Montana Law Review

Volume 22
Issue 1 *Fall 1960*

Article 3

July 1960

State Board of Chiropractic Examiners Compelled through Use of Writ of Mandamus to Approve Particular School

John N. Radonich

STATE BOARD OF CHIROPRACTIC EXAMINERS COMPELLED THROUGH MANDAMUS TO APPROVE PARTICULAR SCHOOL. — Relators entered The Palmer School of Chiropractic at a time when its graduates were accepted for examination by the Montana State Board of Chiropractic Examiners. During their schooling the statute requiring examination was amended to read that applicants for examination must be graduates of a college of chiropractic approved by the Board. The Board thereupon voted to approve only those colleges accredited by the National Chiropractic Association, which did not accredit The Palmer School because it was operated for profit. Relators were denied permission to take the licensing examination. They then obtained a writ of mandamus from the district court to compel the Board (1) to allow petitioners to take the examination, (2) to issue them a license upon successful completion thereof, and (3) to approve The Palmer School insofar as relators were concerned. On appeal to the Supreme Court of Montana, *held,* affirmed. Disapproval of a school on irrelevant grounds is an abuse of discretion and mandamus will lie to compel recognition of preexisting approval. *State ex rel. Westercamp v. State Board of Chiropractic Examiners,* 352 P.2d 995 (Mont. 1960) (Justice Adair dissenting).

Because the third part of the writ requires approval of a particular school, even though for a limited purpose, it appears to undertake a direct control of the Board's discretion. One question presented by this circumstance is whether the writ affirmed does in fact undertake to control discretion, and another is whether, assuming it does, control of discretion is a proper function of the writ of mandamus.

The writ is framed in language requiring the Board "specifically to approve The Palmer School of Chiropractic insofar as the applications of plaintiffs . . . are concerned."[1] By affirming the writ, the court apparently gives sanction to a ruling that mandamus can properly be used to compel a particular decision by an administrative board. That the rule actually extends so far is, however, a matter of doubt. In the first place, the approval is to be for the purpose of relators' applications only, which does not bind the Board beyond this case. Second, the court considers the true facts to be that The Palmer School has been approved in the past, albeit not formally, and that its approved status was unaffected by the Board's improper reliance upon National Chiropractic Association accreditation standards. The reasoning would then follow that if there has not been an effective disapproval, the court can consider the relators graduates of an "approved school" and the Board under a duty to permit them to take the examination. Seen this way the decision is fully justified, but, the court's finding that the Board's prior approval of the school had never been properly overturned when compared with its subsequent order requiring the Board to approve the school raises at least an apparent inconsistency. If the school remained approved, the order compelling the Board specifically to approve it was unnecessary, and the Board had a "clear legal duty"[2] to permit graduates from such a school to take the examination and to issue

[1]Instant case at 1000.
[2]*State ex rel. Doolan v. Board of Comm'rs,* 49 Mont. 517, 143 Pac. 984 (1914).

licenses to them upon their successful completion of the examination. Performance of this duty could properly be compelled by mandamus. But if, on the other hand, The Palmer School was not already approved within the meaning of the statute the Board did not have a clear legal duty to approve the school, it merely had a duty to act, either in approval or disapproval at its discretion.[3]

The statute, unchanged since 1895, says of mandamus that "it may be issued . . . to compel the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station."[4] Mandamus serves to compel performance of a clear legal duty[5] where there is not an adequate remedy at law.[6] It requires a clear showing both of interest in the petitioner[7] and of violation of duty by the person sought to be coerced.[8] The writ will lie to coerce exercise of discretion[9] but not to control discretion by directing the making of a particular decision.[10]

Therefore, the affirmance of the writ requiring approval of The Palmer School is misleading in its apparent approval of using mandamus to control discretion. In this respect the case reinforces a trend of stretching mandamus to fit situations outside its traditional bounds.

Justice Adair's dissenting opinion asserts that if the Board's adoption of the N.C.A. code in effect disapproved The Palmer School, the Board's action was arbitrary and in excess of its lawful power, and that the proper remedy would have been the writ of certiorari to review the proceedings and determination of the board.[11] The dissent charges that to have denied

[3]Speaking of judicial discretion, the California Supreme Court has said that "Mandamus will, and should, issue to put it [Superior Court] in motion, but not, of course, to compel it to act in a particular manner unless the situation presented is one in which the court can exercise its discretion in but one way." See Lissner v. Superior Court, 23 Cal. App. 2d 711, 146 P.2d 232, 235 (1944); State *ex rel.* Anaconda Copper Mining Co. v. District Court, 25 Mont. 504, 65 Pac. 1020 (1901).

[4]REVISED CODES OF MONTANA, 1947, § 93-9102.

[5]Note 2 *supra.*

[6]REVISED CODES OF MONTANA, 1947, § 93-9103.

[7]State *ex rel.* Stuewe v. Hindson, 44 Mont. 429, 120 Pac. 485 (1912).

[8]State *ex rel.* Breen v. Toole, 32 Mont. 4, 79 Pac. 391 (1905).

[9]State *ex rel.* Barclay Motors, Inc. v. District Court, 102 Mont. 503, 59 P.2d 45 (1936); State *ex rel.* North American Life Ins. Co. v. District Court, 97 Mont. 523, 37 P.2d 329 (1934); State *ex rel.* County of Musselshell v. District Court, 89 Mont. 531, 300 Pac. 235, 82 A.L.R. 1158 (1931); State *ex rel.* Finlen v. District Court, 26 Mont. 372, 68 Pac. 465 (1902).

[10]See State *ex rel.* Anderson v. Gile, 119 Mont. 182, 172 P.2d 583 (1946).

[11]Certorari lies to review judicial functions in excess of jurisdiction (REVISED CODES OF MONTANA, 1947, § 93-9002) and extends to review of quasi-judicial functions of administrative agencies. (See, *e.g.*, State *ex rel.* Jacobson v. Board of County Comm'rs., 47 Mont. 531, 134 Pac. 201 (1913).) It is arguable that the act of the Board, though arbitrary and unreasonable, was not in excess of its jurisdiction since REVISED CODES OF MONTANA, 1947, § 66-505, gives to the Board the power of approval or disapproval. But see Milwaukee Iron Co. v. Schube, 29 Wis. 444, 9 Am. Rep. 591 (1872), holding that certiorari may be used to review a body acting within its jurisdiction, but in excess of its powers. There are apparently no Montana cases dealing with this precise point although Justice Adair seems willing to assume such remedy lies.

Another possible remedy is an injunction, mandatory in form. Although R.C.M. 1947, §§ 93-4201, -4216, relating to the issuance of injunctions, are phrased in terms of restraint or prohibition, § 93-4202 excepts from their operation those injunctions, mandatory in form, which may be issued in connection with actions to remove encroachments, to require specific performance of certain contracts, and the abatement of certain nuisances. R.C.M. 1947, §§ 17-701, -1101. MONT. CONST. art. VIII, § 3 which makes the writ of injunction available to the supreme court does not contain language restricting the jurisdiction to those prohibitory in form. It is

mandamus would not have left relators without remedy, and that consequently, although the court may have reached a desirable result, an unnecessary ambiquity has been injected into the scope of the remedy available by mandamus.

Justice Adair is undoubtedly right about the blurring of distinctions between the extraordinary writs, but this may not be all evil. While it makes the law uncertain, it may also hasten the day when special relief will be available if the facts warrant it, whatever the label used. This is a stage long since reached in ordinary pleading, where misnomer of a cause of action will not preclude relief. Rejection of extraordinary relief because the wrong writ was sought is all the more unfortunate when it results from simple failure to use the device of applying for a writ in the alternative, since upon application for "a writ of mandamus or other appropriate relief" the court can and will lend its aid by whatever form of writ is technically proper.[12]

JOHN N. RADONICH

USEFUL LIFE AND SALVAGE VALUE ARE DEFINED BY THE SUPREME COURT FOR FEDERAL INCOME TAX DEPRECIATION PURPOSES.—In three companion cases the United States Supreme Court has passed upon significant questions concerning depreciation of property used in trade or business or for the production of income. All three cases involve automobiles or trucks which were ordinarily used for short periods, then resold substantially before the end of their full economic or physical lives. The figures used in describing the cases are hypothetical but typical.

In two of the cases the taxpayer took as basis for depreciation the cost of the vehicles to him ($1,650) less their value as scrap ($50) at the end of their economic life (4 years). As a result, at the time he sold them (after 2 years) they were depreciated (to $800) far below their actual resale price ($1,400) and the gain which he realized on the sale ($600) was

---

arguable that the scope of the constitutional writ of injunction should be determined with reference to those available at common law at the time the Montana constitution was adopted. *Cf.*, Scharnikow v. Hogan, 24 Mont. 379, 62 Pac. 493 (1900). For discussion of cases involving mandatory injunctions see Klein, *Mandatory Injunctions*, 12 HARV. L. REV. 95 (1898).

The Montana Supreme Court, in Grosfield v. Johnson, 98 Mont. 412, 423, 39 P.2d 660, 664 (1935) stated: "With rare exception, the mandatory form will not be decreed for other purpose than to restore and maintain a condition which has been wrongfully changed, but the early restrictions on this form of injunction have given way to a more liberal construction of the court's power and the courts may relax the rules in order to attain the ends of justice."

[12]See State *ex rel.* Stewart v. District Court, 103 Mont. 487, 63 P.2d 141 (1936); State *ex rel.* Peel v. District Court, 50 Mont. 505, 197 Pac. 741 (1921). A qualification to this statement must be made, however, in circumstances like those in State *ex rel.* United States Fidelity & Guaranty Co. v. District Court, 77 Mont. 214, 250 Pac. 609 (1926), where upon an application for a writ of supervisory control or other appropriate remedy the court denied relief because while certiorari would have been appropriate the record from the court below had not been certified to the supreme court.