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COMMONWEALTH OF MASSACHUSETTS APPEALS COURT

FRIENDS OF THE M.N. SPEAR MEMORIAL PUBLIC LIBRARY, INC., & others
[FN1] vs.
BOARD OF REGISTRARS OF VOTERS OF THE TOWN OF SHUTESBURY, &
others [FN2];
SHOSHANA HOLZBERG-PILL, & others [FN3]; third party defendants.

12-P-843

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

We have heard this case on an expedited basis because it appears that a State grant for a proposed new library in Shutesbury will expire on June 30, 2012. At issue is a Superior Court judge's determination, after a de novo trial, that Shoshana Holzberg-Pill and Jacob Holzberg-Pill (collectively, Holzberg-Pills) were not properly registered to vote in a special election held on January 10, 2012, but that Richard F. and Joan L. Paczkowski were. [FN4] We affirm the ruling concerning the Paczkowskis and, because the parties agree that confirmation of the Paczkowskis' voting status renders unnecessary any decision about the Holzberg-Pills, [FN5] we do not reach or consider any issue regarding the latter. Background. Contingent on a debt exclusion vote, Shutesbury voters (at a special town meeting in October 2011) voted to appropriate funds for a new library. The debt exclusion was rejected at a special election held the following month. The board of selectmen of the town placed the question on the ballot for a second election, which was held on January 10, 2012. At that election, there were 523 votes in support of the debt exclusion and 522 against. Eight of those voters were subsequently challenged before the board of registrars of voters (board), which conducted a public hearing, took evidence, and heard argument. The board confirmed the original ballot count, but disqualified one of the voters who had voted in favor of the debt exclusion. [FN6] The practical consequence was that the vote became tied, thus spelling defeat for the debt exclusion measure and, by extension, for the new library.

The plaintiffs are proponents of the new library who brought suit in the Superior Court pursuant to G. L. c. 56, § 59 and G. L. c. 231A, § 1, seeking an order that the Paczkowskis' votes not be counted. [FN7] The interveners (who oppose the new library) sought to have the Holzberg-Pills' votes invalidated. [FN8] After a de novo jury-waived trial with stipulated exhibits, written submissions, and oral argument, the Superior Court

judge concluded that (1) the plaintiffs had failed to meet their burden of showing that the Paczkowskis were not domiciled in Shutesbury when they registered to vote and cast their votes in 2011 and 2012; and (2) the interveners had satisfied their burden of proving that the Holzberg-Pills were not domiciled in Shutesbury for purposes of voting in the January 10, 2012, election. [FN9]

The record amply supported the trial judge's findings regarding the Paczkowskis, which we summarize here. The Paczkowskis married in 1973 and lived in Shutesbury following their marriage. In 1977, they purchased a house at 59 Briggs Road in Shutesbury. In 1989, the couple bought a home in Edgewater, Florida and moved there with their children. The Edgewater home became the family's primary residence and the Paczkowskis became domiciled in Florida. Joan Paczkowski (Joan) registered to vote in Florida in 1990, and voted there nine times between 1992 and 2008. Richard registered to vote in Florida in 1998 and voted there four times between 1998 and 2008. The Paczkowskis leased their house in Shutesbury from 1995 to 2001. [FN10] The Paczkowskis applied for a Florida Homestead exemption, which they received from 1989 to 2011. [FN11] From 2002 until 2010, the Paczkowskis filed Federal and State tax returns in Florida, using their Florida address. Their cars were registered in Florida and they had Florida drivers' licenses. The children attended school in Florida, and Richard worked as an electrician at Cape Canaveral until 2002.

In 2002 Richard returned north and was employed by Utilities Line Construction in Manchester, Connecticut. From 2003 until 2007 (when he became disabled), Richard returned to Massachusetts and worked for the Springfield Terminal Railway Company. His paychecks were sent to a post office box in Shutesbury.

The Paczkowskis were not included in the Shutesbury List of Residents over 16, dated July 11, 2011. However, according to their affidavits, the Paczkowskis began to spend more time in Shutesbury after Richard retired in 2007 and their children were out of school. In 2011, they spent nine months of the year in Shutesbury, but wintered in Florida. They averred that they made a conscious decision in 2011 to re-establish their domicile in Shutesbury, where they were actively involved in local and church activities. On October 14, 2011, the Paczkowskis submitted affidavits of Voter Registration to Shutesbury, listing 59 Briggs Road as the address where they then lived, and disclosing that they were last registered to vote in Florida.

The trial judge concluded that the Paczkowskis' 'expressed intention to re-establish their domicile in Shutesbury at a time when they still owned a home and had been physically present and actively involved in local activities there for over six months evidences their intent to re-establish Shutesbury as the center of their domestic, social and civi[c] lives, and for Shutesbury to remain their principal residence permanently or for an indefinite period of time. De novo evidence presented at trial does not persuade me otherwise. Like many other retired persons, the Paczkowskis maintain two residences and divide their time between the two locations. While they may have focused their lives in Florida for over twenty years, it is reasonable to accept that they have now decided to re-focus their

lives on the community where Richard was raised and where they began their married life.' (citations omitted).

Discussion. We review here the trial judge's determination that 'the evidence before the board was as matter of law sufficient to warrant its decision[]' that the Paczkowskis were domiciled in Shutesbury when they registered and voted. *Hershkoff v. Board of Registrars of Voters of Worcester*, 366 Mass. 570, 574 (1974). As the trial judge correctly determined, her task was to assess whether there was "substantial evidence," or "such evidence as a reasonable mind might accept as adequate to support" the board's conclusion as to the Paczkowskis' domicile. *Id.*, quoting from *Boston Edison Co. v. Selectmen of Concord*, 355 Mass. 79, 92 (1968). In making that determination, the trial judge, acting in equity pursuant to G. L. c. 56, § 59, was entitled to take evidence beyond that which had been before the board. 'The Superior Court is not limited by the restriction on the scope of judicial review of administrative action contained in the State Administrative Procedure Act, G. L. c. 30A. The broad equity powers given to the court by G. L. c. 56, § 59, override those limitations on the scope of judicial review, and most significantly override those provisions limiting the court to consideration of the record before the administrative agency, G. L. c. 30A, § 14(5), and the limitations as to grounds for overturning an agency decision, G.L. c. 30A, s 14(7).' *McCarthy v. Secretary of the Commonwealth*, 371 Mass. 667, 676-677 n.11 (1977).

There is no quarrel with the judge's determination that the Paczkowskis were domiciled in Florida during the time that they were living, working, voting, and sending their children to school there. During that period, there was 'a concurrence of all [their] interests' in Florida. *Mellon Natl. Bank & Trust Co. v. Commissioner of Corps. & Taxn.*, 327 Mass. 631, 638 (1951). The question is whether the evidence was sufficient as a matter of law to warrant the board's decision that the Paczkowskis had met their burden of showing a change of domicile to Shutesbury before they registered to vote there in 2011. *Ibid.* ('It is a general rule that the burden of showing a change of domicil is upon the party asserting the change.'). 'A change of domicil takes place when a person with capacity to change his domicil is physically present in a place and intends to make that place his home for the time at least; 'the fact and intent must concur.'" *Dane v. Board of Registrars of Voters of Concord*, 374 Mass. 152, 162 (1978), quoting from *Opinion of the Justices*, 5 Met. 587, 589 (1843). One's 'original domicil is presumed to have continued in the absence of compelling evidence that it was changed.' *Dane*, 374 Mass. at 162. [FN12] The ultimate conclusion of domicil 'is mainly a question of fact,' *Mellon Bank*, 327 Mass. at 632, and is to be drawn from the record as a whole, considering the Paczkowskis' professional, social, and charitable ties. See *Horvitz v. Commissioner of Rev.*, 51 Mass. App. Ct. 386, 396 (2001).

With these principles in mind, we conclude that there was sufficient evidence to support the conclusion that the Paczkowskis had re-established their domicil in Shutesbury by the time they registered and voted in the library election. The Paczkowskis have owned property in Shutesbury since 1977, and they reside there whenever they are in town. [FN13] Although that house is currently for sale, the Paczkowskis have averred that they

plan to continue to reside in Shutesbury, even if they must find a property to rent. For the past several years, the Paczkowskis have been gradually re-establishing their social and civic ties to Shutesbury. They have worked and received benefits in Massachusetts and participated in town and religious activities in Shutesbury. By 2011, the Paczkowskis had 'made a conscious decision to relinquish [their] primary residence status in Florida and to re-establish [their] domicile in Shutesbury,' as evidenced by the decision to register to vote in Shutesbury and relinquish the property tax abatement in Florida. Both the Superior Court judge and the board were entitled to conclude that the Paczkowskis had met their burden of showing that Shutesbury is 'the center of [their] domestic, social, and civil li[ves].' Hershkoff, 366 Mass. at 576.

Conclusion. For the reasons set forth above, we affirm the Superior Court judgment insofar as it concerns the Paczkowskis. We do not reach or consider the voting status of the Holzberg-Pills in light of the parties' agreement that a decision is not necessary as to their voting status, registration, or domicile given our decision with respect to the Paczkowskis.

So ordered.

By the Court (Wolohojian, Milkey & Sullivan, JJ.),