

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF HEALTH,

Petitioner

v.

D. BRUCE HANES, in his capacity as the
Clerk of the Orphans' Court of
Montgomery County

379
No. ___ M.D. 2013

TO: The Honorable D. Bruce Hanes
Register of Wills and Clerk of the Orphans' Court of Montgomery County
One Montgomery Plaza
Fourth Floor
Norristown, PA 19404-0311

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COMMONWEALTH COURT
OF PENNSYLVANIA
2013 JUL 30 A 11:20

NOTICE TO PLEAD

YOU HAVE BEEN SUED IN COURT. If you wish to defend against the claims set forth in the following pages, you must take action within thirty (30) days, or within the time set by order of the court, after the Petition for Review and Notice are served, by entering a written appearance personally or by attorney and filing in writing with the Court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so, the case may proceed without you and a judgment may be entered against you by the Court without further notice for any claim or relief that is requested by Petitioner. You may lose rights important to you.

You should take this paper to your lawyer at once. If you do not have a lawyer or cannot afford one, go to or telephone the office set forth below to find out where you can get legal help.

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213 North Front Street
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**PETITION FOR REVIEW IN THE NATURE OF AN ACTION IN
MANDAMUS**

AND NOW, comes the Pennsylvania Department of Health ("Department"), by and through its undersigned counsel, to petition this Honorable Court to issue a writ of mandamus commanding the Clerk of the Orphans' Court of Montgomery County ("Clerk") (1) to perform his duties under the Pennsylvania Marriage Law, 23 Pa.C.S. Part II (the "Law"), in conformity with (a) the Law's definition of the term "marriage" as "[a] civil contract by which one man and one woman take each other for husband and wife," 23 Pa.C.S. § 1102, and (b) the Law's declaration that it is "the strong and longstanding public policy of this Commonwealth that

marriage shall be between one man and one woman, 23 Pa.C.S. § 1704;” and (2) to cease and desist immediately from issuing marriage licenses to individuals of the same gender in violation of the Law.

The Clerk is repeatedly and continuously acting in clear derogation of the Marriage Law inasmuch as he is issuing marriage licenses to applicants of the same gender and accepting marriage certificates of those to whom he has issued marriage licenses indicating falsely that marriages between individuals of the same gender have been lawfully performed by a person authorized under the Law to perform marriages. The Clerk’s actions are in direct defiance of the express policy of the Commonwealth that “marriage shall be between one man and one woman,” 23 Pa.C.S. § 1704, is undermining completely the uniformity in the administration of the Marriage Law intended by the General Assembly, and risks causing serious and limitless harm to the public throughout the Commonwealth and beyond.

In repeatedly and continuously violating the Marriage Law, the Clerk is acting in contravention of, and is directly and substantially interfering with, the proper performance of the powers, duties and responsibilities that the Law assigns to and imposes upon the Department of Health.

Other than a writ of mandamus, there is no other remedy at law that the Department could pursue or secure that would be effective in stopping the Clerk from continuing to violate the Marriage Law, interfering with the proper

administration of the Law (including the responsibilities of the Department), and causing untold harm to the public.

In support of its petition, the Department of Health avers as follows:

I. JURISDICTION

1. Jurisdiction in this Honorable Court is based on section 761(a)(2) of the Judicial Code, which provides in relevant part as follows: “The Commonwealth Court shall have original jurisdiction of all civil actions or proceedings ... [b]y the Commonwealth government....” 42 Pa.C.S. § 761(a)(2).

2. Petitioner Department of Health is an administrative department of the Commonwealth government. *See* 71 P.S. § 61.

3. Because the Department is part of the Commonwealth government, this Honorable Court has original jurisdiction over the Department’s action in mandamus under 42 Pa.C.S. § 761(a)(2).

II. PARTY SEEKING RELIEF

4. The petitioner Department of Health is an administrative department of the Commonwealth government, 71 P.S. § 61, having powers and duties that are prescribed by law. *See, e.g.*, 71 P.S. 531-532.1, 1401-14.

5. The Department has several powers and duties under the Marriage Law, *to wit*:

a. Relating to the marriage licensing process, section 1104 of the Law provides as follows:

Marriage license applications, consent certificates, marriage licenses and other necessary forms shall be supplied at the expense of the county and shall be uniform throughout this Commonwealth **as prescribed by the [D]epartment.** Statements of physicians and laboratories relative to examinations for syphilis shall be **prepared and furnished by the [D]epartment.**

23 Pa.C.S. § 1104 (emphasis added).

b. Relating to the Department's responsibilities for recordkeeping and statistics, section 1106 of the Law provides, in relevant part, as follows:

(a) *Filing transcript or record.*—The county shall furnish **the [D]epartment**, not later than the 15th day of each month, with a transcript or record of each marriage license issued and each return of the celebration of a marriage received or filed during the preceding calendar month.

(b) *Forms.*—The transcripts or records required to be furnished shall be made on forms prepared and furnished **by the [D]epartment** and shall contain such information as **the [D]epartment** may require.

...

(d) *Statistics.*—**The [D]epartment** shall from time to time compile and publish statistics derived from records furnished under this section.

23 Pa.C.S. § 1106 (emphasis added).

6. The Department has similar responsibilities under section 601 of the Vital Statistics Law of 1953, which provides in relevant part as follows:

The clerk of orphans' court of every county shall execute a statistical summary of the marriage license applications for marriages solemnized within this Commonwealth. **The [D]epartment** shall prescribe the forms of such summary and the forms of marriage license applications. On or before the fifteenth day of each calendar month, each clerk of orphans' court shall transmit to **the [D]epartment** the summary of all marriage license applications pertaining to the executed marriage license certificates filed with the clerk during the immediately preceding calendar month.... **The [D]epartment**, at its discretion, may prescribe the method by which the transmission of the statistical summaries to the [D]epartment is to occur under this section, including, but not limited to, transmission by paper copy by mail or other courier, facsimile transmission or electronic means.

35 P.S. § 450.601 (emphasis added).

7. Implicit in the powers and duties reposed in the Department by the Marriage Law and the Vital Statistics Law is the power to seek judicial enforcement of the Law where non-compliance affects the Department's administrative responsibilities. *See Commonwealth v. Beam*, 567 Pa. 492, 496, 788 A.2d 357, 360 (2002) ("[A]n administrative agency is invested with the implied authority necessary to the effectuation of its express mandates," including the power to seek judicial relief to compel compliance with a law under which it has administrative responsibilities); *see also Belden & Blake Corp. v. Dep't of Conservation & Natural Res.*, 600 Pa. 559, 569, 969 A.2d 528, 533 (2009) (Saylor, J., dissenting) (same).

8. The unlawful actions of the Clerk in issuing marriage licenses in violation of the Marriage Law as described herein are directly and substantially interfering with the proper administration of the Law, including the proper performance of the powers and duties of the Department of Health as described in ¶¶ 5 and 6.

9. Because the Clerk's continuing unlawful actions are interfering with the proper administration of the Law and the effectuation of the Department's express mandates under the Law (as well as the Vital Statistics Law), the Department has authority and standing to seek judicial relief against the Clerk. *See Beam, supra.*

10. The Department has a clear legal right, enforceable through an action in mandamus, to insist that county officials comply with the Marriage Law.

III. GOVERNMENT UNIT WHOSE ACTION IS IN ISSUE

11. The Clerk of the Orphans' Court of Montgomery County is the government unit whose actions are at issue in this mandamus action.

12. Specifically, the Department seeks review by this Honorable Court of – and mandamus relief for – the continuing illegal actions of the Clerk in issuing marriage licenses to individuals of the same gender in direct contravention of the Marriage Law.

13. Under Pennsylvania law, the clerks of the orphans' courts of the Commonwealth have the power and duty to issue marriage licenses and to perform other responsibilities under the Marriage Law and the Vital Statistics Law. *See* 35 P.S. § 450.601; *In re: Coats*, 849 A.2d 254, 259 (Pa. Super. Ct. 2004) (the clerks of the orphans' courts are responsible under Pennsylvania law to issue marriage licenses and perform related duties).

14. In performing his powers and duties, the Clerk – an officer of the court (*see* 42 Pa.C.S. § 2777(5)) – must act in conformity with the requirements of the law. *See* 42 Pa.C.S. §§ 2774 (The clerk of the orphans' court division shall “exercise the powers, and perform the duties by law vested in and imposed upon the clerk of the orphans' court division or the office of the clerk of the orphans' court division.”); 2777(6) (The clerk of the orphans' court is required to “[e]xercise such ... powers and perform such ... duties as may ... be vested in or imposed upon the office by law.”); *see also In re: Coats*, 849 A.2d at 258 (“The office of the clerk of the orphans' court is not *sui juris* but is dependent on county and legislative provisions to implement its function.”).

15. In the administration of his responsibilities under the Marriage Law, the Clerk has a solemn duty to perform in compliance with the dictates of the statute as written by the General Assembly; he has no authority to deviate.

IV. THE MARRIAGE LAW (23 Pa.C.S. Part II)

A. The Procedure

16. A license to marry has been required by the law of the Commonwealth of Pennsylvania since 1885.

17. In 1990, the Pennsylvania General Assembly enacted the Marriage Law (23 Pa.C.S. Part II) – which replaced the Marriage Law of 1953 – as part of a new comprehensive and consolidated Domestic Relations Code (Title 23 of the Pa. Consolidated Statutes).

18. Section 1301(a) of the Marriage Law provides that “[n]o person shall be joined in marriage in this Commonwealth until a marriage license has been obtained.” 23 Pa.C.S. § 1301(a).

19. The Law also provides that “[n]o marriage license shall be issued except upon written and verified application made by both of the parties intending to marry.” 23 Pa.C.S. § 1302(a).

20. A marriage license application must include, among other information, “the full name of the applicants,” 23 Pa.C.S. § 1302(b)(1), and “[a]ny ... facts necessary to determine **whether a legal impediment to the proposed marriage exists.**” *Id.* § 1302(b)(6) (emphasis added).

21. To facilitate proper consideration of the application for marriage license, a marriage license may not be issued “prior to the third day following the

making of application,” 23 Pa.C.S. § 1303(a), except “[i]n case of emergency or extraordinary circumstances,” *id.* § 1303(b)(1), or to accommodate certain military service duties. *Id.* § 1303(b)(2).

22. The Law also requires an “oral examination,” *to wit*: “Each of the applicants for a marriage license shall appear in person and shall be examined under oath or affirmation **as to [t]he legality of the contemplated marriage**,” 23 Pa.C.S. § 1306(a)(1) (emphasis added), among other subjects.

23. The Law directs that the marriage license shall be issued “if it appears from properly completed applications on behalf of each of the parties to the proposed marriage that there is **no legal objection to the marriage**.” 23 Pa.C.S. § 1307 (emphasis added).

24. Under section 1310 of the Law, the marriage license is to appear substantially in the following form:

Commonwealth of Pennsylvania

ss: No.

County of (name)

To any person authorized by law to solemnize marriage:

You are hereby authorized to join together in holy state of matrimony, **according to the laws of the Commonwealth of Pennsylvania**, (name) and (name).

Given under my hand and seal of the Court of Common Pleas of (name), at (city, borough or town), on (date).

Signed
(Official Title)

23 Pa.C.S. § 1310 (emphasis added).

25. Under the Law, the forms that the clerks of the orphans' courts use in their administration of the Marriage Law must have been approved by the Department of Health. *See* 23 Pa.C.S. § 1104; *see also* 35 P.S. § 450.601.

26. The county is required monthly to provide to the Department "[a] record of each marriage license issued and each return of the celebration of a marriage received or filed during the preceding calendar month ... on forms prepared and furnished by the [D]epartment," containing "such information as the [D]epartment may require." 23 Pa.C.S. § 1106(a), (b); *see also* 35 P.S. § 450.601. The Department, in turn, compiles and publishes statistics derived from the records furnished to it by the counties. *Id.* § 1106(d).

B. The 1996 Amendments

27. On October 16, 1996, Governor Thomas J. Ridge signed into law Act 124, which made amendments to the Marriage Law.

28. As relevant here, Act 1996-124 added to the Law a definition of "marriage" as "a civil contract by which one man and one woman take each other for husband and wife." 23 Pa.C.S. § 1102.

29. Act 124 also added a new section 1704 addressing specifically "marriage between persons of the same sex." That section provides as follows:

It is hereby declared to be the strong and longstanding public policy of this Commonwealth that marriage shall be between one man and one woman. A marriage between persons of the same sex which was entered into in another state or foreign jurisdiction, even if valid where entered into, shall be void in this Commonwealth.

23 Pa.C.S. § 1704.

30. The 1996 amendments added to restrictions and prohibitions that were already part of the Law relating to minors, 23 Pa.C.S. § 1304(b); incompetent persons, 23 Pa.C.S. § 1304(c); persons under the influence of alcohol or drugs, 23 Pa.C.S. § 1304(d); and persons within certain degrees of consanguinity, 23 Pa.C.S. § 1304(e).

31. No court has declared section 1102 or section 1704 of the Law to be unconstitutional or unenforceable.

32. In fact, Pennsylvania courts have enforced the Law. *See, e.g., Himmelberger v. Dep't of Revenue*, 47 A.3d 160 (Pa. Commw. Ct. 2012) (affirming on the basis of the opinion in *In re Estate of Warnock*, 2011 Pa. Dist. & Cnty. Dec. LEXIS 565 (CCP Berks Co. 2011)); *Kern v. Taney*, 11 Pa. D. & C. 5th 558 (CCP Del. Co. 2010).

IV. MATERIAL FACTS

33. On July 23, 2013, the Clerk of the Orphans' Court of Montgomery County publicly announced that his office would begin issuing marriage licenses to same-sex couples in defiance of the Marriage Law. In a press release forecasting

his intended defiance of the law, the Clerk stated: “Based upon the advice of [the county solicitor], my own analysis of the law and mindful of the Attorney General’s belief that Pennsylvania’s marriage laws are unconstitutional, I decided to come down on the right side of history and the law....”

34. The Clerk’s reference to “the Attorney General’s belief that Pennsylvania’s marriage laws are unconstitutional” apparently is an allusion to the public pronouncement made by the Attorney General on July 11, 2013, at the National Constitution Center in Philadelphia that the provisions of the Marriage Law that define marriage exclusively to be between one man and one woman and prohibiting marriages between those of the same gender are, in her opinion, “wholly unconstitutional.”

35. The context of the Attorney General’s public pronouncement about the Law’s constitutionality was the announcement she made at the same time that she would not perform her duty under Pennsylvania law to defend the constitutionality of the Marriage Law in a federal civil rights action filed on July 9, 2013 (*Whitewood, et al. v. Corbett, et al.*, No. 13-01861 (M.D. Pa.)), challenging under the 14th Amendment to the U.S. Constitution the constitutionality of the Marriage Law’s prohibition against same-gender marriage.

36. The Clerk cited to the Attorney General’s public pronouncement notwithstanding that the Attorney General has issued no official opinion requested

by a Commonwealth official or agency under the Commonwealth Attorneys Act, *see* 71 P.S. § 732-204(a)(1) (“Upon the request of the Governor or the head of any Commonwealth agency, the Attorney General shall furnish legal advice concerning any matter or issue arising in connection with the exercise of the official powers or the performance of the official duties of the Governor or agency”), and notwithstanding that the Attorney General has no authority to render legal opinions or advice – official or otherwise – to local public officials, such as the Clerk. In other words, the Attorney General’s individual opinion respecting the constitutionality of the Marriage Law is of no legal consequence to the Clerk or any other public official or agency.

37. Moreover, the Attorney General’s public declaration that the Marriage Law is unconstitutional is not based on the holding of any court that has binding effect in Pennsylvania. The case cited by the Attorney General in her announcement – *United States v. Windsor*, No. 12-307, 2013 U.S. LEXIS 4921 (June 26, 2013) – in no way holds that a state law resembling Pennsylvania’s Marriage Law violates the Constitution.

38. Absent a controlling judicial decision of a court of competent jurisdiction, neither the Attorney General, *see* 71 P.S. § 732-204(a)(1), nor any other public official has license under Pennsylvania law to act in defiance of a controlling statute enacted by the General Assembly.

39. There is no controlling judicial decision of a court of competent jurisdiction that would justify the Attorney General or the Clerk not to defend and enforce the Marriage Law as written.

40. Based on media reports, it is averred that the Clerk on July 24, 2013, issued five (5) marriage licenses to same-sex couples in direct contravention of sections 1102 and 1704 of the Marriage Law. Based on other reports, it is averred that the Clerk on July 25, 2013, issued 11 additional marriage licenses to couples of the same gender. On information and belief, the Department avers that the Clerk has continued to issue marriage licenses to same-sex couples.

41. To highlight the impact of the Clerk's unlawful performance of his sworn duty and the consequent public harm in allowing his illegal actions to persist, the media reports that the availability of unlawful marriage licenses has attracted to the Montgomery County seat of government individuals from other Pennsylvania counties whose orphans' court clerks will not violate the Law by issuing marriage licenses to same-sex couples.

42. In one such instance, it has been reported, two women – Loreen Bloodgood and Alicia Terrizzi of Schuylkill County – traveled to Montgomery County on the strength of the Clerk's announced intention to defy the Marriage Law; and they obtained a license to marry on July 24, 2013.

43. In further defiance of the Marriage Law, the Clerk in that instance reportedly waived, presumably based on some “extraordinary” reason, the three-day waiting period mandated by the Law. *See* 23 Pa.C.S. § 1303.

44. As a result of the Clerk’s violation of the Law, it has been reported, Ms. Bloodgood and Ms. Terrizzi immediately appeared before a minister who, upon presentation of the illegal marriage license they had received from the Clerk and the waiver of the waiting period granted by the Clerk, purported to perform a marriage between the two women in defiance of Pennsylvania law.

45. Thus, as a result of the illegal issuance of marriage licenses by the Clerk, it appears that same-sex couples are proceeding with marriage ceremonies that are not permitted by Pennsylvania law, marriage certificates are being illegally filed, and the same-sex couples are left to believe erroneously that they have entered into a valid marriage under the law of Pennsylvania.

47. One consequence of the Clerk’s illegal conduct in issuing invalid marriage licenses is likely to be this: Same-sex couples who falsely believe (or merely contend erroneously) that they are married will apply for or claim benefits or other treatment (both public and private) that is reserved for those who are lawfully married under Pennsylvania law.

48. There is no limit to the administrative and legal chaos that is likely to flow from the Clerk's unlawful practice of issuing marriage licenses to those who are not permitted under Pennsylvania law to marry.

49. The Clerk is likely to continue to defy the Marriage Law unless and until a court should order him to cease and desist.

50. A writ of prohibition would be well-suited to cause the Clerk to stop violating the Law.

V. THE MANDATORY DUTY OF THE CLERK

51. The Clerk has a mandatory duty to comply with the Law as written by the General Assembly.

52. Like any public official, the Clerk is relieved of his mandatory duty to comply with the Law only if a court of competent jurisdiction has declared the law in question to be unconstitutional or otherwise unenforceable, or a court has rendered a precedential decision binding on public officials in the Commonwealth that establishes definitively and indistinguishably that the law is unconstitutional or unenforceable.

53. No public pronouncement of an executive official – even the Attorney General of Pennsylvania – declaring his or her individual legal opinion that a law is unconstitutional relieves a public official such as the Clerk from his mandatory duty to comply with the law.

54. Absent a controlling opinion of a court of competent jurisdiction, an administrative official such as the Clerk lacks the power or discretion under the law or our system of government not to perform his duties in accordance with applicable statutes enacted by the General Assembly.

55. An administrative official who refuses to comply with the law that applies to the performance of his public duties is properly the subject of a writ of mandamus to compel his adherence to the law.

56. The Marriage Law is the law of Pennsylvania.

57. The Clerk has a clear legal duty to comply with the Law and should be ordered to perform his duty accordingly.

VI. STATEMENT OF THE RELIEF BEING SOUGHT

58. The Department of Health seeks a writ of mandamus to compel the Clerk of the Orphans' Court of Montgomery County to comply with the Marriage Law (including sections 1102 and 1704 of the Law) and to immediately cease and desist from issuing marriage licenses to individuals of the same gender.

59. Pennsylvania's Marriage Law prohibits same-sex marriage. The Law unequivocally defines marriage as a civil contract between one man and one woman, 23 Pa.C.S. § 1102, and explicitly renders void any marriage between persons of the same sex. 23 Pa.C.S. § 1704.

60. Compliance with Pennsylvania law by its public officials is a mandatory obligation.

61. Ours is a government of laws, not one of public officials exercising their will as they believe the law should be or will be.

62. Under our constitutional system, public officials -- including the Governor, the Attorney General, and the clerks of our courts -- administer and enforce the laws that are enacted by the Legislature. Only the courts in a proper case brought before them have the power to declare that a law is unconstitutional and to suspend its effects.

63. Until a court of competent jurisdiction has declared a law to be unconstitutional, the oath taken by all elected and appointed officials requires compliance with the duly enacted laws of the Commonwealth as they are written.

64. To avoid the disorder and confusion that would otherwise result, mandamus to compel compliance with the Pennsylvania Marriage Law as written is necessary and appropriate in this case.

65. No other remedy at law is available to curtail the continuing unlawful acts of the Clerk of the Orphans' Court of Montgomery County.

WHEREFORE, the Pennsylvania Department of Health respectfully requests that this Honorable Court issue a writ of mandamus to the Clerk of the Orphans' Court of Montgomery County ordering him to comply fully with the

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Montgomery County :

VERIFICATION

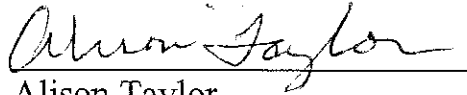
Marina O'Reilly Matthew, RHIA, State Registrar and Director of the Bureau of Health Statistics & Research, Department of Health, hereby verify that the factual averments made in the Petition for Review in the Nature of an Action in Mandamus filed by the Department of Health in the above-captioned matter are true and correct to the best of my knowledge, information and belief. I make this verification subject to the provisions and penalties prescribed by 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities).

Marina O'Reilly Matthew

Marina O'Reilly Matthew, RHIA
State Registrar and Director of the
Bureau of Health Statistics &
Research
Pennsylvania Department of Health

DATE: July 30, 2013

Marriage Law (23 Pa.C.S. Part II), and to direct the Clerk immediately to cease and desist from issuing marriage licenses to same-sex couples.



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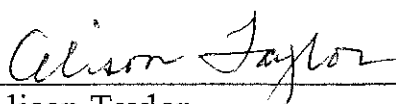
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	:	
D. BRUCE HANES, in his capacity as the	:	
Clerk of the Orphans' Court of	:	
Montgomery County	:	

CERTIFICATE OF SERVICE

I, Alison Taylor, Chief Counsel, Pennsylvania Department of Health, Office of Legal Counsel, hereby certifies that on July 30, 2013, I served true and correct copies of the foregoing, Commonwealth of Pennsylvania, Department of Health's Petition for Review in the Nature of an Action in Mandamus by causing same to be deposited in the United States Mail, certified mail, postage prepaid and UPS overnight mail to the following:

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