STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
SUPREME COURT

MARGARET CHAMBERS	:	
	:	
v.	:	No. 2006-0340 M.P.
	:	
CASSANDRA ORMISTON	:	

A CERTIFIED QUESTION OF LAW
FROM THE RHODE ISLAND FAMILY COURT

BRIEF OF AMICUS CURIAE STATE OF RHODE ISLAND

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INTRODUCTION

On May 26, 2004, the City Clerk of Fall River joined two Rhode Island residents, Margaret Chambers and Cassandra Ormiston, in matrimony. That marriage, without question valid under Massachusetts law, bestowed upon Chambers and Ormiston the same civil rights—too many to mention—that Massachusetts bestows upon any other validly married couple, regardless of gender. Unfortunately, the Chambers-Ormiston marriage faltered, and each party filed for divorce in the only place that she could—the Rhode Island Family Court. The parties seek nothing more than an order dissolving their legal relationship and allocating their property.

This is a simple divorce case. The only issue that this Court has to decide is whether Rhode Island will permit a couple, lawfully married in a sovereign sister state, in full compliance with a ruling of the highest judicial body of that state, to obtain a divorce in this state, the couple's state of domicile, or whether Rhode Island will force two Rhode Island residents to remain married under the laws of Massachusetts and any other state and country that chooses to respect the laws of that independent and equal sovereign. The fact that the couple may or may not have been able to marry in Rhode Island should be of no moment. The Rhode Island General Laws do not require the Family Court to pass upon the validity of a marriage as a prerequisite for issuing a divorce decree.

In any event, well-established principles of comity would cause this state to recognize the incident of marriage, a divorce, presently before this Court. A state must or should accord respect and recognition to the laws of other states unless it would be contrary to the public policy to do so. Because public policy in Rhode Island favors recognition of a valid Massachusetts same-sex marriage, the Family Court should recognize the Chambers-Ormiston marriage for purposes of adjudicating the parties' respective divorce petitions.

Finally, this Honorable Court must recognize and address that before it are two Rhode Island citizens who have done no more than seek to have a marriage, valid where performed, dissolved in their domicile state. Should that request be denied, these citizens will legally be cast into a limbo where their status as married or single for all legal purposes will vary as they drive across adjoining borders of a united country. Our state's laws and our nation's commitment to mutual sovereign respect through the doctrine of comity should prevent this uncertain and inequitable result.

STATEMENT OF FACTS AND TRAVEL OF THE CASE

The Commonwealth of Massachusetts issued a Certificate of Marriage to Margaret Chambers and Cassandra Ormiston on May 26, 2004. Findings of Fact at ¶ 1.[1] Chambers and Ormiston married that same day in a ceremony that Carol Valcourt, on information and belief, the City Clerk for Fall River, performed at One Government Center in Fall River, Massachusetts. Findings of Fact at ¶ 6. A fully completed Certificate of Marriage and Certificate of Solemnization was thereafter returned to the Registry of Vital Records and Statistics of the Department of Public Health for Massachusetts. Findings of Fact at ¶ 8. This marriage is valid under Massachusetts law. See Cote-Whitacre v. Department of Public Health, 21 Mass. L. Rptr. 513, 2006 WL 3208758 (Mass. Super. 2006) (entering declaratory judgment that same-sex couples from Rhode Island could marry in Massachusetts);[2] see also Cote-Whitacre v. Department of Public Health, 446 N.E.2d 623 (Mass. 2006).

Chambers and Ormiston were domiciled inhabitants of Rhode Island for at least the two years preceding their marriage and continued to live in Rhode Island thereafter to the present day. Findings of Fact at ¶¶ 3, 9-10. The Family Court specifically held that the "domiciliary and residency requirements set forth in G.L. 1956 § 15-5-12 have been satisfied." Findings of Fact at ¶ 11.

Chambers first filed a divorce complaint in the Rhode Island Family Court on October 23, 2006. Ormiston filed an Answer and Counterclaim four days later. The Family Court thereafter certified a question that asked this Court to decide whether the Family Court had

[1] The "Findings of Fact" to which the State cites are contained in the Decision that the Family Court issued on February 21, 2007, in Chambers v. Ormiston, F.C. P06-0340.

[2] The Department of Public Health apparently did not appeal this decision.

subject matter jurisdiction to hear a divorce complaint filed by a same-sex couple married in Massachusetts.

On January 17, this Court directed the Family Court to both rephrase the certified question and make a series of factual findings relating thereto. The Family Court did so after hearing on February 17.

QUESTION PRESENTED

The Certified Question from the Family Court is 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?"

For the reasons discussed below, this Court need only and should only answer the following question: May the Family Court grant a divorce to two persons who were validly married in another state?

DISCUSSION

This Court should either decline to answer the Certified Question from the Family Court or do so as follows: The Family Court may entertain the Chambers-Ormiston divorce petitions. The Family Court is not required to determine whether a marriage is valid before issuing a divorce decree. See R.I. Gen. Laws § 15-5-1 (authorizing the issuance of a divorce decree "in case of any marriage originally void or voidable by law"). As such, this Court need not reach the issue of whether the Family Court may recognize a same-sex marriage from another state as a valid marriage under Rhode Island law. To the extent it chooses to reach this issue, however, this Court should advise the Family Court that Rhode Island law will recognize a valid and legal same-sex marriage performed in another state based on principles of comity and that it therefore may entertain a petition for divorce of such a marriage.

I. The Certified Question Does Not Present A Case Or Controversy Because The Family Court May Entertain Chambers's And Ormiston's Petitions For Divorce Under R.I. Gen. Laws § 15-5-1 or § 15-5-3.1.

The Certified Question asks this Court to decide whether the Family Court may recognize a marriage between two persons of the same gender, which is a legal and binding marriage in another state, as a marriage under Rhode Island law so that it may entertain a divorce petition. This Court need not and should not answer this question because it is based on a faulty premise—that a review of a marriage's "validity" is a prerequisite to granting a divorce in Rhode Island. It is not. The General Laws vest the Family Court with the authority to enter divorce decrees with respect to marriages that are valid, void or voidable, see R.I. Gen. Laws § 15-5-1 et seq., which means that the Family Court need not find, let alone review, the underlying validity of this marriage before granting a divorce. This Court should therefore refrain from deciding whether Rhode Island law will recognize a same-sex marriage because it would not impact the ability of the Family Court to entertain the instant divorce petition or the merits of the underlying

dispute and, as such, would amount to nothing more than an advisory opinion. See R.I. Gen. Laws § 9-24-27; Rhode Island Ophthalmological Society v. Cannon, 317 A.2d 124, 130-31 (R.I. 1974) (holding that this Court will not "render advisory opinions or function in the abstract").

Title 15, Chapter 5 of the General Laws clearly and unequivocally defines the instances in which the Family Court "shall enter" divorce decrees.[3] Section 15-5-1 mandates the issuance of a divorce decree "in the case of any marriage originally void or voidable by law . . . ." Id. The three statutory sections that follow mandate the issuance of a divorce decree on other grounds. See R.I. Gen. Laws § 15-5-2 (specified and unspecified "gross misbehavior and wickedness . . . repugnant to and in violation of the marriage covenant"); R.I. Gen. Laws § 15-5-3 (separation of the parties); R.I. Gen. Laws § 15-5-3.1 (irreconcilable differences).

The Family Court stayed the instant divorce proceedings to ask this Court about the validity of the Chambers-Ormiston marriage. Because this is not a prerequisite to the issuance of a divorce decree, the court should not have done so. Chambers and Ormiston are entitled to a divorce under either R.I. Gen. Laws § 15-5-1 or § 15-5-3.1, and there is nothing prohibiting the Family Court from granting a divorce on alternative grounds. Since a divorce decree is all that Chambers and Ormiston seek, a decision about the validity of their marriage would affect neither the Family Court's jurisdiction nor the merits of the underlying action. This Court therefore need not and should not reach this issue. See R.I. Gen. Laws § 9-24-27; Rhode Island Hospital Trust Co. v. Davis, 29 A.2d 647, 648-50 (R.I. 1942); cf. Vose v. Rhode Island Brotherhood of Correctional Officers, 587 A.2d 913, 915 n.2 (R.I. 1991) ("[T]he court will not issue advisory opinions or rule on abstract questions.").

[3] The General Assembly vested the family court with jurisdiction "to hear and determine all petitions for divorce from the bond of marriage . . . ." R.I. Gen. Laws § 8-10-3.

The Restatement of the Law (2d), Conflict of Laws § 284, Incidents of Foreign Marriage, supports this position, as well as the position advanced in Section II of this brief. Section 284(b) states that a state will recognize a foreign marriage even if it would have been void if performed in that state. Section 284(c) not only provides that it will require a "strong public policy" to refuse recognition of a foreign marriage, but also that the "strong public policy" argument should be applied to each incident of marriage, not necessarily to the marriage itself. The example given therein is that a state may refuse to recognize a polygamous marriage because polygamy violates a strong public policy of the state, yet it will recognize offspring of such a "marriage" as legitimate.

The Restatement's position is consistent with the State's position that this Court need not reach the issue of the validity of this foreign marriage (admittedly valid in Massachusetts) to grant parties thereto a divorce under Rhode Island law. When applying the strong public policy of Rhode Island to the incident of marriage at issue herein – a divorce – it is clear from R.I. Gen. Laws § 15-5-1 et seq. that not only is there no strong public policy against granting these parties a divorce, there is actually specific statutory authority supporting their right to a divorce in this state. This is the only state that can lawfully grant this couple a divorce; without it, they will be forced to live in a legal limbo of a marriage that is valid as they cross certain sovereign borders, yet void, voidable or uncertain as they cross others.

It may be unclear to the parties or their critics whether that authority is R.I. Gen. Laws § 15-5-1 or § 15-5-3.1, but it is beyond argument that such a statutory basis for the requested incident (divorce) exists in Rhode Island. Therefore, applying the Restatement of the Law (2d), Conflict of Laws § 284(b) and (c) to this case, the Court must find no impediment to the

requested divorce whether or not it reaches the unnecessary determination of the validity of the marriage for the limited purpose (incident) of dissolving it by divorce.

II. The Certified Question, If Answered, Should Be Answered In The Affirmative As Principles of Comity Compel Recognition Under Rhode Island Law Of A Valid Same-Sex Marriage From Another State.

If this Court chooses to answer the Certified Question, it must answer it in the affirmative. As discussed more fully below, principles of comity compel recognition in Rhode Island of a valid and legal Massachusetts same-sex marriage.

A. Comity

Comity is a common law principle under which "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. See O'Brien v. Costello, 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, 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, contains a public policy exception.

Thus, when examining Rhode Island's position on the recognition of a same-sex marriage under principles of comity, the crucial issue is whether there is a public policy 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 laws of its sister states. Rhode Island's case law and legislative enactments do not support such a finding.

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 and a woman went 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 examined 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, holding 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, this 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).

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,[4] "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.

[4] 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.

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).

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.[5] Chace, 58 A. at 981.

Rhode Island has not enacted any legislation prohibiting same-sex marriages[6] or stating a public policy against same-sex marriages, and same-sex marriages have been validly performed in Massachusetts for more than three (3) years. Moreover, Rhode Island, through legislation and case law, has expressed an affirmative policy against discrimination on the basis of sexual orientation[7] in, among other areas, public accommodations, employment, credit, housing, and home health care,[8] has provided insurance benefits to domestic partners of state employees,

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[5] 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 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). The failure to address this issue is, of course, consistent with the State's position herein that it would be an unnecessary advisory opinion for the Court to reach the same unnecessary issue in this action.

[6] 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. See R.I. Gen. Laws § 15-1-3; R.I. Gen. Laws § 15-1-5.

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

[8] See R.I. Gen. Laws § 11-24-2 (prohibiting discrimination in public accommodations based on sexual orientation); R.I. Gen. Laws § 23-17.16-2 (granting home care patients rights to receive services without regard to sexual orientation); R.I. Gen. Laws § 28-5-5 (prohibiting employment discrimination on basis of sexual orientation); R.I. Gen. Laws § 28-5.1-7 (prohibiting state agencies from discriminating based on gender or sexual orientation); R.I. Gen. Laws § 34-37-1 et seq. (prohibiting discrimination based sexual orientation in selling, renting, leasing or managing housing accommodations); R.I. Gen. Laws § 34-37-4.3 (prohibiting financial institutions from discriminating based on sexual orientation); R.I. Gen. Laws § 34-37-5.3 (prohibiting inducement of any persons to sell or rent any dwelling based on representations that a person of a specific

recognized the de facto parental status for same-sex non-biological partners,[9] and permitted same-sex couples to adopt.

Consistent with this legislation, this Court recently enacted Personnel Rules and Regulations that extend the same benefits to same-sex couples that are extended to other couples. For example, Rule 8.08(a)(1) grants to Judiciary personnel 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."

In short, the foregoing all supports the conclusion that recognition of same-sex marriages is not contrary to Rhode Island public policy.[10] This Court should therefore hold that the Family Court may and should recognize the Chambers-Ormiston marriage—and any other same-sex marriage lawfully performed in Massachusetts—for purposes of adjudicating a divorce petition.

B. Full Faith & Credit Clause

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,

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sexual orientation may be entering neighborhood). Cf. Goodridge v. Department of Public Health, 798 N.E.2d 941 at 967 (Mass. 2003)(recognizing affirmative policy in Massachusetts to prevent discrimination on basis of sexual orientation for similar protective laws).

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

[10] 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 and Peter Case Graham (2004) (citing Langan v. St. Vincent's Hospital, 196 Misc. 2d 440, 446-47 (2003)).

293 (1942); Silva v. James Ursini Co., 475 A.2d 205 (R.I. 1984); State of Maryland v. Board of Regents, 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 U.S. 541, 546 (1948).

A difference exists, however, between respecting a sister-state's judgments and its laws (legislative measures and common law). Pac. Employers Ins. Co. v. Indus. 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." Hall, 440 U.S. at 426.[11]

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[11] 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.

As recently as yesterday, July 31, 2007, this Court reaffirmed the importance of the Full Faith and Credit Clause. When faced with a conflict between "the significant interests in efficiency and finality" and "the fundamental interest in not allowing constitutionally infirm judgments to be enforced," this Court sided with courts that allowed only narrow attacks on foreign judgments so as not to "undermine the important goals of efficiency and finality in which the class action law suit finds its genesis." Lamarque v. Fairbanks Capital Corp., -- A.2d --, 2007 WL 2177153, at *8-*10 (R.I. 2007). This Court recognized the broad scope of the Full Faith and Credit Clause and that the purpose for which it stands requires the fullest deference to valid legal rulings from foreign courts. Such is the issue before this Court in this case, as the Chambers-Ormiston marriage arises from a ruling of the highest court in Massachusetts. To the extent the FFCC Clause applies to this certified question, it compels deference to the Massachusetts judgment(s) that created the Chambers-Ormiston union and recognition of the marriage at least for the purpose of granting the limited relief requested, a divorce in the only state legally authorized to enter one.

For the reasons discussed more fully above, see supra at II.B, recognition of a validly performed same-sex marriage in Rhode Island is not contrary to the public policy of this state. As such, to the extent that the Full Faith and Credit Clause governs recognition of a state's marriage laws, it would seemingly compel Family Court recognition of the Chambers-Ormiston marriage for purposes of adjudicating the pending divorce petitions.

C. Defense of Marriage Act

In 1996, the United States Congress enacted the Defense of Marriage Act ("DOMA"). See 28 U.S.C. § 1738C. DOMA contains two separate provisions. The first provides that, for

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

purposes of interpreting any federal rule, regulation, or act of Congress, the term 'marriage' should be defined as "a legal union between one man and one woman as husband and wife" and the term 'spouse' should be defined as "a person of the opposite sex who is a husband or a wife." 28 U.S.C. § 1738C(3). In other words, federal law will not recognize a union between two persons of the same sex as a marriage.

DOMA's second provision touches upon state recognition of same-sex marriage. Although defining marriage has traditionally been a function of the states, see Sherrer v. Sherrer, 334 U.S. 343, 354 (1948), DOMA provides that states do not have to recognize same-sex marriages or same-sex marriages validly performed in another state:

> 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 other State, territory, possession, or tribe respecting a 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.

28 U.S.C. § 1738C(2).

At least thirty-eight states have enacted DOMA legislation defining marriage as a union between one man and one woman and prohibiting same-sex marriage. Rhode Island is not one of those states and, as such, DOMA does not apply in this case.

CONCLUSION

For all of the reasons discussed above, this Court should answer the certified question in the affirmative and advise the Family that it may and should adjudicate the instant petitions for divorce.

Respectfully submitted,
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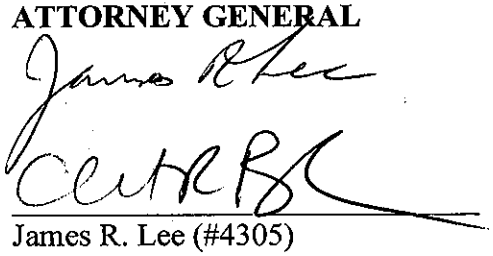

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CERTIFICATE OF SERVICE

I hereby certify that, on August 1, 2007, I mailed copies of this brief to the following by first-class mail:

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