State of Rhode Island and Providence Plantations

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Commissioner Jack R. Warner
Rhode Island Board of Governors for Higher Education
301 Promenade Street
Providence, RI 02908-5748

Dear Commissioner Warner:

By letter dated February 1, 2007 you have asked me for an official opinion as to whether or not the Rhode Island Board of Governors for Higher Education should recognize as married persons certain of its employees who were validly married in same sex ceremonies in the State of Massachusetts. I respond to your query as follows:

I. Will Rhode Island recognize same-sex marriages validly performed in Massachusetts as marriages in Rhode Island?

Under both principles of comity and full faith and credit, Rhode Island will recognize *any* marriage validly performed in another state unless it would be against the strong public policy of this state to do so. Accordingly, one must answer the question as to whether a same-sex marriage, valid in the State in which it was performed, is contrary to the public policy of Rhode Island.

Under either the Full Faith and Credit Clause (FFCC) or principles of comity, Rhode Island public policy will be the determining factor as to whether Rhode Island will recognize same-sex marriages validly performed in another state as marriages.[1] One identifies or determines a state's public policy from express statutory pronouncements,[2] case law,[3] and the common law. If a

[1] Federal DOMA does not affect our analysis both because it cannot be an expression of Rhode Island law and because it merely allows a State to accept or reject a same sex marriage performed in another jurisdiction. See 28 U.S.C. § 1738C.

[2] See, e.g., R.I. Gen. Laws § 28-5-3 (declaring a "public policy of this state to foster employment of all individuals regardless of sexual orientation, gender identity or expression").

[3] See, e.g., Keidel v. Keidel 383 A.2d 264 (R.I. 1978) ("the meaning of this statute is clear, it indicates a legislative intent to provide the parties, as a matter of public policy, with an opportunity for reconciliation and condonation"); Phillips v. Phillips, 39 R.I. 92, 97 A. 593 (1916) ("public policy of Rhode Island law is to preserve marital relationship").

court determines that same-sex marriages would not offend public policy, they will be presumed valid and will be recognized as marriages under Rhode Island law; if a court determines that same-sex marriages are contrary to public policy, then Rhode Island will not recognize those marriages as marriages under Rhode Island law.

A. Full Faith and Credit

The Full Faith and Credit Clause (FFCC) of the United States Constitution provides that "[f]ull faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." U.S. Const. art. IV, § 1. This means that "a judgment valid under the laws of one state should have the same credit, validity, and effect in every court in the United States that it had in the state where rendered." Williams v. North Carolina, 317 U.S. 287, 293 (1942); Silvia v. James Ursini Co., 475 A.2d 205 (R.I. 1984); State of Maryland Central Collection Unit v. Board of Regents for Education of the University of Rhode Island, 529 A.2d 144 (R.I. 1987) (Rhode Island required to enforce a judgment of another state provided that state's court properly exercised subject matter and personal jurisdiction).

The purpose of the FFCC is to promote uniformity among states so that they are not "independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin." Williams, 317 U.S. at 303 (quoting Milwaukee County v. M.E. White Co., 296 U.S. 268 (1935)). In this regard, the FFCC "substituted a command for the earlier principles of comity and altered the status of the States as independent sovereigns." Estin v. Estin, 334 US. 541, 546 (1948).

A difference exists, however, between respecting a sister-state's *judgments* and its *laws* (legislative measures and common law). Pacific Employers Ins. Co. v. Industrial Accent Comm'n., 306 U.S. 493, 501 (1939). Regarding judgments, full faith and credit is "exacting" and must be given. Baker by Thomas v. General Motors Corp., 522 U.S. 222, 233 (1998). A state, however, need not recognize or apply another state's *laws* if doing so would run contrary to its own "legitimate public policy." Nevada v. Hall, 440 U.S. 410, 426 (1979); Vanderbilt v. Vanderbilt, 77 S.Ct. 1360, 1377 (1957).[4]

[4] As the Supreme Court explained in Estin:

> The Full Faith and Credit Clause is not to be applied, accordion-like, to accommodate our personal predilections. It substituted a command for the earlier principles of comity and thus basically altered the status of the States as independent sovereigns. It ordered submission by one State even to hostile policies reflected in the judgment of another State, because the practical operation of the federal system, which the Constitution designed, demanded it. The fact that the requirements of full faith and credit, so far as judgments are concerned, are exacting, if not inexorable, does not mean, however, that the State of the domicile of one spouse may, through the use of constructive service, enter a decree that changes every legal incidence of the marriage relationship.

Estin, 334 U.S. at 545-46 (internal citations omitted).

B. Comity

Under the common law principle of comity "courts of one state or jurisdiction give effect to laws and judicial decisions of another state or jurisdiction, not as a matter of obligation but out of deference and mutual respect." Black's Law Dictionary 267 (6th Ed. 1990). Comity is not a rule of law, but rather, a *courtesy* or *practicality* based on a regard for the law of a foreign state. O'Brien v. Costello, 100 R.I. 422, 430, 216 A.2d 694, 699 (1966). Comity promotes cooperation and the orderly administration of justice among the states. See, e.g., Nevada v. Hall, 440 U.S. 410, 426 (1979).

"How far foreign laws should be enforced as a basis for jurisdiction depends on the law of the forum and this rests in turn on the forum's *public policy* with reference to its own institutions and the interests of its citizens." O'Brien, 100 R.I. at 430, 216 A.2d at 699 *(emphasis added)*. "In the absence of legislative restriction, comity in the application of the laws of another state rests in sound judicial discretion dictated by the facts of the case." Id. (refusing to invoke rules of comity where foreign court did not have *in rem* jurisdiction over property located in Rhode Island). Comity, then, also contains a public policy exception.

Thus, whether we examine Rhode Island's position on the *recognition* of a marriage validly performed in another state under Full Faith and Credit or under principles of Comity, the crucial issue is: Is there a public policy exception in this State that is so strong it will require Rhode Island to except same sex marriages from the traditional respect and recognition it has shown to sister State's laws since the union's creation? Rhode Island's case law and legislative enactments do not support such a finding.

II. Rhode Island Public Policy

More than a century ago, in the only reported case in Rhode Island in which a court applied principles of comity to decide whether to recognize an out-of-state marriage that would not have been valid if performed in this State, our Supreme Court held that a marriage validly performed in Massachusetts must be recognized in Rhode Island. In Ex Parte Chace, 58 A. 978 (R.I. 1904), a Rhode Island couple went to Massachusetts to marry. Rhode Island law prohibited persons under guardianship from marrying without the written permission of their guardian. Public Laws 1896, c. 549, § 11. Henry Chace was one such person, and, without obtaining his guardian's permission, he took his betrothed to Massachusetts where no such restrictive law existed. Never intending to live in Massachusetts, the newlyweds returned to Rhode Island. Chace's guardian, however, removed Mr. Chace from the marital home and forced him to live at another address (under the guardian's care). Mrs. Chace, on behalf of her new husband, petitioned the court for a writ of habeas corpus. Chace, 58 A. at 978-79.

In order to determine the propriety of the habeas corpus petition, the Rhode Island Supreme Court first engaged in a determination of whether the Chaces were lawfully married, particularly since they could not have married in Rhode Island. The guardian argued, *inter alia*, that the Chaces' marriage was invalid on *public policy* grounds; that because Rhode Island statutes expressly voided "all contracts, bargains and conveyances made by any person under guardianship," it was thus the *policy* of Rhode Island law to deny validity to any kind of a

contract a ward attempts to make. Id. Therefore, the guardian argued, the marriage contract, while it may have fulfilled the requirements of Massachusetts law, was void in Rhode Island. Id.

The Supreme Court rejected the guardian's arguments, ruling that, "even assuming the marriage would have been void in [Rhode Island]," it *must* be considered valid in Rhode Island because it was lawfully celebrated in Massachusetts and was not contrary to Rhode Island public policy. Chace, 58 A. at 979 *(emphasis added)*. The Court reached this conclusion on several grounds.

First, the Court acknowledged the generally accepted principle that the *capacity* of parties to marry depends on the law of the place where the marriage occurred not on the domicile of the parties. Since "all nations allow marriage contracts," all persons are equally concerned in the certainty of their marriage contract and the rights attendant to their marriage. Id. at 980. Using the legal domicile of the parties to determine the law to be applied, however, would result in applying different laws of different jurisdictions and would create "confusion" and "infinite mischief." Id. Thus, our Supreme Court determined that the better rule "for the common benefit and advantage," would be to recognize that a marriage valid where celebrated is valid everywhere. Id. (citing Scrimshire v. Scrimshire, 2 Hagg. Cons. 395, 417).[5]

Second, the Court confirmed that the only exception to this presumption of validity exists when a foreign marriage is "odious by the common consent of nations, or if its influence is thought dangerous to the fabric of society, so that it is strongly against the public policy of the jurisdiction." Id. at 980. In those instances, validity need not be presumed. This exception, however, is fairly narrow. As Chace recognized (at the time) only polygamous marriages, incestuous marriages and, in other jurisdictions, inter-racial marriages,[6] "would probably be denied validity in all countries where such unions are prohibited." Id.; see also Allen v. Allen, 703 A.2d 1115 (R.I. 1997) (bigamous marriage void from inception); accord Mazzolini v. Mazzolini, 155 N.E.2d 206 (Ohio 1958) (policy of the law is to sustain marriages where they are not incestuous, polygamous, shocking to good morals, unalterably opposed to a well defined public policy, or prohibited). But see Medway, fn. 3 (inter-racial marriage expressly prohibited by Massachusetts statute, but performed in Rhode Island, still valid in Massachusetts).

Holding that the Chaces' marriage did not fall within the public policy exception, and despite the fact that it would not have been lawful if performed in Rhode Island, the Court held that the marriage was valid and not void.[7] Chace, 58 A. at 981.

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[5] In support of its holding in this regard, the Chace Court pointed to Medway v. Needham, 16 Mass. 157. In that case, a Massachusetts statute prohibited inter-racial marriages. An inter-racial couple, however, went to Rhode Island to marry in order to evade the Massachusetts statute. That marriage, valid in Rhode Island, was held to be valid in Massachusetts despite the existence of the statutory prohibition against it and despite the couples' clear intention to evade Massachusetts' law.

[6] Rhode Island did not have a prohibition against inter-racial marriage at that time. It goes without saying that no state could or would prohibit inter-racial marriages today.

[7] The Chace court did not address the question of whether the Chaces' marriage would have been void or voidable if performed in Rhode Island. It instead reached its conclusion that the Rhode Island would recognize the Massachusetts marriage "even *assuming* that the marriage would have been void in this state . . . ." Chace, 58 A. at 980 *(emphasis added)*

Rhode Island has not enacted any legislation prohibiting same-sex marriages[8] or stating a public policy *against* same-sex marriages even though they have been validly performed in neighboring Massachusetts for approximately three (3) years. Additionally, on October 19, 2004, this Department opined in a letter to Rhode Island's General Treasurer that a party to a same sex marriage validly performed in Massachusetts was entitled to receive "spouse's benefits" under Rhode Island General Laws § 16-16-26. Copy attached. To date, neither our legislature, nor our Supreme Court has expressed disagreement with that opinion.

Moreover, Rhode Island through legislation and case law has expressed an affirmative policy to prevent discrimination on the basis of sexual orientation and has provided insurance benefits to domestic partners of state employees and recognition of *de facto* parental status for same-sex non-biological partners. The Rhode Island Judiciary through recently enacted Personnel Rules and Regulations has confirmed benefits to same sex partners as if they were spouses. For example, Rule 8.08(a)(1) grants to the Judiciary four (4) days of bereavement leave "in the case of the death of a spouse (including domestic partner)." In Rule 8.07(f) "immediate family" is defined to include "domestic partners of the same or opposite sex." The foregoing all supports a conclusion that same-sex marriages are not contrary to Rhode Island public policy. Rather, the only marriages declared contrary to public policy (and void) in Rhode Island law are bigamous marriages,[9] incestuous marriages,[10] and marriages between two mentally incompetent persons.[11]

While Rhode Island law does not affirmatively recognize same-sex marriages, it *does* state an affirmative policy of preventing discrimination on the basis of sexual orientation[12] in, among other areas, public accommodations, employment, credit, housing, and home health care.[13] In addition, Rhode Island courts have recognized the *de facto* parental status for same-sex non-

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[8] Currently the only marriages declared contrary to public policy (and void) under Rhode Island law are bigamous marriages, incestuous marriages and marriages between two mentally incompetent persons.

[9] R.I. Gen. Laws § 15-1-5; Allen, 703 A.2d at 1117 (bigamous marriage void from inception)

[10] R.I. Gen. Laws § 15-1-3.

[11] R.I. Gen. Laws § 15-1-5.

[12] "Sexual orientation" means having or being perceived as having an orientation for heterosexuality, bisexuality, or homosexuality. R.I. Gen. Laws § 11-24-2.1.

[13] See R.I. Gen. Laws § 11-24-2 (prohibiting discrimination in public accommodations based on sexual orientation); § 23-17.16-2 (granting home care patients rights to receive services without regard to sexual orientation); § 28-5-5 (prohibiting employment discrimination on basis of sexual orientation); § 28-5.1-7 (prohibiting state agencies from discriminating based on gender or sexual orientation); § 34-37-1 et seq. (prohibiting discrimination based sexual orientation in selling, renting, leasing or managing housing accommodations); § 34-37-4.3 (prohibiting financial institutions from discriminating based on sexual orientation); § 34-37-5.3 (prohibiting inducement of any persons to sell or rent any dwelling based on representations that a person of a specific sexual orientation may be entering neighborhood). Cf. Goodridge, 798 N.E.2d at 967 (recognizing affirmative policy in Massachusetts to prevent discrimination on basis of sexual orientation for similar protective laws).

biological partners[14] and permitted same-sex couples to adopt.[15] The General Assembly has also enacted legislation extending health insurance benefits to the domestic partners of state employees.[16] Taken together, these favorable conditions support the argument that Rhode Island does *not* have a strong public policy against homosexuals[17] or same-sex relationships.[18]

It is our opinion based on all of the foregoing that whether based on Full Faith and Credit or on principles of Comity, Rhode Island will recognize same sex marriages lawfully performed in Massachusetts as marriages in Rhode Island. Therefore, we advise the Board of Governors that it should accord marital status to its employees who were lawfully married in Massachusetts under the ruling of that state's highest court in Goodridge v. Department of Health, 798 A.2d 941, (Mass. 2003).

Very truly yours,

Patrick C. Lynch
Attorney General

PCL/JRL

[14] Rubano v. DiCenzo, 759 A.2d 959 (R.I. 2000).

[15] This is seemingly not the case in all states. See, e.g., Fla. Stat. Ann. § 63.042 (expressly prohibiting homosexuals from adopting children).

[16] R.I. Gen. Laws § 36-12-1.

[17] Under § 11-24-2.1, the definition of sexual orientation includes language of construction as follows: "[T]his definition is intended to describe the status of persons and does not render lawful any conduct prohibited by the criminal laws of this state nor impose any duty on a religious organization". R.I. Gen. Laws § 11-24-2.1

[18] New York's Attorney General concluded that New York would recognize same-sex marriages performed in another state based, in part, on a New York lower court's determination that the "expansive protections" afforded same-sex couples under the New York law supported the conclusion that New York public policy would not preclude recognition. 2004 N.Y. Op. Atty. Gen. No. 1, Darrin B. Derosia Peter Case Graham (2004) (citing Langan v. St. Vincent's Hospital, 196 Misc. 2d 440, 446-47 (2003)).