STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
SUPREME COURT

MARGARET CHAMBERS Plaintiff,	:	
v.	:	Case No. 06-340-M.P. (Family Court 06-2583)
CASSANDRA ORMISTON Defendant.	:	

ON A CERTIFIED QUESTION OF LAW FROM THE FAMILY COURT

BRIEF OF AMICUS CURIAE GAY & LESBIAN ADVOCATES & DEFENDERS

Lauren E. Jones #2141
JONES ASSOCIATES
72 South Main Street
Providence, RI 02903-2907
(401) 274-4446

Gary D. Buseck*
Mary L. Bonauto
Michele E. Granda
GAY & LESBIAN ADVOCATES
& DEFENDERS
30 Winter Street, Suite 800
Boston, MA 02108-4720
(617) 426-1350

*admission pro hac vice pending

TABLE OF CONTENTS

Index of Authorities

Cases

Statutes

Other Authorities

STATEMENT OF INTEREST OF AMICUS CURIAE

Gay & Lesbian Advocates & Defenders (GLAD) is New England's leading legal rights organization dedicated to ending discrimination based upon sexual orientation, HIV status, and gender identity and expression. In addition to GLAD's litigation on workplace discrimination, parenting issues, access to health care, public accommodations and services, and myriad other issues in law, GLAD has sought marriage equality in cases in several states. Most notably, these cases include GLAD's litigation as counsel in Goodridge v. Dep't of Pub. Health, 440 Mass. 309 (2003), in Baker v. Vermont, 170 Vt. 194 (1999), and in Kerrigan v. Dep't of Pub. Health, Conn. Super. No. NNH-CV 04-4001813. GLAD has also appeared as an amicus curiae in other marriage-related litigation.

CERTIFIED QUESTION

> MAY THE FAMILY COURT PROPERLY RECOGNIZE, FOR THE PURPOSE OF ENTERTAINING A DIVORCE PETITION, THE MARRIAGE OF TWO PERSONS OF THE SAME SEX WHO WERE PURPORTEDLY MARRIED IN ANOTHER STATE?

STATEMENT OF THE CASE

Prior Proceedings

This action was commenced in the Family Court on October 23, 2006 by the Plaintiff, Margaret R. Chambers, seeking "a judgment divorcing the plaintiff from the

bond of marriage," a denial of alimony and an award with respect to certain property. See Complaint, Chambers v. Ormiston, F.C. PO6-2583; Appendix [A.] 1-2.[1]

The defendant, Cassandra Ormiston, filed an Answer and Counterclaim on October 27, 2006, seeking dismissal of the Plaintiff's Complaint and a judgment of divorce and ancillary relief on her Counterclaim. A. 3-6.

Following the filing of several preliminary motions,[2] on November 30, 2006, Plaintiff asked the Family Court to certify a question to this Court as to whether the Family Court "has jurisdiction to entertain divorce litigation between the parties …." (Motion for Certification to the Supreme Court).

Based upon findings of fact as agreed to by the parties, the Family Court (Jeremiah, C.J.) concluded that the question of law was "of the utmost importance to the litigants before the court, as well as potential future litigants who may become similarly situated" and therefore certified a question regarding subject matter jurisdiction to this Court.[3] (See the Decision and the Request for Certification, both dated December 11, 2006).

---

[1] The materials included in the Appendix, which is bound in with this brief, have been numbered in the lower right corner for ease of reference.

[2] The Plaintiff filed a Motion for Temporary Allowances on October 23, 2006; and the Defendant filed a Motion for Accounting and a Petition to Partition on November 27, 2006.

[3] The question originally certified by Chief Judge Jeremiah was as follows: "Does the Rhode Island Family Court have subject matter jurisdiction under R.I. Gen. Laws §8-10-3 (1956) to hear a divorce complaint wherein the plaintiff and defendant are of the same sex, were lawfully married in the Commonwealth of Massachusetts, are both domiciled inhabitants of the state of Rhode Island for at least one year, have met all other jurisdictional requirements and are seeking a divorce?" (See the Decision and the Request for Certification, both dated December 11, 2006).

By Order dated January 17, 2007, this Court retained jurisdiction while deciding that a response to the certified question would be premature prior to additional proceedings in the Family Court. (Order of 1/17/07, p. 1). Specifically, this Court sought a "fuller factual record" and directed that: (1) a series of twelve fact questions be addressed; (2) properly authenticated documentation of the parties' marriage license and certification of solemnization be provided to the Court; and (3) certain legal issues be "determine[d] in the first instance." (Order of 1/17/07, pp. 2-3). Finally, this Court directed the Family Court to reword the Request for Certification. (Order of 1/17/07, p. 3).

By decision dated February 21, 2007, the Family Court responded to this Court's Order of January 17, 2007. Family Court Decision, 2/21/07; A. 7-13. At the outset the Family Court noted

> On February 9, 2007, a hearing was conducted wherein the parties offered testimony, various exhibits and memoranda of law. More particularly, the parties submitted affidavits sworn under oath and a certified copy of a Certificate of Marriage from Massachusetts.

A. 8. As a result, the Family Court discussed the legal issues identified by this Court and made Findings of Fact in answer to this Court's questions. (Those Findings of Fact are discussed in detail in the Statement of Facts below.)

Finally, the Family Court clarified the question for certification as follows:

> May the Family Court properly recognize, for the purpose of entertaining a divorce petition, the marriage of two persons of the same sex who were purportedly married in another state?

A. 13.

By Order dated May 21, 2007, this Court assigned the certified question, as clarified, to the regular calendar for full briefing and oral argument and invited all interested parties to file briefs as amicus curiae. (Order, 5/21/07).

GLAD submits this amicus brief in response to the Court's invitation.

Statement of Facts

On May 17, 2004, same-sex couples became eligible to marry in the Commonwealth of Massachusetts. See Goodridge v. Dep't of Pub. Health, 440 Mass. 309, 344, 798 N.E.2d 941, 969-970 (2003)(the Court stayed its decision of November 18, 2003 for 180 days). Nine days later, on May 26, 2004, the Plaintiff, Margaret R. Chambers, and the Defendant, Cassandra B. Ormiston, traveled to Fall River, Massachusetts and executed a Notice of Intention of Marriage. A. 14.

When the parties completed the Notice of Intention of Marriage, they were "domiciled inhabitants of the State of Rhode Island," A. 9, and they each indicated that fact on the Notice of Intention of Marriage, identifying their joint residence as "24 Everett Ave., Providence, Rhode Island 02906," A. 14).

As of May 26, 2004, the parties had "resided in Rhode Island for approximately two (2) years prior to making application for a Massachusetts Certificate of Marriage." A. 9.

The marriage of Margaret and Cassandra was solemnized at One Government Center in Fall River, Massachusetts on May 26, 2004, by Carol A. Valcourt, Justice of the Peace, as certified by Ms. Valcourt on May 26, 2004. A. 9, 15.

The Certificate of Marriage was recorded by the Fall River, Massachusetts City Clerk on May 26, 2004, A. 15, and it was recorded with the Registry of Vital Records and Statistics of the Department of Public Health for Massachusetts. A. 9, 15.

Since the solemnization of their marriage on May 26, 2004, neither party has "ceased to reside within the State of Rhode Island at any time." A. 9. As such, both Plaintiff and Defendant have been domiciled inhabitants, residing in the State of Rhode Island "for at least one year next before their complaint and counterclaim for divorce were filed." A. 9.

POINTS

I. THE FAMILY COURT HAS SUBJECT MATTER JURISDICTION TO ENTERTAIN THIS DIVORCE ACTION.

A. The Parties Were Validly Married In Massachusetts.

As found by the court below, the parties, Margaret Chambers and Cassandra Ormiston, obtained a marriage license and were married in Fall River, Massachusetts on May 26, 2004. That marriage was wholly valid in Massachusetts. Because the former Governor of Massachusetts, Mitt Romney, and his administration took a different view of the matter for a period of time, some explanation is necessary.

Under Massachusetts law, there have been, since 1913, certain restrictions on the ability of non-Massachusetts residents to marry in Massachusetts. See G.L. c. 207, §§11-12. The scope and meaning of those statutory provisions came before the Massachusetts Supreme Judicial Court for the first time in the wake of Goodridge v. Dep't of Pub. Health, 440 Mass. 309 (2003), after then Massachusetts Governor Romney, in 2004,

sought to enforce the statute to preclude same-sex couples from every state in the nation other than Massachusetts from obtaining Massachusetts marriage licenses. In Cote-Whitacre v. Dep't of Pub. Health, 446 Mass. 350 (2006), the Court ruled on the interpretation of the statute vis a vis residents of Maine, New Hampshire, Vermont, Connecticut, New York and Rhode Island. The Court held that same-sex couples who are residents of Maine, New Hampshire, Vermont and Connecticut could not marry in Massachusetts and remanded as to couples residing in New York and Rhode Island "for a determination whether same-sex marriage is prohibited in those States." Id. at 352 (Court's rescript). By the controlling majority of the Court, Rhode Island same-sex couples were, and are, free to marry in Massachusetts – strictly as a matter of the interpretation of the restriction in Massachusetts law – if the marriage "is not expressly 'prohibited' by their home State's positive law, i.e., by constitutional amendment, statute, or controlling appellate decision." Id. at 393 (Marshall, C.J. concurring, joined by Greaney, J. and Cordy, J.) and id. at 395-412 (Ireland, J., dissenting)(viewing §§11-12 as unconstitutional as applied to non-Massachusetts same-sex couples otherwise qualified to marry in Massachusetts).

On remand, the Massachusetts Superior Court applied this test announced by the Supreme Judicial Court and ruled that Mass. G.L. c. 207, §§11-12 did not and do not operate to forbid the issuance of marriage licenses to Rhode Island same-sex couples. Cote-Whitacre v. Dep't of Pub. Health, 21 Mass. L. Rptr. 513, 2006 WL 3208758 (Mass. Super. Sept. 29, 2006) at *4. The Commonwealth did not appeal that ruling.

Simply as a matter of Massachusetts law and, in particular, as to who is eligible to marry in Massachusetts under Massachusetts law, it is settled that same-sex couples from

Rhode Island were not, and currently are not, precluded from marrying in Massachusetts by G.L. c. 207, §§11-12. See Mouradian v. Gen. Elec. Co., 23 Mass. App. Ct. 538, 542, 503 N.E.2d 1318, 1320 further app. rev. denied 399 Mass. 1105, 507 N.E.2d 1056 (1987)(if an interpretive rule expresses the "true meaning of the statute," then "that is what the statute has always meant and the rule has not changed the law," quoting 1 Davis Administrative Law Treatise §5.09 (1958)).

Therefore, to the extent there was ever any doubt, it is now clear that the parties before this Court were validly married in Massachusetts on May 26, 2004.

B. The Family Court's Broad Jurisdiction Must Be Construed Liberally.

It is well settled in Rhode Island law both that the Family Court "possess[es] only such jurisdiction as was explicitly conferred upon it by the Legislature," Carr v. Prader, 725 A.2d 291, 293 (R.I. 1999) quoting Fox v. Fox, 115 R.I. 593, 596, 350 A.2d 602, 603 (1976), and that "[d]ivorce proceedings are statutory actions in which both jurisdiction and procedure depend on the statutes," Budlong v. Budlong, 51 R.I. 113, 152 A. 256, 257 (1930). See also Schwab v. Schwab, 897 A.2d 37, 38 (R.I. 2006)("the Family Court is a statutory tribunal whose powers are specifically granted by the Family Court Act," quoting Christensen v. Christensen, 121 R.I. 272, 274, 397 A.2d 900, 901 (1979)).

It is also undisputed that the Family Court has subject matter jurisdiction with respect to divorce actions. G.L. 1956 §8-10-3 expressly provides, in pertinent part: "There is hereby established a family court, consisting of a chief judge and eleven (11) associate justices, to hear and determine all petitions for divorce from the bond of marriage and from bed and board …." G.L. 1956 §8-10-3(a).

In interpreting §8-10-3(a), the Legislature has expressly provided that it should be "liberally construed to the end that families whose unity or well-being is threatened shall be assisted and protected, and restored, if possible, as secure units of law-abiding members; …." G.L. 1956 §8-10-2. In keeping with that directive, while noting that the Family Court does not have "jurisdiction over the family unit completely," this Court has recognized "a legislative intent to make the family court responsible for 'hearing and determining practically all problems and disputes involving the family unit.'" Rogers v. Rogers, 98 R.I. 263, 267, 201 A.2d 140, 143 (1964) quoting State v. Zittel, 94 R.I. 325, 328, 180 A.2d 455, 457 (1962).

C. The Principles Of Family Court Jurisdiction Require The Court To Exercise Subject Matter Jurisdiction In This Case.

Applying these settled principles to the facts of the present case, this Court should hold that the Family Court has subject matter jurisdiction over this action for the following reasons.[4]

1. This divorce action plainly involves a marriage.

First, Rhode Island law provides for "divorce from the bonds of marriage" and, therefore, most obviously, requires a marriage to be ended or dissolved, restoring the parties to the status of single persons under the law.[5]

---

[4] As found by the Family Court, there is no dispute that both parties have satisfied the domicile and residence requirements for obtaining a divorce found in G.L. 1956 §15-5-12. A. 9.

[5] Rhode Island also provides for more limited divorces "from bed, board, and future cohabitation …." G.L. 1956 §15-5-9.

Interpreting the meaning of the word "marriage" in §8-10-3(a) is a question for which this Court is the "final arbiter" and has *de novo* review. See, e.g., Unistrut Corp. v. Dep't of Labor and Training, 922 A.2d 93, 98 (R.I. 2007); Henderson v. Henderson, 818 A.2d 669 (R.I. 2003). "`If the [statutory] language is clear on its face, then the plain meaning of the statute must be given effect' and this Court should not look elsewhere to discern the legislative intent." Id. at 673 quoting Fleet Nat'l Bank v. Clark, 714 A.2d 1172, 1177 (R.I. 1998)(quoting Gilbane Co. v. Poulas, 576 A.2d 1195, 1196 (R.I. 1990)). With an unambiguous statute, "`there is no room for statutory construction and [the Court] must apply the statute as written.'" State v. Day, 911 A.2d 1042, 1045 (R.I. 2006) quoting State v. DiCicco, 707 A.2d 251, 253 (R.I. 1998)(quoting In re Denisewich, 643 A.2d 1194, 1197 (R.I. 1994)).

The use of the word "marriage" in §8-10-3(a) is clear and unambiguous. It references the fact that two parties have entered into a contract. See, e.g., Leckney v. Leckney, 26 R.I. 441, 59 A. 311 (1904)("the parties to this suit entered into a contract of marriage"). In addition, marriage is something more, a status, as this Court said more than 150 years ago:

> …regarding marriage not as an executory contract between the parties to it, but as an universally recognized relation between them, deeply affecting their *status*, or legal and social condition, and for that reason, properly dissoluble according to the law of the country in which they are domiciled, without reference to the law of the place of the original contract of marriage, out of which the relation has emerged (emphasis in text).

Ditson v. Ditson, 4 R.I. 87, 1856 WL 2348, at *6 (1856); see also Henderson, 818 A.2d at 674 (jurisdiction over divorce is considered *quasi in rem* in that it concerns the legal status of the state's citizens).

In the present case, it is undisputed that the Plaintiff and the Defendant entered into a valid contract of marriage under the laws of the Commonwealth of Massachusetts on May 26, 2004. (See Section I.A., above). As such, they are presently parties to a "marriage" as that term can only be understood to mean in §8-10-3(a). Therefore, for this reason alone, the Family Court has jurisdiction over this action for divorce.

2. Even if the term "marriage" is ambiguous, jurisidiction is proper based upon the Legislature's policies.

Second, even if the word "marriage" were somehow deemed ambiguous with respect to the present case before the Court, a proper construction of §8-10-3(a) would still bring these parties' marriage within the scope of the jurisdictional statute.

When statutory language is ambiguous, "it is the task of this Court … to interpret the meaning of the language employed. Our task is accomplished through the use of the rules of statutory construction." (Citations omitted). LaPlante v. Honda N. Am., Inc., 697 A.2d 625, 628 (R.I. 1997). The goal is "to glean the intent of the Legislature." Unistrut, 922 A.2d at 99. And as this Court stated recently, it seeks that intent "from a consideration of the entire statute, keeping in mind [its] nature, object, language and arrangement." Tanner v. Town Council of the Town of East Greenwich, 880 A.2d 784, 796 (R.I. 2005) quoting Algiere v. Fox, 122 R.I. 55, 58, 404 A.2d 72, 74 (1979). The Court's purpose is to "determine and effectuate the Legislature's intent and [] attribute to the enactment the meaning most consistent with its policies or obvious purposes." Tanner, 880 A.2d at 796, quoting Keystone Elevator Co. v. Johnson & Wales Univ., 850 A.2d 912, 923 (R.I. 2004)(quoting State v. Burke, 811 A.2d 1158, 1167 (R.I. 2002)).

As noted above, the Legislature has expressly stated its intention that §8-10-3(a) is to be liberally construed to assist and protect families. G.L. 1956 §8-10-2. It should go without saying that the Plaintiff and the Defendant have comprised a Rhode Island family both before and since their marriage, and they are seeking the assistance of the court system.

In addition, finding the parties' marriage as within the meaning of "marriage" in §8-10-3(a) is consistent with the Legislature's general willingness to allow a wide variety of marriages and to expressly disallow very few marriages. In this regard, it is worth noting that:

(1) Rhode Island's restriction on kindred marriages is narrow and does not, for example, prohibit the marriages of first cousins. G.L. 1956 §§15-1-1 and 15-1-2;

(2) Moreover, Rhode Island law expressly exempts from its kindred marriages restriction "any marriages solemnized among the Jewish people, within the degrees of affinity or consanguinity allowed by their religion." G.L. 1956 §15-1-4; see In re May's Estate, 305 N.Y. 486, 114 N.E.2d 4 (1953)(noting validity in Rhode Island of Jewish wedding before a rabbi of a man and his niece);

(3) Rhode Island expressly declares as "good and valid in law" any marriage "had and solemnized" according the uses, rites and ceremonies of the Quakers, the Jewish religion and assemblies of the Baha'is. G.L. 1956 §15-3-6;[6]

---

[6] The Quakers and both Reform and Reconstructionist Judaism officially solemnize the marriages of same-sex couples under their uses, rites and ceremonies. For Reform Judaism, see the March 2000 "Resolution on Same Gender Officiation," http://www.rcfm.org/positions/refjudaism.htm (last visited July 20, 2007). For Reconstructionist Judaism, see the March 16, 2004 "Resolution in Support of Civil Marriage for Same-Sex Couples," http://www.therra.org/resolution-Mar2004.htm (last visited July 20, 2007). For the Quakers, see "Quakers Lead Way in Same-Sex Marriage," N.Y. Times, November 19,

(4) Although common law marriage has been expressly abolished by most American jurisdictions, the Rhode Island legislature has never done so such that "common law marriages have long been recognized as valid in this state." DeMelo v. Zompa, 844 A.2d 174, 177 (R.I. 2004); and

(5) Also, unlike many other American jurisdictions, the Rhode Island legislature has never undertaken to expressly declare any statutory prohibition against marriage by same-sex couples despite a number of invitations to do so.[7,8]

Similarly, but coming from the perspective of the end of marriage, although the parties here seek a divorce solely on the grounds of "irreconcilable differences which have caused the irremediable breakdown of the marriage" under G.L. 1956 §15-5-3.1, see

---

1989, http://query.nytimes.com/gst/fullpage.html?res=950DE1D8103EF93AA25752C1A96F948260 (last visited July 19, 2007)("Several Quaker meetings have married gay and lesbian Quakers, and many other meetings have passed minutes affirming their willingness to do so"). Rhode Island has six Quaker meetings, see http://quakerfind.org/QF/qfind.php, including in Westerly and Smithfield, each of which has issued a minute about marriage for same-sex couples. In June 1997, Westerly stated, "The same loving care and considerations will be given to all couples, both of same-gender and opposite gender, who request marriage under the care of the Meeting." In October 1993, Smithfield stated, "We acknowledge that same gender marriage and celebrations of commitment are taking place in the larger Quaker community. Should one of the couples move to our meeting, we will support their relationship as we would that of any other couple." For both of these minutes, see http://www.quaker.org/flgbtqc/marriageminutes.html (last visited July 20, 2007). Therefore, although the parties here were not married according to these faith traditions, presumably Rhode Island would see such marriages of same-sex couples as "good and valid in law." G.L. 1956 §15-3-6.

[7] See 1997 – H 5808; 2000 – H 7552; 2004 – H 5571, H 7395, S 2583, S 2663 and H 8223 (proposed non-binding referendum); 2005 – S 0846; 2006 – S 2310.

[8] Rhode Island has mostly been free of any ban on interracial marriage although a prohibition did exist in the State from 1822 to 1881. See Dred Scott v. Sanford, 60 U.S. 393, 416 (1856)(noting an 1822 Rhode Island enactment – and an 1844 re-enactment – of an interracial marriage ban); Keith E. Sealing, Blood Will Tell: Scientific Racism and the Legal Prohibitions Against Miscegenation, 5 Mich. J. of Race & Law 559, 605 n. 348 (2000)(noting 1881 repeal in Rhode Island).

A. 1-6, looking at the entire statutory structure, the Legislature has provided for divorce in a broad range of circumstances, see G.L. 1956 §15-5-2 (enumerating various causes for divorce, including, e.g., adultery, extreme cruelty and willful desertion for five years); §15-5-3 (divorce where parties "have lived separate and apart from each other for the space of at least three (3) years"); and §15-5-3.1 (divorce, "irrespective of the fault of either party, on the ground of irreconcilable differences which have caused the irremediable breakdown of the marriage"). In addition, the Legislature has provided for the alternative of divorce "from bed and board," G.L. 1956 §15-5-9, as well as divorce in case of "any marriage originally void or voidable by law," G.L. 1956 §15-5-1.

Moreover, it cannot be doubted that divorce jurisdiction is available with respect to residents' marriages regardless of whether those marriages were entered into in Rhode Island or outside of Rhode Island.

This statutory structure suggests a clear purpose of the Rhode Island Legislature to make divorce widely available to its citizens in essentially every conceivable circumstance so as to address the need of its citizens to obtain and clarify the legal status that they desire.

Finally, this Court has stated that it must not interpret a statute so as to defeat the underlying purpose of the enactment or create an "absurd or unjust result." LaPlante, 697 A.2d at 628; Dias v. Cinquegrana, 727 A.2d 198, 200 (R.I. 1999). The underlying purpose of §8-10-3(a) is to address the legal status of married Rhode Island residents and to allow them to return unambiguously to the status of single persons to the extent that

they can otherwise satisfy the Rhode Island courts that they are entitled by law to resume their single status.[9]

There is no reason required by the language of §8-10-3(a) or the otherwise expressed intent and purpose of the Rhode Island Legislature that these two parties as Rhode Island citizens are not entitled, as any other Rhode Island married couple would be, to maintain a divorce action in the Family Court. To read §8-10-3(a) to exclude their cause of action from Family Court jurisdiction, particularly where the parties have no ready availability to a Massachusetts court, or any other forum, to dissolve their marriage[10], would create an unjust result that is not required in any way under Rhode Island law.[11]

For all of the foregoing reasons, this Court should hold that the Family Court has subject matter jurisdiction under G.L. 1956 §8-10-3(a) to entertain this action for divorce

---

[9] The state "has a unique interest in assuring that its citizens are not compelled to remain in such personal relationships against their wills…." Von Schack v. Von Schack, 893 A.2d 1004, 1011 (Me. 2006)(Maine had jurisdiction over complaint for divorce although the plaintiff alone was a Maine resident).

[10] Like Rhode Island, Massachusetts has a residency requirement for obtaining a divorce. It is generally one year. See Mass. G.L. c. 208, §§4-5.

[11] The amicus is aware of only two reported cases in which jurisdiction for a divorce action involving a married same-sex couple has been addressed. Both were at the trial court level. Gonzalez v. Green, 14 Misc.3d 641, 831 N.Y.S.2d 856 (N.Y.Sup. 2006) and Lane v. Albanese, 39 Conn. L. Rptr. 3, 2005 WL 896129 (Conn. Super., March 18, 2005). Both Gonzalez and Lane are inapposite to the present question before this Court in that these courts each relied upon their determination that the Massachusetts marriages in issue of a New York same-sex couple and a Connecticut same-sex couple, respectively, were void under Massachusetts law. Gonzalez, 14 Misc.3d at 644-645, 648, 831 N.Y.S.2d at 858-859, 861; Lane, 2005 WL 896129 at *4. Whether those courts were correct in their analysis of Massachusetts is immaterial. What is material here is that Rhode Island same-sex couples are free to validly marry in Massachusetts. See Section I.A., above.

of these parties' marriage which falls within the meaning of "marriage" under §8-10-3(a).[12] The Court should answer the certified question in the affirmative.

II. TO THE EXTENT ANY DETERMINATION NEEDS TO BE MADE INDEPENDENT OF §8-10-3(a) AS TO THE VALIDITY OF THESE PARTIES' MARRIAGE FOR THE PURPOSE OF GRANTING A DIVORCE, THIS COURT SHOULD HOLD THAT THEIR MARRIAGE IS VALID.

Implicit in the statutory argument set forth in Section I, above, is the proposition that the Legislature has, in G.L. 1956 §8-10-3(a), resolved the question of the recognition of these parties' marriage in the context of an action for divorce. Put another way, the Legislature has statutorily determined that all of its domiciliaries are entitled to a judicial determination of their marital status.

Nonetheless, assuming for the sake of argument alone that some determination remains to be made as to whether the instant marriage of a Rhode Island couple in Massachusetts is recognized as valid under Rhode Island law, this Court should answer the certified question in the affirmative for the following reasons.

---

[12] In light of the breadth of the cause of action for divorce in Rhode Island in that it reaches marriages entered into both in Rhode Island and outside the State as well as valid and assertedly void and voidable marriages, see G.L. 1956 §15-5-1, the denial of jurisdiction solely to the marriages of same-sex couples would seem to raise serious constitutional questions of Equal Protection under both the state and federal constitutions. "It is the function of the court to adopt an interpretation of an ordinance or statute 'that allows us to avoid a finding of unconstitutionality'." State ex rel. Town of Westerly v. Bradley, 877 A.2d 601, 606 (R.I. 2005) quoting Advisory Opinion to the Governor (DEPCO), 593 A.2d 943, 946 (R.I. 1991); State v. Fonseca, 670 A.2d 1237, 1240 (R.I. 1996)("If more than one construction is possible, we will opt for that which will avoid unconstitutionality"); Gardiner v. Kennelly, 79 R.I. 367, 375, 89 A.2d 835, 836 (1952)("when different constructions of a statute are possible court will adopt a construction which will accord with its constitutionality rather than one which would raise serious question as to its unconstitutionality").

A. The Parties' Massachusetts Marriage Should Be Recognized As A Wholly Valid Marriage Under Rhode Island Law.

A determination that a Massachusetts marriage validly entered into by two residents of Rhode Island is also recognized as valid under Rhode Island law is the only result consistent with settled Rhode Island law.

1. This Court's decision in Ex parte Chace establishes the standard to be applied in the present case.

The present case is squarely governed by this Court's decision in Ex parte Chace, 26 R.I. 351, 58 A. 978 (1904). In Chace, a male, under guardianship and domiciled in Rhode Island, traveled to Massachusetts and entered into a marriage with another Rhode Island domiciliary, having never obtained his guardian's consent to the marriage. Id., 58 A. at 979. The couple then returned to Rhode Island to live, and the male's guardian removed him from the marital home, forcing the wife to petition for a writ of habeas corpus to restore the husband's liberty. Id., 58 A. at 978-979.

a. Chace embraces the traditional validation rule.

In defending against the petition, the guardian pointed to two Rhode Island statutes: (a) one providing that "all contracts, bargains and conveyances made by any person under guardianship shall be utterly void"; and (b) one providing "that no marriage license shall issue to a person under guardianship without the written consent of the guardian." Id., 58 A. at 979. The guardian then argued that each of these statutes independently barred the habeas petition. Id.

This Court rejected those arguments, refusing to find any extraterritorial effect in these Rhode Island statutes.

> [W]e think it clear that the statutes relied upon can have no direct application to this marriage, for it was celebrated in another state, and under the provisions of other laws.

Id. Stated differently, Rhode Island statutes, applicable in Rhode Island, could not be applied to a foreign marriage.

Secondarily, the guardian argued that the same statutes evinced a Rhode Island policy to "deny any validity to any kind of a contract which a ward attempts to make …." Id.

The Court rejected this argument as well. First, although Rhode Island quite expressly would not have allowed the parties' marriage to take place in Rhode Island, the Court noted:

> it nowhere appears, either in the pleadings or proof, that the marriage involved here was entered into in evasion of the laws of the domicile and contrary to the public policy thereof. For aught that appears, the parties may have entered into this contract of marriage in the most perfect good faith, and without any intention of evading the laws of Rhode Island. And as is said by Mr. Bishop in the first volume of his work on Marriage, Divorce & Separation, §§77, 836: "Each particular instance of what is meant for marriage has the aid of all the presumptions, both of law and fact, and equally whether the marriage was domestic or foreign."

Id.

With respect to the asserted policy to deny validity to a ward's contracts, the Court noted that "it is not clear that, even if the marriage had been solemnized in this state, it would have been void." Id. The law simply says that the license may not issue without consent. While the person who solemnizes might be liable to punishment, "it is to be carefully borne in mind that [the statutes] nowhere declare that the failure to

observe any or all of said formalities or requirements shall have the effect to render a marriage void." Id.

Third, without deciding the question, but assuming for the sake of argument that the marriage would have been void in Rhode Island, the Court held that "as … [the marriage] was lawfully celebrated in Massachusetts, it must be considered valid here." Id. The Court recognized that the law was not "entirely uniform upon this point" but that the "general principle" was that "capacity or incapacity to marry depends on the law of the place where the marriage is celebrated, and not on that of the domicile of the parties." Id. Citing cases in support of the general principle, including Medway v. Needham, 16 Mass. 157 (1819)[13], the Court noted that the reasoning of these cases was "well stated" as follows:

> "All nations allow marriage contracts. They are 'juris gentium,' and the subjects of all nations equally concerned in them; and from the infinite mischief and confusion that must necessarily arise to the subjects of all nations with respect to legitimacy, succession and other rights, if the respective laws of different countries were only to be observed as to marriages contracted by the subjects of those countries abroad, all nations have consented, or must be presumed to consent, for the common benefit and advantage, that such marriages should be good, or not according to the laws of the country where they are made. *** By observing this law no inconvenience can arise, but infinite mischief will ensue if it is not."

Chace, 58 A. at 980 (quoting Sir Edward Simpson in Scrimshire v. Scrimshire, 2 Hagg. Cons. 395 at 417).

---

[13] Medway v. Needham was, of course, the famous (and, in some places, "infamous") case where, as this Court described it, "[a] couple, one of who was a mulatto and the other white, in order to evade the statute [in Massachusetts making the marriage of the parties void], came into Rhode Island, where such connections were allowed, were there married, and immediately returned. And the marriage, being good in Rhode Island, was held to be good in Massachusetts." Chace, 58 A. at 980.

b. Chace established the contours of a public policy exception to the validation rule.

In distinguishing cases cited by the guardian where the out-of-state marriage was not recognized as valid, this Court noted that there was a "well-recognized exception to the general rule" of validation for an out-of-state marriage entered into in evasion of forum law if the marriage were "strongly against the public policy of the jurisdiction." Chace, 58 A. at 980.

To be strongly against Rhode Island's public policy, this Court used the following phrases: (a) "a marriage is odious by the common consent of nations"; (b) "its influence is thought dangerous to the fabric of society;" and (c) it is "considered so subversive of good morals." Id., 58 A. at 980-981.

The Court said that this exception would "probably" apply to polygamous and incestuous marriages. Id., 58 A. at 980. As to interracial marriages, the Court noted that the differing views of courts throughout the country rest "not upon any conflict of opinion regarding the general principle governing foreign marriages, but only upon the different conceptions of the courts regarding the importance of the public policy forbidding such marriages." Id. Finally, as to cases with different results regarding restrictions upon remarriage post divorce, the Court again thought the "conflict" concerned the "conception of the public policy regarding such marriages" but that if the cases were truly in conflict, the "current of authority" favored the principle of validation enunciated by this Court. Id.

In summary, Chace encompasses a number of key principles for questions of marriage recognition:

(1) Rhode Island statutes written in general language are not to be read to have direct application outside of Rhode Island;

(2) Intent to evade Rhode Island law by marrying elsewhere is not to be presumed; in fact, marriages anywhere are entitled to all presumptions in their favor;

(3) Whether a marriage is void requires careful attention to any applicable Rhode Island statutes and whether the statutes expressly intend to void the marriage;

(4) Even if a marriage would be explicitly void by statute if celebrated in Rhode Island, the general rule is to validate the marriage if it was valid where celebrated;

(5) The exception to this general rule is only triggered where a marriage is odious by the common consent of nations; subversive of good morals; and dangerous to the fabric of society;

(6) There is no valid out-of-state marriage which would absolutely be refused recognition in Rhode Island although polygamous and incestuous marriages "probably" would be denied validity; and

(7) Public policy conceptions and application may differ among jurisdictions, but the "current of authority" points against invalidation on public policy grounds and in favor of validation.

These principles, sound in 1904, remain applicable in 2007 and reflect the dominant view of the law today.

2. This Court's view of the law in 1904 has only been confirmed over time and, if anything, has moved further in the direction of marriage validation.

When this Court decided Ex parte Chace in 1904, the general rule that "marriages valid in the state of celebration are valid for all purposes" had been the conflict of laws rule in America since the "dawn of time for the subject in the United States" as marked by Joseph Story's treatise. Patrick J. Borchers, Baker v. General Motors: Implications for Interjurisdictional Recognition of Non-Traditional Marriages, 32 Creighton L. Rev. 147, 155 (1998).[14]

Joseph Story's treatise, first issued in 1834, argues that the general rule "has received the most deliberate sanction of the English and American Courts" and is "easily vindicated," quoting the very same language from Sir Edward Simpson as cited by this Court in Chace and noted above. Joseph Story, Commentaries on the Conflict of Laws §113, p. 104 and §121, p. 112 (2d ed. 1841).[15]

As to marriages entered by residents outside the state and in violation of domiciliary law, Story noted some contrary law but that "it has, however, been settled, after some struggle, both in England and America, that such a marriage is good." Id., §123a, p. 115. Indeed, he cited the 1819 Massachusetts decision of Medway v. Needham

---

[14] A statement of the rule generally contemporaneous with Chace is found in Commonwealth v. Graham, 157 Mass. 73, 31 N.E. 706 (1892). "The general rule of law is that marriage contracted elsewhere, if valid where it is contracted, is held valid here, although the parties intended to evade our laws, unless the statutes declare such a marriage to be void, or the marriage is one deemed 'contrary to the law of nature as generally recognized in Christian countries'." Id., 157 Mass. at 75.

[15] Story's second edition in 1841 greatly expanded the original 1834 edition but maintained the same pagination.

(as did this Court in Chace) for the proposition that this view has been "firmly established." Story, Commentaries §123b, p. 116.

Story notes that the Medway "doctrine" is based on the view that it is

> far better to support marriages, celebrated in a foreign country as valid, when in conformity with the laws of that country, although the rule may produce some minor inconveniences, than by introducing distinctions as to the designs, and objects, and motives of the parties, to shake the general confidence in such marriages; to subject the innocent issue to constant doubts as to their own legitimacy; and to leave the parents themselves to cut adrift from their solemn obligations, when they have become discontented with their lot.

Story, Commentaries §124, p. 118.[16]

As this Court in Chace correctly spoke of the "current of authority" consistently flowing in the direction of validation in American jurisprudence, Chace, 58 A. at 980, that current has continued and only grown stronger in the 103 years since Chace.

In 1934, the first Restatement of the Law of Conflict of Laws was introduced and provided that "a marriage is valid everywhere if the requirements of the marriage law of the state where the contract of marriage takes place are complied with." Restatement of Conflict of Laws §121 (1934). In that circumstance, the marriage is "valid everywhere

---

[16] Story argued that it was no answer to this reasoning to say that "every nation has a right, at its pleasure, to impose any restraints and prohibitions upon the marriages of its subjects, whether they marry within or without its own territory." Although true, Story noted that "it is quite as true no other nation must recognize those boundaries." Story, Commentaries §124a, p. 118.

Story acknowledged that the general rule had exceptions for polygamy and incest (with ambiguity as to where the incest prohibition ceases) as well as for marriages "prohibited by the public law of a country, from motives of policy," applying strictly only to subjects of that country. Id., §113a, p. 104 and §117, p. 108.

… although the parties to the marriage went to that state in order to evade the requirements of the law of their domicil." Id. §129.[17]

The exceptions to the rule were "remarriage after divorce" and "polygamous, incestuous, and abhorrent marriages." Id. §121 cmt. a; see also §132 and cmts. b and c (although expressly not intending to be exclusive, identifying only interracial marriages as possibly "odious," which requires prohibition by statute and an offense to "a deep-rooted sense of morality predominant in the state").[18]

Similarly, with the second Restatement of the Law of Conflict of Laws adopted in 1969, the general rule of recognition was endorsed: "A marriage which satisfies the

---

[17] Treatises also continued to demonstrate the dominance of the "place of celebration" rule. See, e.g., 2 Arthur W. Blakemore, A Treatise on the Law of Marriage, Divorce, Separation and Domestic Relations, §§1258-1262, pp. 1493-1500 (6th ed. 1921); Borchers, 32 Creighton L. Rev. at 155 (summarizing a 1937 treatise on the point by George W. Stumberg).

[18] In the decades immediately preceding the first Restatement, there had been some movement to pass statutes to void marriages by domiciliaries who traveled outside a state to marry in evasion of the laws of the domicile. The first Restatement acknowledges the existence of this Uniform Marriage Evasion Act ("UMEA"), which was proposed in 1912. Restatement of Conflict of Laws §132(d) comment e (1934). The UMEA was ultimately adopted in only five states, i.e., Massachusetts, Vermont, Illinois, Wisconsin and Louisiana (which later repealed its law). Eleven other states over time also adopted some form of "evasion" legislation. Eugene F. Scoles, Peter Hay, Patrick J. Borchers & Symeon C. Symeonides, Conflict of Laws, §13.13, pp. 579-580 (4th ed. 2004). However, this effort to modify the general rule of recognition never really took hold in the country. In 1943, the UMEA was officially withdrawn by the Commissioners on Uniform State Laws; and, in 1970, the Commissioners proposed the Uniform Marriage and Divorce Act ("UMDA"). 9A U.L.A. 159 (1998). Section 210 of the UMDA provides that "All marriages contracted … outside this State, that were valid at the time of the contract … are valid in this State." 9A U.L.A. 194. The Comment to §210 notes that one purpose was to codify "the emerging principle that marriages valid by the laws of the state where contracted should be valid everywhere, even if the parties to the marriage would not have been permitted to marry in the state of their domicil." Id. At the same time, §210 "expressly fails to incorporate the 'strong public policy' exception of the Restatement and hence may change the law in some jurisdictions." Id.

requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage." Restatement (Second) of Conflict of Laws §283(2) (1969).

As to the scope of the "strong public policy" exception, the Restatement says:

> Indeed in the absence of explicit statute or judicial precedent in the state of most significant relationship, the only rules that the forum would be likely to find embody a sufficiently strong policy of that state to warrant invalidation of an out-of-state marriage are rules that prohibit polygamous marriages, certain incestuous marriages, or the marriage of minors below a certain age.

Id. §283 cmt. k.[19]

Finally, and more recently, it is clear that the general rule of validation remains strong. See, e.g., Robert A. Leflar, Luther L. McDougal III & Robert L. Felix, American Conflicts Law, §§220-221, pp. 605-614 (4th ed. 1986); William M. Richman & William L. Reynolds, Understanding Conflict of Laws §119, p. 398 (3d ed. 2000)("overwhelming tendency"); Borchers, 32 Creighton L. Rev. at 154-158; Joseph W. Hovermill, A Conflict of Laws and Morals: The Choice of Law Implications of Hawaii's Recognition of Same-Sex Marriages, 53 Md. L. Rev. 450, 454 (1994)(summarizing the general rule as "supported by both traditional and modern choice of law analysis").

---

[19] It is also worth noting that the "public policy" exception is narrower under the Second Restatement than under the First Restatement because the Second Restatement is clear that only the state with the most significant relationship to the parties and the marriage "at the time of the marriage" should be in a position to invoke any policy to invalidate the marriage. In other words, if a married couple subsequently changes residence to a state other than their state of domicile at the time of the marriage or the state of celebration of the marriage (if different from the state of domicile at the time), this "third" state cannot have the most significant relationship and cannot apply its public policy to invalidate a marriage.

In sum, Chace embodies a view that presumes validation of out-of-state marriages and is skeptical of invalidation; and that view was and remains the dominant view in American law.

3. A straightforward application of the governing principles of law, settled in Rhode Island and confirmed over time, results in the recognition of the Massachusetts marriage of these parties.

a. The principle of validation established in Chace has been satisfied.

Turning to the instant case and the question of the validity of the parties' marriage as a matter of Rhode Island law, a straightforward application of the principles enunciated in Chace indicates that this Massachusetts marriage should be recognized.

First, as the findings of Chief Judge Jeremiah demonstrate, the parties here have a valid marriage license from Massachusetts. As Rhode Island residents, they traveled to Massachusetts to obtain that license in May, 2004; were married; and then returned home to Rhode Island where they have resided to this day. See generally A. 8-9.

Second, their marriage is entitled to every presumption in its favor. Chace, 58 A. at 979. Moreover, as in Chace, there is every reason to find that the parties here entered into their marriage "in the most perfect good faith, and without any intention of evading the laws of Rhode Island." Id. Indeed, in Chace, this Court made that observation although there was an express Rhode Island restriction on marriage by a ward without his guardian's consent. In the instant case, there is no express restriction of any kind in Rhode Island statutes against the parties' marriage. As such, these parties cannot even

technically be said to have evaded Rhode Island law.[20] They simply married where they were expressly allowed to marry.

Third, there is nothing in Rhode Island law that provides that the parties' marriage "would have been void [in Rhode Island]." Chace, 58 A. at 979. It is immaterial whether these two parties could not have married in Rhode Island. Affirmative permission within the jurisdiction to marry cannot be required for recognition of an out-of-state marriage. If that were the test, there would never be any actual choice-of-law issue since there would be no question that a marriage expressly permitted in Rhode Island would be recognized if performed in another state.

The parties' marriage would only conceivably be held invalid under Rhode Island law if there were a Rhode Island statute that expressly declared the marriage of a same-

---

[20] The law draws a distinction between an "evasion" of the law and an "avoidance" of a law; and "evasion" connotes in some way a violation of a law.

> "…`evasion' means a wrongful avoidance of the law or a statute. … In other words, an evasion has come to mean the commission of a wrongful act that is against a particular statute or 'the law', where an 'avoidance' means an act that is permitted by the law. … Both an evasion and an avoidance are attempts to cause the non-application of a statute. The difference is that the former is unlawful; the latter is not.

Woods v. City of Lawton, 1992 OK 167, 845 P.2d 880, 889 (1992) quoting Anglin v. Nasif, 217 La. 392, 399, 46 So.2d 309, 311 (1950)(a landlord may avoid rent control ceilings by a legal redesignation of her property as separate sleeping rooms rather than as an apartment); see also Heaton v. City of Charlotte, 277 N.C. 506, 527-528, 178 S.E.2d 352, 365 (1971)(zoning; "one may avoid the impact of a particular statute but may not evade such impact"; creation of a buffer zone validly avoided the requirement of a supermajority vote for approval of a rezoning petition).

As such, in the instant case, the parties did not evade Rhode Island law. As a matter of their motive and intent, it seems more than reasonable to presume that, in the wake of marriage being available for same-sex couples in Massachusetts on May 17, 2004, they simply decided – nine days later – to take the opportunity to formalize their commitment to each other.

sex couple to be void and if that statute expressed a clear intent to be applied extraterritorially to marriages entered into outside Rhode Island.

Although some States have attempted to adopt statutes that seek to operate in this fashion, see, e.g., Va. Code Ann. §20-45.2[21], Rhode Island has not undertaken to pass any type of law speaking in any way to the validity of marriages of same-sex couples, including in the nearly a year since the September 2006 ruling from the Massachusetts courts that made it clear that, as of May 17, 2004, same-sex couples from Rhode Island could, as a matter strictly of Massachusetts law, legally marry in Massachusetts if they were otherwise qualified to marry under Massachusetts law.

In short, although the Rhode Island Legislature clearly has the authority to take steps to alter the general rule validating all marriages valid where celebrated, it has not done so vis a vis the marriages of same-sex couples.[22] Where the Legislature has not chosen to alter the common law rule of validation for these parties' marriage, it is not the proper role of this Court to interpose a rule of invalidation for the instant marriage.

---

[21] Va. Code Ann. §20-45.2 is denominated "Marriage between persons of same sex" and provides: "A marriage between persons of the same sex is prohibited. Any marriage entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created by such marriage shall be void and unenforceable."

[22] Moreover, as Chace indicates, this Court looks very carefully in this area of the law to determine whether the Legislature intended extraterritorial effect to any marriage-related legislation and whether the Legislature intended to register any particular marriages void. Chace, 58 A. at 979. In doing so, this Court has carefully guarded the common law rule in favor of marriage validation, holding to the "well-established principle that the abrogation of a common-law right by statute requires that the legislative intent to do so be clearly expressed." Souza v. O'Hara, 121 R.I. 88, 91, 395 A.2d 1060, 1062 (1978)(statute providing that all persons "intending to be joined together in marriage in this state must first obtain a license" did not effect the validity of common-law marriage in Rhode Island).

Fourth, even if it could somehow be determined that these parties' marriage, under the current state of Rhode Island law, would have been void if celebrated in Rhode Island, Chace makes it clear that Rhode Island would still recognize this marriage as valid. As "it was lawfully celebrated in Massachusetts, it must be considered valid here." Chace, 58 A. at 979.

It follows from all of the foregoing that these parties' marriage is valid under Rhode Island law unless it can be determined that it somehow violates Rhode Island public policy as that concept has been explicated in Chace.

b. This Court should abolish any common law public policy exception.

It would be appropriate for the Court to use this case to actually abolish the public policy exception as recommended by the Commissioners of Uniform Laws in the Uniform Marriage and Divorce Act, discussed above at fn. 18. Where, as in Rhode Island, the public policy exception is a matter of determining whether a marriage valid somewhere in the United States is odious, subversive of good morals and dangerous to the fabric of society, Chace, 58 A. at 980-981, this "repugnance" exception has a certain unsavory side. It is extremely parochial in judging other states' laws and, in that sense, it disrespects our federal system. More generally, it is not in keeping with the rule of law in that it opens up opportunities for forum-shopping by dissatisfied parties. Finally, it is an amorphous and imprecise standard that does not, of itself, provide guidance as to the contours of the law. As this Court noted in Chace, different results regarding the validation of marriages have seemingly turned on "different conceptions of the courts

regarding the importance of the public policy forbidding such marriages." Chace, 58 A. at 980.

All in all, abolition of the exception would not practically alter the law in Rhode Island since Chace indicates that Rhode Island has rightly been skeptical of applying the exception. And this is in keeping with the practice of most American courts. See generally Barbara J. Cox, Same-Sex Marriage and the Public Policy Exception in Choice-of-Law: Does It Really Exist?, 16 Quinnipiac L. Rev. 61 (1996)(reviewing cases from 32 states and opining that the "vast majority of courts have not used a public policy exception to invalidate their domiciliaries' out-of-state marriages"). Moreover, without the public policy exception, the law is clearer and more precise; and also any exceptions to the rule of validation would come strictly and clearly, as appropriate, from express legislative enactments purposefully designed to alter the common law rule.

c. The public policy exception has no operation in the context of the present case.

Assuming that this Court retains the public policy exception, in Chace, as noted above, a marriage would not be entitled to recognition in Rhode Island if it is deemed "odious by the common consent of nations, or if its influence is thought dangerous to the fabric of society" or "subversive of good morals." Chace, 58 A. at 980-981.

Historically, the only marriages that have been thought to satisfy that standard – although even then not in every conceivable factual circumstance – are polygamous marriages and certain incestuous marriages. And, for a period of time in our history in some states, interracial marriages were held to fall under this rubric. See, e.g., Chace, 58

A. at 980 (discussing all three types of marriages); Restatement of Conflict of Laws §121 cmt. a and §132 and cmts. b and c (1934)(noting "polygamous, incestuous and abhorrent marriages" and identifying interracial marriages as potentially "odious" and thus in the "abhorrent" category); Restatement (Second) of Conflict of Laws §283 cmt. k (1969)(strong public policy only likely to be found in rules against polygamous marriages and certain incestuous marriages)[23]; see also Robert A. Leflar, Luther L. McDougal III & Robert L. Felix, American Conflicts Law, §221, pp. 609-614 (4th ed. 1986)(discussing incestuous, polygamous, interracial and underage marriages as well as remarriage following divorce, under a broad public policy rubric including both marriages contrary to the "law of nature" and marriages contrary to positive law without distinguishing between the two).

Amicus is aware of no reported case anywhere in the country which has ever declared as "odious" or "abhorrent" as a matter of public policy any marriage other than the three types identified in Chace and the first Restatement; and, of course, interracial marriage could not be so classified today in any State.

Amicus submits that this Court cannot and should not include marriages of same-sex couples within the public policy exception for odious or abhorrent marriages. Quite simply, such marriages cannot, by definition, be viewed as "odious by the common

---

[23] The second Restatement also speaks of underage marriages as potentially violative of public policy. Restatement (Second) of Conflict of Laws §283 cmt. k (1969). However, here the Restatement is speaking of marriages as potentially contrary to a strong public policy expressed in positive law. Whether Rhode Island law even recognizes such a "positive law" branch of the "public policy" exception doctrine is a matter this Court need not even reach in this case since, as previously noted, there is no positive law expressing any view on the marriages of same-sex couples let alone any such law speaking to the validity of such marriages and directed to such marriages performed outside Rhode Island.

consent of nations," "dangerous to the fabric of society" and "subversive of good morals."

Initially, there is simply no common consent among the states or nations that marriage for same-sex couples is "odious." In fact, marriage for same-sex couples is gaining in recognition in the United States and around the world, particularly if one includes those jurisdictions which grant same-sex couples all or most of the rights, benefits and obligations of marriage but choose to denominate the legal status created by some word other than "marriage," e.g., "civil union" or "registered domestic partnership."[24] This, in and of itself, should foreclose application of the exception.

Moreover, in other contexts where there is no essential consensus among jurisdictions as to certain marriages, e.g., of first cousins or between uncles and nieces or aunts and nephews, most states that prohibit these marriages "do not view them with much social alarm, and say that the validity of the marriage is governed by the law of the place where it was performed." Leflar, et al., American Conflicts Law §221, p. 610. That is precisely the view this Court enunciated and applied in Chace and that this Court should apply here, particularly where, as noted above, Rhode Island law has expressed no prohibition against marriage by same-sex couples.

---

[24] Marriage for same-sex couples is currently available in the Commonwealth of Massachusetts and in the countries of Canada, Netherlands, Belgium, Spain and South Africa. Civil unions or registered domestic partnerships are currently available in the States of Vermont, California, Connecticut and New Jersey and are scheduled to be effective January 1, 2008 in New Hampshire and Oregon. Similar legal statuses exist for same-sex couples in many countries, including Denmark, Norway, Sweden, Greenland, Iceland, France, Germany, Portugal, Finland, Luxembourg, New Zealand, United Kingdom, Czech Republic and Switzerland.

In addition, given that "it is not illegal for two men to live together, much less to contract and to enter into partnership with each other while doing so," Doe v. Burkland, 808 A.2d 1090, 1094 (R.I. 2002), and given that, in 1998, Rhode Island decriminalized sodomy for all citizens of Rhode Island, whether same-sex or opposite-sex couples, see G.L. 1956 §11-10-1, it cannot be "subversive of good morals" to recognize the marital commitment of a Rhode Island same-sex couple living together in the State.[25]

Further, it is also clear that Rhode Island has taken actions that indicate a belief that it is actually beneficial to the fabric of society to protect and support Rhode Island gay and lesbian citizens and their relationships. To that end, for example, Rhode Island law extends insurance benefits to the dependents of state employees and "dependents" is defined to include a "domestic partner." G.L. 1956 §36-12-1; §36-12-1(3) and (4); and §36-12-4.[26] Most recently, in 2006, Rhode Island extended COBRA benefits to domestic partners of state employees, G.L. 1956 §36-12-2.4; extended the state Parental and Family Medical Leave Act to domestic partners as statutory "family members," G.L. 1956 §28-48-1; and extended the one-time line-of-duty death benefit for police, fire and correctional officers to domestic partners, G.L. 1956 §45-19-4.3.[27]

---

[25] Similar to the manner in which the U.S. Supreme Court's decision in Loving v. Virginia, 388 U.S. 1 (1967), effectively put an end to any public policy exception as to interracial marriages on the ground of unacceptable, immoral cohabitation, Lawrence v. Texas, 539 U.S. 558 (2003), by invalidating any criminalization of same-sex sexual intimacy by adults in private, undercut any plausible argument that marriages of same-sex couples could be denied recognition on the ground of immoral conduct.

[26] Domestic partnership benefits are available to a majority of the union employees of the City of Providence pursuant to collective bargaining agreements.

[27] More generally, in recent years, the Legislature has extended protections against discrimination based on sexual orientation and gender identity or expression in employment, public accommodations, housing, credit, residential real estate and state

This Court has also recognized the relationship of same-sex couples. In Rubano v. DiCenzo, 759 A.2d 959 (R.I. 2000), the Court held that the Family Court had jurisdiction to: (1) determine the de facto parental status of a non-biological mother vis a vis the child she had raised from birth with her former female partner; and (2) consider enforcement of the biological mother's written agreement to allow visitation.

Subsequently, in 2002, in Doe v. Burkland, 808 A.2d 1090 (R.I. 2002), the Court held that, following the end of a nine-year relationship between two men, one of the partners could properly bring claims for breach of oral promise to share property, breach of express and implied contract, promissory estoppel, constructive and resulting trust and unjust enrichment. Doe v. Burkland, 808 A.2d at 1092-1093.

For all of these fundamental reasons, the public policy exception as enunciated in Chace does not apply to the present case.[28]

---

services. See, e.g., G.L. 1956 §§28-5-2 to 28-5-14; §§11-24-2 to 11-24-2.1; §§34-37-1 to 34-37-5.4; §§28-5.1-4 to 28-5.1-14. Similarly, home health care patients are entitled to services without regard to sexual orientation. G.L. 1956 §23-17.16-2. Harassment in higher education based on various factors, including sexual orientation and gender identity or expression, is also addressed by statute. G.L. 1956 §16-76.1-1. Finally, the Legislature has also established a system for monitoring crimes of bias and bigotry which includes sexual orientation, and the State Hate Crimes Sentencing Act also includes sexual orientation. See G.L. 1956 §42-28-46 and §12-19-38.

[28] It is worth noting the tack of Rhode Island law in other aspects of the conflict of laws. In torts, this Court abandoned the lex loci delicti doctrine in Woodward v. Stewart, 104 R.I. 290, 299, 243 A.2d 917, 923 (1968), and adopted the interest-weighing approach. Id.; see also Cribb v. Augustyn, 696 A.2d 285, 288 (R.I. 1997); Taylor v. Mass. Flora Realty, Inc., 840 A.2d 1126, 1128 (R.I. 2004). For the interest-weighing approach, the Court has indicated a preference for Professor Leflar's five choice-influencing guidelines as well as consideration of the factors identified in the second Restatement. Woodward, 104 R.I. at 300, 243 A.2d at 923; Cribb, 696 A.2d at 288.

Although a conflicts analysis from one area of the law is obviously not translatable to a different area of the law, it bears noting that both Professor Leflar's approach and that of the second Restatement support validation of the instant marriage.

Finally, with regard to the general recognition of these parties' marriage, two points of policy are worth noting. First, this Court – and, indeed, all American courts – have followed the common law rule of recognizing all marriages valid where celebrated. Out-of-state marriages have only not been recognized essentially where either they are deemed "odious" as violative of the "laws of nature" or the Legislature has acted in derogation of the common law to positively address the validity of certain marriages. See Hovermill, 53 Md. L. Rev. at 454-465. In short, it has been the role of the courts to validate marriages and to guarantee that any invalidation by the Legislature is done squarely and explicitly in unmistakable statutory language. See, e.g., Ex parte Chace, 26 R.I. 351, 58 A. 978 (1904) and Souza v. O'Hara, 121 R.I. 88, 395 A.2d 1060 (1978). Conversely, it has been the Legislature's principal role to declare and enact public policies regarding marriage. See, e.g., Whippen v. Whippen, 171 Mass. 560, 562, 51 N.E. 174 (1898)(validity of marriage of Massachusetts citizens is "a subject within the power of the legislature to regulate"); Hesington v. Hesington, 640 S.W.2d 824, 827 (Mo.App. 1982)(statutes and court decisions have a bearing on public policy "but statutes are the very highest evidence of public policy and binding on the courts").

For Professor Leflar, the choice-influencing factors of predictability, interstate order and the better rule of law support validation in "the bulk of marriage cases." Leflar et al., American Conflicts Law §220, p. 605. Only the factor of the forum's governmental interest points the other way and then only if there is "some genuinely strong public policy, such as that against incestuous or polygamous marriage." Id., p. 606. Therefore, for Professor Leflar, any policy of the forum asserted against a particular marriage must be weighed against the better rule of law which is to validate marriages.

As noted above, the second Restatement endorsed limiting the public policy exception, absent some explicit statute or judicial precedent, to "polygamous marriages, certain incestuous marriages, or the marriage of minors below a certain age." Restatement (Second) of Conflict of Laws §283 cmt. k (1969).

Where, as here, the Legislature has done nothing to abrogate the common law rule of recognition, this Court should not do so independently. Courts often engage in carefully nuanced interpretations of the law in order to validate marriages. See Souza v. O'Hara, 121 R.I. 88, 395 A.2d 1060 (1978). However, the amicus has found no reported case where a court has undertaken a similar type of analysis or recognized a new public policy in order to invalidate marriages.

Second, the breadth of the availability of marriage under Rhode Island law has created in other jurisdictions the very question now before this Court in the present case. Indeed, two of the highest profile cases in American conflicts law arose out of marriages – arguably controversial at the time but permitted – in Rhode Island but prohibited in the parties' domiciles at the time of the marriages. See Medway v. Needham, 16 Mass. 157 (1819)(interracial marriage in Rhode Island) and In re May's Estate, 305 N.Y. 486, 114 N.E. 4 (1953)(uncle-niece marriage in Rhode Island). The high courts of Massachusetts and New York, respectively, recognized those marriages; and, presumably, Rhode Island desired that respect in comity for those marriages that it authorized. Rhode Island can return the favor in comity today.

B. The Parties' Massachusetts Marriage Should At Least Be Recognized For The Purpose Of Entertaining An Action For Divorce.

For the reasons stated in Section II.A, above, these parties' marriage should simply be recognized as valid simpliciter. Nonetheless, their marriage must certainly be recognized for the purpose of obtaining a divorce.

The amicus submits that a blanket rule of non-recognition is something totally unknown in American legal history. Even in the context of interracial marriage in the Southern states where public debate and emotions were certainly as strong as they are today vis a vis marriage for same-sex couples, the courts did not impose a blanket non-recognition rule. See, e.g., Miller v. Lucks, 36 So.2d 140 (Miss. 1948)(interracial marriage held valid to allow the surviving spouse to inherit property in Mississippi); State v. Ross, 76 N.C. 242 (1877)(interracial marriage recognized where couple validly married in South Carolina and then later moved to North Carolina). Similarly, in the context of polygamous marriages, non-recognition has been less than absolute. See, e.g., In re Dalip Singh Bir's Estate, 83 Cal.App.2d 256, 188 P.2d 499 (1948)(allowing distribution of estate between two surviving wives).[29]

There are two additional reasons not to adopt a blanket non-recognition rule for the first time in the present case. First, such a blanket rule is flawed in that it ultimately creates absurd and unjust results by, for example, allowing the state with such a rule to become a haven for parties to shield themselves from legal obligations undertaken in another jurisdiction. Also, such a broad rule can impinge on the constitutional right to travel and also deny equal protection guarantees.

Second, any public policy doctrine requires consistent application in order to give shape to what is otherwise an amorphous, ill-defined concept. Consistency then should counsel the court not to adopt something wholly new like a blanket non-recognition rule simply for this category of marriages.

---

[29] This Court seemed to acknowledge this very point in Chace in refusing to state that even polygamous or incestuous marriage were categorically invalid. The Court stated that such marriages "would probably be denied validity in all countries." Chace, 58 A. at 980.

Putting aside then the question of a blanket non-recognition rule, there is support for the proposition that the court can consider whether a marriage is valid for a particular purpose, or incident, of marriage. See, e.g., Scoles et al., Conflict of Laws §§13.2-13.3, pp. 561-562; Russell J. Weintraub, Commentary on the Conflict of Laws, §5.1C, pp. 312-313 (5th ed. 2006); Herma Hill Kay, Same-Sex Divorce in the Conflict of Laws, 15 Kings Coll. L. J. 63, 71 (2004).

There has been criticism as well because it is certainly burdensome to have to litigate one's marriage for every incident that happens to be put in issue. See Barbara J. Cox, Using An "Incidents of Marriage" Analysis When Considering Interstate Recognition of Same-Sex Couples' Marriages, Civil Unions, and Domestic Partnerships, 13 Widener L. J. 699, 718 (2004). Put another way, it is perhaps reasonable to move to an incident approach if a court is otherwise inclined to declare a marriage invalid. However, if a court is inclined to view a marriage as valid (the operative presumption in virtually every case), the incidents approach only tends to create confusion.

Looking at the specific issue, or incident, presented in this case, i.e., access to a Rhode Island court to obtain a divorce, it is difficult to discern a reason why a court would refuse recognition for the purpose of entertaining a divorce petition. To paraphrase Professor Weintraub, cited above, "it is passing strange" to express a public policy against marriages of same-sex couples by acting to make it nigh on impossible for Rhode Island's resident, married same-sex couples to terminate their marital relationships.

Also, where the transition from fault to no-fault divorce means a decrease in the public interest in domestic relationships and an increase in the interests of the parties, see

Scoles at al., Conflict of Laws §15.3, p. 630, the parties' interest is in the clarity and resolution of their legal status. In this case, that should actually be Rhode Island's interest as well. See Von Schack, 893 A.2d at 1011 (state has a "unique interest in assuring that its citizens are not compelled to remain in such personal relationships against their wills …"). Without a forum in Rhode Island to clarify their legal status vis a vis the res of their marriage that exists with them in Rhode Island, these Rhode Island residents qua Rhode Island residents are denied any forum at all. That should not be an acceptable legal result.

For this additional, alternative reason, this Court should answer the certified question in the affirmative.

III. NEITHER THE FULL FAITH AND CREDIT CLAUSE NOR THE FEDERAL DEFENSE OF MARRIAGE ACT HAS ANY RELEVANCE TO THE PRESENT CASE.

In inviting amicus participation in this case, the Court identified as issues to be addressed the relevance of the Full Faith and Credit Clause of the United States Constitution and of the federal Defense of Marriage Act ("DOMA"), 28 U.S.C. §1738C. In the view of the amicus, neither provision has relevance to the question before this Court which is wholly governed by the analysis set forth in Section I, above, or, alternatively, by the analysis set forth in Section II, above.

A. The Full Faith And Credit Clause.

The amicus has discovered no reported judicial decision (and no literature discussing any such decision) applying the Full Faith and Credit Clause, U.S. Const., art.

IV, §1 to the question of recognizing the validity of a marriage entered into in another jurisdiction. This is undoubtedly so because American courts have been able to resolve all questions of marriage recognition by resort to the principles of comity.

As a result, any Full Faith and Credit question would essentially be one of first impression. There are certainly arguments to be made that the Clause does require sister states to give credit to marriages validly entered into in another state. See, e.g., Joseph Singer, Same-Sex Marriage, Full Faith and Credit, and the Evasion of Obligation, 1 Stan. J. Civ. Rts. & Civ. Liberties 1, 31-43 (2005). However, the amicus would urge this Court not to reach this question and to answer the reported question on grounds of statutory interpretation or comity.

B. The Federal DOMA Statute.

The federal Defense of Marriage Act, Pub. L. 104-199, contains three sections. Section 2, denominated "Powers Reserved to the States," adds section 1738C to title 28 of the United States Code as follows:

> §1738C. Certain act, records, and proceedings and the effect thereof
>
> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any State, territory, possession, or tribe respecting the relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

Defense of Marriage Act, Pub. L. 104-199, §2.

Congress' primary purpose in adopting this §2 of DOMA was not to require any State to do anything. Rather, it was designed to give the States the freedom to do as they please vis a vis respecting the marriages of same-sex couples. Therefore, at least with

respect to any analysis other than under the Full Faith and Credit Clause, §2 of DOMA does not direct or restrict any choice this Court might make vis a vis recognition of these parties' Massachusetts marriage. To that extent, DOMA has no relevance to the present matter.

As to a Full Faith and Credit Clause analysis, DOMA is also wholly irrelevant if a court finds that marriage recognition is not within the purview of the Clause. Again, in that circumstance, with no federal constitutional mandate, the State is free to treat the marriage of a same-sex couple exactly as it wishes and, therefore, DOMA has no role to play.

DOMA becomes conceivably relevant only if a court finds that a marriage is entitled to full faith and credit under the federal Constitution. In that circumstance, the State is being compelled to recognize a marriage that it presumably would otherwise not recognize; and DOMA was certainly designed to prevent that exact compulsion. Of course, this last scenario requires both a finding that the Full Faith and Credit Clause requires the recognition of marriages entered into in another state and a finding that §2 of DOMA is a constitutional exercise of Congress' power. If both findings are made, the two federal provisions may apply but they, in fact, "cancel each other out" such that the State is left to do as it pleases under its own law and so both provisions are technically irrelevant.

In the end, the only truly relevant scenario would be if the Full Faith and Credit Clause applies and §2 of DOMA is unconstitutional. Again, the amicus would urge this Court not to reach the first question of Full Faith and Credit and to answer the reported question on grounds of statutory interpretation or comity.

CONCLUSION

For all of the foregoing reasons, the amicus, Gay & Lesbian Advocates & Defenders (GLAD), respectfully requests that this Court answer the certified question in the affirmative.

GAY & LESBIAN ADVOCATES & DEFENDERS

By its attorneys,

_____

Lauren E. Jones #2141
JONES ASSOCIATES
72 South Main Street
Providence, RI 02903-2907
(401) 274-4446

_____

Gary D. Buseck*
Mary L. Bonauto
Michele E. Granda
GAY & LESBIAN ADVOCATES & DEFENDERS
30 Winter Street, Suite 800
Boston, MA 02108-4720
(617) 426-1350

*admission pro hac vice pending