STATE OF RHODE ISLAND AND PROVIDENCE PLANTATION
SUPREME COURT OF RHODE ISLAND

MARGARET R. CHAMBERS, Plaintiff,	:	
Vs	:	NO. 2006-340
CASSANDRA B. ORMISTON Defendant	:	

BRIEF IN REPLY TO THOSE IN OPPOSITION TO THE
CERTIFIED QUESTION OF LAW
FROM THE PROVIDENCE COUNTY FAMILY COURT
F.C.06-2583

BRIEF OF CASSANDRA ORMISTON

Nancy A. Palmisciano, Attorney at Law
665 Smith Street
Providence, Rhode Island 02908
401-521-8958

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STANDARD FOR REVIEW

The question certified to this Court is " 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?

The standard for review of this question is whether or not there is a case and controversy; whether or not the Full Faith and Credit Clause of the Federal Constitution applies to the resolution of this question; what method of analysis should be properly used to determine the resolution of the certified question and whether or not the federal Defense of Marriage Act applies in the consideration of the resolution of the question.

TRAVEL OF THE CASE

On May 26, 2004, a marriage license was issued to Cassandra Ormiston and Margaret Chambers in the State of Massachusetts. Both of these women, at that time and now, were and are residents of the State of Rhode Island. Meeting the requirements of the State of Massachusetts, the couple filed a notice of intention to marry as required under Massachusetts law M.G.L. 207, Section 19, 20. The marriage was solemnized by a Massachusetts Justice of the Peace who also served as the City Clerk of the City of Fall River M.G.L. 207, Section 28. The three day waiting period was waived as required by law and the marriage was solemnized. The relationship faltered and a divorce complaint was filed in the State of Rhode Island in October, 2006, by Margaret Chambers.. A counterclaim was subsequently filed by the Defendant. The parties had satisfied all of the residency requirements and other requirements contained in R.I.G.L. 15-5-12. A Petition to Partition, as a separate action, was filed in the Providence County Superior Court by the Defendant on December 18, 2006, and service was accepted by counsel for the Plaintiff.

On November 14, 2006, the parties were summoned by the Chief Justice and appeared before him. Originally, the matter was scheduled for a hearing on the Motion for Temporary Allowances on that date. Defendant had filed a number of Motions, including a Petition for Partition, also to be heard on that date. A motion was filed by the Plaintiff asking for the Certification of the question of jurisdiction to the Supreme Court. That Motion was granted and the question was forwarded to the Supreme Court. Upon remand, counsel and the Court complied with a number of requests and instructions from

the Supreme Court and the matter was set for briefing and for oral argument. The question presently certified to this Court is : " 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 ON THE CASE

This writer finds it imperative to indicate some concerns with regard to the briefs filed in opposition to an affirmative answer to the certified question in this matter.

First and foremost, it is the question of same sex marriage which has occasioned the necessity of the certification of this question to this Court. It is not the statute in Massachusetts; it is not the fact that Rhode Island residents were married in Massachusetts; it is not the fact that they intended to return to Rhode Island but it is because they are individuals of the same sex. To that end, it is necessary to focus more directly on the question at hand.

It is particularly disturbing to hear moral arguments and the fears of the heterosexual majority in a case which basically involves the civil rights of two individuals. In this country of the separation of Church and State, the State and the Churches have both benefited. The State can guarantee the freedom of its citizens to worship as they please and the Churches have grown in influence, power and wealth. As long as violence is not advocated, our freedom of speech guarantees and even encourages institutions and individuals to proselytize and promote the beliefs of their faith amongst the citizenry. Indeed, under the tenants of their religions, they may even have the

obligation and duty to do so. It is a mistake to confuse the law with institutional religion. It is a mistake to subject it to the subjectivity of such positions. Our second president, John Adams, set the example at considerable risk to himself and his family in the representation of the British soldiers of the Boston Massacre. We have come to call this civil rights. Justice does not wear blinders because she doesn't want to see but because she is to be objective. It is a mistake to surround the resolution of the question before this Court with such rhetoric. This is a matter of law. In order to resolve the question properly, it must remain so.

It is also important to place this question into the format or the outline of practice before the Family Court. Every day, marriage certificates from other jurisdictions are submitted with divorce complaints. They are accepted without question. There has never been an inquiry into the validity of a marriage certificate. The inquiries commonly made are as to the grounds of the divorce; the residency of the parties; questions regarding the resolution of issues regarding children and whatever else is pertinent to the matter at bar. During the pendency of this litigation, this writer has the opportunity to file a divorce complaint for a graduate student at a local university. The person was from the People's Republic of China and was here on a student visa. The spouse was likewise a citizen of that country and here on a student visa. The marriage certificate was quite ornate and also from the People's Republic of China. Not one question was asked and not one inquiry was answered relative to the worth of that certificate. It was accepted. Accordingly, not one inquiry was made or answered as to whether or not those individuals could have been married in the State of Rhode Island. In the Family Court, comity is applied everyday to the acceptability of marriage certificates as prima facie evidence of the existence of valid

marriages. One has to wonder why two citizens of these United States cannot be accorded the same civil rights as two citizens of a totalitarian society.

There has been much discussion in these briefs about the travel of these parties to Massachusetts for their marriage. Heterosexual couples do this all the time. There have been states, such as Nevada, which rely on the principles of comity to support both their wedding and divorce industries. Those decrees and certificates are accepted without question. This is not something new.

These two individuals come to this Court seeking what? Do they want you to recognize gay marriage? No. That is the job of the legislature when they choose to do it. Do they wish to threaten society with their lifestyle? Hardly. No. They wish to have this Court accept as valid a marriage certificate for which they applied in good faith and in accordance with the requirements of the issuing state. The marriage certificate. Recognize it. That is it.

I

IS THIS A "CASE OR CONTROVERSY"?

The case and controversy "requirement" in the law is seen as a judicial limitation which is a threshold question of justiciability, State of Rhode Island vs. Lead Industries Association, Inc. et al. 898 A.2d 1234, 1237 (2006). While "there is no express language in the Rhode Island Constitution which confines the exercise of the Rhode Island Court's judicial power to actual cases and controversies, the Court ...has recognized this functional limitation to judicial review as a logical underpinning of judicial power"., Id. at 1237. The case and controversy limitation does not apply in the instant case at bar

since the threshold question of jurisdiction is being presented to the Supreme Court by the Chief Justice of the Family Court of the State of Rhode Island. Subject matter jurisdiction is a crucial threshold question. No other issues may be adjudicated until this question is decided.

Since both parties have filed complaints and counterclaims against each other it is a prima facie indication that both parties feel that the Family Court has jurisdiction in this matter. While this case is here on the motion of the Plaintiff it is also presented to this Court on the motion of the Chief Justice. The mere filing of the complaint and counterclaim for divorce, without the filing of a special appearance, is an indication of the intent of the parties to submit to the jurisdiction of the Court. In fact, on such a threshold question, can the parties ever evidence adverse legal interests as required by the case and controversy limitation? As long as one of the parties to the action satisfies the one year residency requirement, the answer is no. Is it then to be said that any Justice of the Rhode Island Family Court cannot certify a question regarding such jurisdiction? If the answer to such a question is in the affirmative, then the matter should be remanded to the Chief Justice with instructions that he follow the mandate in the statute. There are a number of things which are absolutely certain in this matter. One, the marriage certificate was validly obtained. The couple was not purportedly married in Massachusetts because they WERE married in Massachusetts. Secondly, they are not eligible to obtain a divorce in Massachusetts unless they intend to change their residency. Third, if they cannot afford to change their residency and if they cannot get a divorce in their home state, they will live in a state of legal limbo until the death of one or the other- and their estates will have to grapple with the consequences. To be left in this legal limbo is one of the reasons why

so many of the comity questions are answered with the acceptance of the marriage certificate. It would violate the civil rights of these parties to thrust them into this uncertainty.

The Rhode Island Family Court is a statutory court. It derives the parameters of its powers from the statutes which created it. Section 8-10-3 of the Rhode Island General Laws (1956 Reenactment) empowers the Rhode Island Family Court to have subject matter jurisdiction over all petitions for divorce from the bond of marriage. The presentation of a valid marriage certificate is a necessary prerequisite to the Court's exercise of jurisdiction. The statute is clear and direct. Indeed, the Family Court regularly and, as a matter of practice, accepts marriage certificates from every state in the Union and from foreign countries. Individuals do not have to be citizens of these United States or the State of Rhode Island but merely have to be residents of the State of Rhode Island for one year to satisfy the residency requirement for the State of Rhode Island. Then, they may file for divorce.

Obviously, as with many divorces, the conflicts arise, not with the assertion of the subject matter jurisdiction, but with the judicial determination of the equitable distribution of the marital estate. Unable to reach an agreement on their differences, and unable to be heard during the pendency of this matter, the Defendant felt constrained to file a Petition in the Superior Court relative to jointly held property in the State of Colorado. An answer has been filed in that matter and it is proceeding along on its due course.

In the opposition briefs there is much discussion with regard to the definition of marriage. Relying upon the definition of marriage almost as a basis for its importance and

"sacredness", the feeling is that the redefinition of marriage will result in its decline. In Doe vs.Burkland, 759 A.2d 959, 974 (2000) this Court dealt with a redefinition of the term family and family unit. This, however, was based not on homosexuality and those relationships but on the relationships of unmarried individuals. The Court stated, in quoting the *Troxel* matter, 120 S. Ct. at 2059, 147 L.Ed.2d at 55, "Indeed, the demographic changes of the past century make it difficult to speak of an average American family." Zoning cases in Connecticut and New Jersey have redefined the term family to accommodate non-related college students in determining the validity of zoning limitations based on the number of non-related individuals in a dwelling. To place a disregard for the civil rights of individuals of a particular persuasion and hide behind a definition may be a new approach but not one that should be accorded any worth in a legal arena.

Until there is a decision regarding jurisdiction, no other question can be decided. "...The determination of the certified question is indispensably necessary for a disposition of this case". State vs. Goldberg, 1 A.2d 101 (1938) The only real question before this Court is whether or not the Family Court has subject matter jurisdiction. This is a purely legal determination. It should have nothing to do with the gender of the parties. There is a case or controversy in this matter. The fact that the parties happen to agree on the question of the jurisdiction of the Family Court over this matter is not a happenstance that affects their agreement. It is just one aspect of their relationship with the State of Rhode Island and its Family Court. If this were not the case, then none of the parties in any divorce could present a case or controversy to this Court.

In the alternative, if one looks behind the arguments with regard to the case or controversy considerations, it becomes immediately clear that the concern is really whether or not this Court is being asked to make law instead of enforcing it. In other words, the concern is that of the separation of powers. While this may or may not have been the concern of the Chief Justice of the Family Court, we are really looking at the interpretation of the enabling statute of the Family Court. It is empowered to hear divorces in the State of Rhode Island. Absent a prohibition to the contrary, it is clear that the Chief Justice has the statutory authority to do just that. "The nonjusticiability of a political question is primarily a function of the separation of powers. Much confusion results from the capacity of the 'political question' label to obscure the need for case-by-case inquiry", Baker vs.Carr, 369 U.S. 186, 211, 82 S. Ct. 691 (1962). "We have said that 'In determining whether a question falls within the (political question) category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations" Id. at page 210. This Court must look at the statutes which are there and the considerations and authority which they embody. Then, the Court must determine the appropriate method of analysis in the matter at bar. This road can only lead to the destination of comity.

II

IS THE FULL FAITH AND CREDIT CLAUSE OF THE UNITED STATES CONSTITUTION APPLICABLE TO THE CASE AT BAR AND, IF SO, IN WHAT MANNER?

The full faith and credit clause of the United States Constitution provides that the States shall recognize and give force and effect to the judgments of its sister states. Ramsay vs. Ramsay, 90 A.2d 433, 435, 79 R.I. 441,445. Since the full faith and credit clause arose, historically, in an attempt to address the chaos arising out of the Articles of Confederation, we utilize it to grant enforceability to judgments which are final.Those judgments which are final and beyond modification and even those which involve child support and other matters, can be enforced under this clause. Full Faith and Credit is not generally utilized to address issues such as the ones applicable to the case at bar.

The standards which are applied to the enforceability of statutes between the States are not as absolute as those which are applied to the full faith and credit of judgments. While there has been some utilization of this clause in the domestic relations area, as it applies to final judgments, it has not been the predominant method of analysis. Nonetheless, this Court has asked counsel to comment on the full faith and credit clause in its orders. To look at the full faith and credit clause to analyze the facts of this matter, however, would be to blind one's legal eye.

It is a matter of legal tradition and common law that probate and domestic relations matters are considered areas of local control and dominance. It needs to be noted that the Clause also allows some latitude for individual states to apply the interest of its own laws in resolving disputes. Certainly, the domestic relations area remains a subject of abiding local interest. Every state ha a right to an overriding interest in the lives of its citizens. However, it has long been a tradition in the law to follow the celebratory rule and not to resort to the Full Faith and Credit clause of the Constitution for the acceptance of marriage certificates. It is also not unusual for residents of one state

to establish residency in a second state for the sole purpose of getting a divorce, as in the State of Nevada or even to get married. All of those actions have found credibility in the law.

Further, this Court has long followed the principle that it would not decide cases on constitutional issues if there are other bases available to it. To attempt to decide this case on a Full Faith and Credit basis would be a violation of that principle. "We must and will decide a constitutional question so raised when, upon hearing, it is clear to this court that the case cannot be decided on any other point, or that the determination of the certified question is indispensably necessary for a disposition of the case. This doctrine, which was recognized in Newell vs. Franklin, 30 R.I. 258, 74 A. 1009, has been consistently applied in the decisions of this court", State vs Goldberg, 61 R.I.461,1 A.2d 101 (1938). The case at bar can simply be decided by the reading of Section 8-10-3 of the Rhode Island General Laws or by following the case precedents in this State. There is no need to address constitutional issues. In the alternative, comity offers the case precedents necessary for decision.

III

WHAT IS THE DOCTRINE OF COMITY AND IS IT APPLICABLE TO THE CASE AT BAR?

Comity, by definition, involves the mutual recognition of legislative, executive and judicial acts amongst the states as well as foreign countries. Comity is the proper method of analysis in the instant case at bar. Historically, comity has been the method of legal analysis utilized for the universal respect offered by one state for the marriage

certificates of its sister states- and the certificates of marriage issued by foreign countries. As a matter of fact, Reno, Nevada, built an industry around its six week divorces- and those decrees are recognized. Our own Rhode Island divorce complaint contains a paragraph referring to the pendency of divorce litigation in other states. So, the comity clause raises its head in more than the issue of the recognition of relationships by the issuance of marriage certificates and licenses.

Comity, as expressed, in In Re Chace, 58 A. 978, (1904), follows what is referred to as "the place of celebration" rule. This is defined as the legal principle which states that if the marriage is valid where celebrated then it is valid in all other jurisdictions. In other words, the marriage certificate itself is prima facie evidence of the validity of the marriage. "Now , it is a principle adopted for general convenience and security, that a marriage, which is good according to the laws of the country where it is entered into, shall be valid in any other country. And this principle is considered so essential, that "even when it appears that the parties went into another state to evade the laws of their own country, the marriage in the foreign state shall nevertheless be valid in the country where the parties live" Medway vs Needham, 16 Mass.157 (1819). "...even assuming that the marriage would have been void in this state, yet as, so far as appears, it was lawfully celebrated in Massachusetts, it must be considered valid here. ...but the general principle,... is that the 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" In Re Chace, 69 L.R.A. 493, 58 A. 978(1904).

There are two exceptions which are attached to this recognition. They are that the marriage must not be "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 Rhode Island". Like any other state, Rhode Island has statutes indicating what degree of kinship or other close relation, may not marry. However, that is not the case with gay marriage. Since 1997, the legislature has failed to either pass a positive gay marriage bill or a statute forbidding gay marriage. Rhode Island is a state which is silent on the issue. Our statutes are not gender specific. They are silent on same sex couples being issued marriage licenses and, therefore, marriage certificates. One cannot say that same sex relationships are legally recognizable in the State of Rhode Island. One cannot say that they are not recognizable, either.

Opposition briefs continually point to Massachusetts as a State attempting to impose its will on the State of Rhode Island. This is definitely not the case. Massachusetts is not imposing its will on anybody. In spite of its opportunities, the State of Rhode Island has not rendered a decision with regard to the recognition or prohibition of gay marriage. Absent such an express prohibition, and in the interpretation of its own statute, the Massachusetts Supreme Judicial Court,in Cote-Whitacre vs Dept of Public Health. 446 Mass. 350 (2006), said that Rhode Island residents could receive a marriage license in the State of Massachusetts. The residents of other New England states could not because their states had statutes expressly prohibiting such marriages. If your state did have such a prohibition, then the ruling was that your residents could not marry in Massachusetts-due to the interpretation of its own statutes.

As a matter of fact, there are a number of cases which have been considered in the Family Court involving gay couples. All have been entertained and brought to judgment. Our legislature has passed legislation allowing for the provision of certain legal rights

and benefits for same-sex domestic partners and Rhode Island has extended protections against discrimination based on sexual orientation. There is no public policy in the State of Rhode Island, whether expressed or implied, which prevents the Family Court from exercising its statutory jurisdiction. There is no public policy in the State of Rhode Island rendering such marriages odious or offensive to same.

The only question here is whether or not the State of Rhode Island, for purposes of divorce, is going to recognize marriage certificates issued to same sex couples. We recognize out-of-state marriage certificates for other couples so we are concerned here only with same sex couples. Or perhaps, we should phrase the question differently, and ask if the State of Rhode Island, through its Supreme Court, is willing to carve out a gay exception to the recognition of marriage certificates from other jurisdictions? Is our Supreme Court willing to do what the legislature would not and, thereby, fly in the face of its own historical legal tradition and case precedent? If every marriage license from other than the State of Rhode Island were put through this kind of scrutiny, it is fair to say that the Family Court could not function. Although members of the public may not be aware, certainly the legal establishment is cognizant of the fact that certificates from every state and many foreign countries are regularly submitted to the Family Court- and recognized as prima facie evidence of the existence of the marriage. A look at our case law would establish both the technique of analysis and the long history of respect for the marriage certificates of other entities. Comity is accorded with the acceptance of these certificates. Both of these litigants are being put through an unnecessary test.

IV

DOES THE DEFENSE OF MARRIAGE ACT HAVE ANY RELEVANCY IN THE INSTANT MATTER?

The Defense of Marriage Act, otherwise known as 28 USC 1738C, has been raised as a question mark in the instant case at bar. It is not a question which needs to be answered. Stepping to one side of the question of the constitutionality of the statute, there is no applicability of this act in the instant case at bar. While this act relieves any state of the requirement, under federal law, to give full faith and credit to another state's issuance of legal recognition to the marriage of a same sex couple, it does so by allowing each State to determine its own public policies in such matters. Acting more like a placebo than medication to cure an ill, the statute leaves every state to its own devices- and every state must follow comity as part of its own legal precedents and historical tradition. There have been tremendous questions as to the constitutionality of the above statute and whether or not the Congress of the United States has the authority to grant an exemption from the Full Faith and Credit clause in the recognition of same sex marriages. The congress, in essence sought to amend the Constitution of the United States with the passage of litigation- and that is decidedly not the way to do it. To decide these issues on the basis of this statute, or to even consider it in the analysis of the issue, is to raise all matters of constitutional issues. To consider this matter on the constitutional issues raised by DOMA is to fly in the face of case precedents of this court. We do not reach constitutional issues unless it is absolutely necessary.

SUMMARY ARGUMENT

The question before the Court is simply this: Will the State of Rhode Island continue to recognize the marriage licenses of its sister states under the legal principles of comity and, in so doing, exercise the powers of the Family Court over the issue of divorce and other related matters?

These litigants do not ask this Court to recognize gay marriage. They do not ask this Court to make determinations which the legislature has refused to make since 1997. They ask this Court to recognize the license issued to them by the State of Massachusetts for which they qualified and for which they applied in good faith. Having satisfied the requirements of our sister state, they ask that their certificate of marriage be accepted as prima facie evidence of the validity of their marriage-just like anyone else. In doing so, the powers of the Family Court to hear divorces within the State of Rhode Island are activated and the matter may be heard. They do not wish to go through the purgatory of this case to rest in legal limbo.

Respectfully submitted,

Nancy A. Palmisciano #0371
665 Smith Street
Providence, Rhode Island 02908
401-521-8958
401-273-4609-Fax

CERTIFICATION OF SERVICE

The undersigned hereby certifies that a copy of the within brief was sent by regular mail, postage prepaid, to Louis M. Pulner, 369 South Main Street, Providence, Rhode Island, 02903; The Honorable Patrick C. Lynch, 150 South Main Street, Providence, Rhode Island, 02903 ; David Strachman, Esquire, McIntyre, Tate & Lynch, LLP, 321 South

Main Street, Suite 400, Providence, Rhode Island, 02903-7109; Thomas R. Bender, Esquire, Hanson Curran, LLP, 146 Westminster Street, Providence, Rhode Island, 02903; Gary D. Buseck, Legal Director, Gay & Lesbian Advocates & Defenders, 30 Winter Street, Suite 800, Boston, MA, 02108; the Honorable William J. Murphy, Speaker of the House, 323 State House, Providence, Rhode Island, 02903; The Honorable Joseph A. Montalbano, President of the Senate, 318 State House, Providence, Rhode Island, 02903; The Honorable Donald Carcieri, Office of the Governor, State House, Room 115, Providence, Rhode Island, 02903;Lise M. Iwon, Attorney at Law, 11 Caswell Street, Wakefield, Rhode Island, 02879; Philip M. Weinstein, Esquire, 99 Wayland Avenue, Suite 200, Providence, Rhode Island 02906; Joseph V. Cavanagh, Jr., Esquire, 30 Exchange Terrace, Providence, RI, 02903; Christopher F. Young, 25 McArthur Boulevard Wakefield, Rhode Island 02879; Laura C. Harrington, Attorney At Law, 299 West Main Road, Middletown, Rhode Island, 02842; Steven W. Fitschen, The National Legal Foundation, 2224 Virginia Beach Boulevard, Suite 204, Virginia Beach, Virginia 23454; Robert M. Duffy, Esquire, One Turks Head Place, Suite 1200, Providence, Rhode Island 02903; Gerald C. DeMaria, Esquire, 123 Dyer Street, Providence, Rhode Island, 02903; William T. Murphy, Esquire, 312 Turks Head Building, P.O. Box 9623, Providence, Rhode Island, 02940-9623 on the 15th day of August, 2007.