law, Vt. St. Ann. Tit 15, §§ 1202, which is a creature entirely of Vermont statutory law, Vt. Stat. Ann. Tit 15, §§ 1201-1206, and which has never been created or enacted by Massachusetts law, and equate it to a Massachusetts marriage.To take a relationship defined wholly by Vermont statute, a relationship that never existed in Massachusetts law, and to now, equate that Vermont relationship to a Massachusetts marriage and therefore render the Massachusetts marriage of the

parties in the case at bar void is well beyond the clear language of G.L. c. 207, § 4 and the authority of this court.

3. Massachusetts Public Policy

There can be no doubt that public policy in Massachusetts on the matter of same sex relationships has evolved significantly over the past six years. See Goodridge v. Department of Public. 440 Mass 309 (2003). There can be no doubt that in Massachusetts now, same sex couples, desiring to enter a committed civil marriage are free to do so consistent with the decision of the Supreme Judicial Court in Goodridge, just as the parties in the case at bar did. RA at 18.

However; as has been noted, various states have opted to handle the issue of same sex relationships differently, with some states opting for a more limited grant of authority, like a "domestic partnership", or Vermont, offering a "substantial equivalent of marriage", but nevertheless, not marriage. Salucco at 499. Massachusetts has never confronted the issue of domestic partnerships or civil unions, opting instead to grant full rights of marriage to same sex couples who meet the eligible criteria set forth by statute. Goodridge v. Department of Public Health, 440 Mass 309 (2003). We do not know, nor can we attempt to speculate as to whether Massachusetts would have ever created legally recognizable relationships akin to either a

domestic partnership, civil union or other statutory based relationship.

What is clear is that in 2009, Vermont repealed their civil union statutes and replaced it with a statute allowing for same sex couples to "marry". Vt. Stat. Ann. Tit. 15, § 8. In so doing, Vermont's actions affirmatively state that a civil union is not a marriage, is different from a marriage, and is not equal to a marriage, thus determining that same sex couples deserve the equal right of access to marriage. Vermont also made the decision to repeal its existing civil union law and not automatically convert existing civil unions to marriages. Vt. Stat. Ann. Tit, 15., giving further evidence that a civil union does not equate to a marriage.

Conclusion

While there can be little doubt that the instant case can be used to attempt to create broad social and legal arguments, it is fundamentally about the validity of the parties' marriage. Given that neither party has a living former Wife or Husband, they were not prohibited by statute from entering into a valid Massachusetts Marriage. Therefore, the Plaintiff submits that this court should direct the lower court that the marriage between the parties is valid, and that the Motion to Dismiss brought by the Defendant should be denied.

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Dated: August 2, 2011

BRIEF CERTIFICATION

I, Nicholas J. Plante, pursuant to Mass R. App. P. 16(k), hereby certify that the attached brief complies with all court rules governing appellate briefs including but not limited to Mass. R. App. P. 16(e), (f), (h), Mass. R. App. P. 18 and Mass. R. App. P. 20.

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CERTIFICATE OF SERVICE

I, Nicholas J. Plante, hereby certify that I have this day served two copies of the foregoing Appellant's Brief upon Appellee's Counsel of Record by mail, postage pre-paid, to:

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Dated: August 2, 2011