No. 06-340-M.P.

RHODE ISLAND SUPREME COURT

Margaret Chambers,

Plaintiff

v.

Cassandra Ormiston,

Defendant

Question Certified from the Rhode Island Family Court

REPLY BRIEF OF AMICUS CURIAE GOVERNOR DONALD L. CARCIERI

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****Pro Hac Vice Motion filed July 25, 2007***

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Introduction

By Court Order, this Court solicited briefs from amici, including Governor Carcieri, to be filed on August 1, 2007, with responses due August 15, 2007, and replies due August 31, 2007. The Governor now timely files his reply.

Argument

I. The Family Court Can Resolve This Matter Without A Resolution To Its Certified Question.

Pursuant to Rhode Island General Law § 8-10-3(a), the Family Court has jurisdiction "to hear and determine all petitions for divorce from the bond of marriage." "Divorces from the bond of marriage shall be decreed in case of any marriage originally void or voidable by law[.]" R.I. Gen. Laws § 15-5-1. Some amici have suggested that because the marriage between Ms. Ormiston and Ms. Chambers is not a marriage—i.e., is not between one man and one woman—it does not fall within the purview of Section 15-5-1. *See* UFI Resp. at 1; *see also* Law Professors' Opening Br. at 37-38. Similarly, assertions have been made that the underlying marriage must be valid in any action seeking a divorce. *See* FRC Resp. at 14. Both misapprehend this provision.

Reading its plain language, Section 15-5-1 instructs the Family Court to grant a divorce petition to any marriage that is void or voidable. Thus, for example, a citizen of Rhode Island that had entered into a bigamous marriage in another state that recognized such marriages would be granted his divorce petition despite Rhode Island's express policy of finding such marriages void and refusal to grant such a marriage any legal effect. R.I. Gen. Laws § 15-1-5. Similarly, an incestuous marriage could be dissolved by divorce petition despite such a marriage being void in Rhode Island. R.I. Gen. Laws §

15-1-3. In either circumstance, the Family Court would have jurisdiction to entertain a divorce petition and grant the petition.

Although these types of marriages are void in Rhode Island and cannot legally be entered into for that reason, the statute still countenances them as marriages. *See* R.I. Gen. Laws § 15-1-3; 15-1-5. Consequently, a divorce petition involving these types of marriage are within the Family Court's jurisdiction to review.

In so granting jurisdiction, however, it would be absurd to conclude that Rhode Island recognizes bigamous or incestuous marriages or is granting them any legal effect under Rhode Island law, particularly since the law expressly states otherwise. Rather, Section 15-5-1 seeks to afford citizens an opportunity to dissolve their marriage, whatever form it took and regardless of the state's position on granting that marriage might be. Such a provision makes practical sense. Rhode Island, in the interests of its citizens, allows them to extract themselves from relationships the State finds inconsistent with its interests. It would be incongruous to on the one hand refuse recognition to certain legal relationships and yet on the other hand insist that those in such relationships must so remain. By granting a divorce, neither the court nor the state endorses or lends validity to the marriage it is dissolving. If it did, the distinction between void and valid in the statute would be meaningless: the Family Court would only ever review divorce petitions involving valid marriages because they are made so by virtue of the Court's review.

The same-sex marriage presently before this Court is another example of a void marriage. Like bigamous marriage, same-sex marriage changes the definition of marriage, from "one man, one woman" to two persons of the same gender, a step Rhode

Island has to date been unwilling to take.[1] Yet, while Rhode Island's law strongly demonstrates a public policy against recognizing same-sex marriage and granting such marriages within the confines of the State's borders, *see* Governor's Opening Brief at Part III, such policy does not render a divorce petition from such an existing marriage outside the scope of the Family Court's jurisdiction by making it a non-marital relationship. It merely renders the marriage void. The Family Court has jurisdiction to entertain a petition for that marriage, and in fact *shall* grant it, despite the nature of the marriage before it. *See* R.I. Gen. Laws § 15-5-1. Because the Family Court has jurisdiction to address divorce petitions for marriage whether valid or void, the Family Court, and this Court in turn, need not determine whether the marriage is valid or void because the resolution of the divorce petition naturally flows from the statute regardless of its validity.

Concerns are raised that such a reading of Section 15-5-1 abrogates the public policy exception. *See* UFI Resp. at 8. Quite the opposite is true. While Rhode Island has a strong public policy opposing recognition of same-sex marriage, it also has an interest in allowing its citizens to extract themselves from those circumstances that the State has a strong public policy against. By allowing divorces from void as well as valid marriages, Rhode Island allows those in relationships contrary to public policy to dissolve them

[1] Both same-sex marriage and bigamous marriage change the definition of marriage from "one man, one woman" to multiple spouses of the same sex, the prevention of which may be part of the State's interest in declaring them void. Yet, even marriages that technically comport with the "one man, one woman" requirement can still be void. *See* R.I. § 15-1-3 (rendering incestuous marriages void).

should they so choose while also leaving itself free to recognize those marriages that are consistent with the State's public policy.

Because Rhode Island has empowered its courts to dissolve marriages despite their actual recognition in the State, this Court should not address the substantive issue of whether Rhode Island recognizes same-sex marriage but should direct the Family Court to act in accordance with Sections 8-10-3(a) and 15-5-1. Doing so places the issue of same-sex marriage and its recognition properly in the hands of the people of Rhode Island and their legislature, to which this Court defers on issues of public policy. *Volpe v. Gallagher,* 821 A.2d 699, 720 (R.I. 2003) ("'the reasoning for this deferral is . . . that the question raised is one of broad public policy rather than an interpretation of the common law'") (*quoting Ferreira v. Strack,* 652 A.2d 965, 968 (R.I. 1995).

II. Rhode Island's Conflicts of Law Jurisprudence Focuses This Court's Inquiry Upon Public Policy.

Should the Court determine it must evaluate the validity of the same-sex marriage at bar to determine whether to grant the divorce petition, the analysis must utilize Rhode Island's conflicts of law standards, not those presented in other jurisdictions. While Massachusetts may interpret the application of its evasion law, found at Mass. Gen. Laws ch. 207, § 11 (1913), to require an express ban in the married party's home state, *see Cote-Whitacre v. Dep't of Pub. Health*, 21 Mass.L.Rptr. 513 (Mass. Super. Ct. Sept. 29, 2006), such a standard does not dictate Rhode Island's standard of review in determining whether the marriage before it will be recognized in Rhode Island. Thus, even if, as the Attorney General asserts, the marriage involved in this matter is valid in Massachusetts,

Resp. at 2, such a showing has little bearing on the decision of this Court regarding its validity in Rhode Island.

In reviewing issues of marriage, Rhode Island's analysis inquires into the public policy of the State, with a particular eye towards evidence that the "marriage is odious by the common consent of nations, or its influence is thought dangerous to the fabric of society." *Ex parte Chace*, 58 A. 978, 980 (R.I. 1904). As various amici have demonstrated, a strong public policy against recognizing same-sex marriage exists in Rhode Island. *See* Governor's Opening Brief at Part III; FRC Opening Brief at Part I.D; Becket Fund Opening Brief. Some amici have argued this demonstration does not adequately meet the standard articulated in *Chace*. *See* GLAD Resp. at 22. But the State's interest in protecting its children and families directly relates to dangers to the fabric of society in a very real and tangible way. Likewise, Rhode Island's statutes, which intentionally utilize terms such as "husband" and "wife" and not merely "spouse,"[2] reflect the State's interest in preserving marriage between one man and one woman to protect the fabric of society. And the State's willingness to only broaden rights of same-sex partners to that of domestic partners—rights also granted to opposite sex partners—further underscores this interest. For these reasons, the marriage before this Court is void as against public policy.

Some amici contend that Rhode Island's Constitution mandates recognition of same-sex marriage, regardless of public policy, citing Article I, Section 5 and Article I

[2] Section 43-3-3, which allows "[e]very word importing the masculine gender only . . . [to] be construed to expend to and include females as well as males," does not undermine this position, as amici suggest. *See* GLAD Resp. at 22. Instead, applying the provision in all contexts would only allow references to "husband" to mean "wife," but not vice versa, which would absurdly suggest that Rhode Island is opposed to same-sex marriages involving two males but not those involving two females.

Section 2 of the Rhode Island Constitution. *See* ACLU Opening Brief at Part II. However, that question is not properly before this Court and should not be reached. Only in the event that the divorce petition is denied—a result that is contrary to the plain language of Section 15-5-1—would such a constitutional claim be ripe.[3]

Conclusion

Because it is not necessary that the certified question before this Court be resolved before the Family Court can proceed with the divorce petition before it, this Court should stay its hand and allow this significant policy issue to be weighed and considered by the people of Rhode Island. Should the Court choose to answer it, this Court, in light of Rhode Island's strong public policy against recognizing same-sex marriage, should advise the Family Court in accordance with that policy and decline to recognize same-sex marriages in Rhode Island, finding such marriages void.

[3] Even if it were properly raised, since no right to marry a person of the same sex exists under Rhode Island law, neither equal protection as found in Article I Section 2 nor a right to remedy a recognized right under Article I Section 5 arises.

Dated: August 31, 2007

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**Pro Hac Vice Motion filed July 25, 2007*

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I hereby certify that I caused the attached Reply Amicus Brief of the Governor to be served upon all known counsel of record herein by U.S. First Class Mail on August 31, 2007. The counsel are:

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