

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

MARGARET R. CHAMBERS,

Plaintiff,

v.

No. 2006-340
(FC 06-2583)

CASSANDRA B. ORMISTON,

Defendant.

ON A CERTIFIED QUESTION OF LAW

RESPONSE BRIEF OF *AMICI CURIAE* FAMILY
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RESPONSE BRIEF

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STATEMENT OF RESPONSE

Including the Appellants, Ms. Chambers and Ms. Ormiston, seven (7) briefs were filed with this Honorable Court advocating for the recognition of same-sex “marriage” in Rhode Island and, alternatively, for the extension of the remedy of divorcement to the parites’ same-sex “marriage” contract. These briefs were remitted by the following:

- (1) Margaret Chambers (Chambers)
- (2) Cassandra Ormiston (Ormiston)
- (3) Marriage Equality Rhode Island (MERI)
- (4) Gay & Lesbian Advocates & Defenders (GLAD)
- (5) Honorable Patrick C. Lynch (Attorney General)
- (6) Professors of Conflict of Laws and Family Law (Professors)¹
- (7) American Civil Liberties Union (ACLU)

In each of these listed briefs, the submittants contend, *inter alia*, that (a) the definition of “marriage” in Rhode Island somehow includes same-sex couples, (b) the remedy of divorcement can be extended to the parties, and (c) *Ex Parte Chace* somehow assists their arguments and positions.

In that each of these arguments, among others, address issues raised and briefed in these *Amici’s* Initial Brief, a response brief is appropriate.

¹ This brief is distinguished from the BRIEF OF *AMICI CURIAE* LAW PROFESSORS, ET AL., authored primarily by Professor Lynn D. Wardle. This brief will be referenced herein as “Wardle’s Initial Brief” for clarity and distinction.

RESPONSE ARGUMENT

I. APPELLANTS AND THEIR SUPPORTING *AMICI* ERRONEOUSLY ASSUME A RADICAL REDEFINITION OF MARRIAGE AS A PRESUMPTIVE FACT.

Throughout their respective briefs, the Appellants and their supporting *amici* presumptively assume that Rhode Island’s definition of “marriage” somehow includes same-sex couples. As an example, GLAD argues that “[t]his divorce action plainly involves a marriage” and that the term “marriage” is somehow “ambiguous.” (GLAD Initial Brief at 8, 10). Thus, this Court is being requested literally to ignore the true meaning of “marriage” that has defined the institution for centuries throughout the world, including the United States and Rhode Island. The Appellants’ use of the term “marriage” evokes a famous passage by Lewis Carroll:

“When I use a word,” Humpty Dumpty said, in rather a scornful tone, “it means just what I choose it to mean—neither more nor less.” “The question is,” said Alice, “whether you *can* make words mean so many different things.” “The question is,” said Humpty Dumpty, “which is to be master—that’s all.”

Lewis Carroll, *Through the Looking Glass* (1934 ed.) p. 205. Appellants and their supporting cast have taken the Humpty Dumpty approach to the term “marriage,” nowhere defining what they mean by it, obviously assuming it means something other than a union of a man and a woman, and using it with a malleability never contemplated by the judicial decisions they cite. This is unequivocally true for Rhode Island. “Marriage” in Rhode Island is not ambiguous and only means the union of one man and one woman—no more and no less.

A. Arguments Surrounding an “Express Ban” of Same-sex “Marriage” are Red Herrings.

The Appellants and their supporting *amici* continually raise the argument that Rhode Island does not contain an “express ban” on same-sex “marriage.” (MERI Initial Brief at 16; GLAD Initial Brief at 26-27; Chambers Initial Brief at 12; Ormiston Initial Brief at 8; ACLU Initial Brief at 6; Professors Initial Brief at 15-16; and Attorney General’s Initial Brief at 10-11, 13). This argument hinges on the false premise that the absence of a specific, express exclusion in the law means that same-sex “marriage” is somehow permitted or even authorized under the law. An examination of Rhode Island law exposes the fallacy of this argument.

For example, Rhode Island law does not expressly prohibit (1) a man marrying an animal, and (2) a man marrying a deceased woman. Thus, following the logic of the Appellants and their supporters, man/animal marriage and man/deceased woman marriage must be permitted under Rhode Island law simply because the General Assembly has not expressly prohibited it. Obviously, such a view would lead to absurd results.

It is clear that Rhode Island’s marriage laws contemplate live human beings as the parties to a marriage. Thus, although “man’s best friend” (a dog) is not expressly excluded from marrying under Rhode Island law, the prevalent use of the term “persons” and the overall statutory scheme makes it clear that a dog cannot participate in the rites of holy matrimony. Moreover, Rhode Island law does not expressly require that “persons” to a marriage must be alive. In fact, a deceased individual could easily meet the

residency requirement posed by § 15-2-1. However, the “persons” to a marriage must sign the marriage license (§ 15-3-7) and presumably go through a ceremony (§ 15-3-5 *et. seq.*). Thus, although Rhode Island law does not expressly exclude a “person” from marrying a deceased “person,” the overall statutory scheme does not permit such a union.

The above analogies demonstrate the fallacy of the arguments regarding the lack of an express exclusion of same-sex “marriage.” It is commonly understood that the interpretation of the overall statutory scheme defines what is and is not a part of Rhode Island law. As outlined in these *Amici’s* Initial Brief, Title 15 of Rhode Island’s General Laws makes clear that same-sex “marriage” is not part of Rhode Island law.² If same-sex “marriage” is part of Rhode Island law, then §§ 15-1-1 and 15-1-2, both of which are designed to prevent men and women from marrying their kindred, would distinctly permit same-sex incestuous “marriage.” (FRC and Mook Initial Brief at 17-18). To make this argument about what Rhode Island law allegedly permits is to purposely ignore the plain meaning of Rhode Island’s statutes.

B. The Definition of Marriage is Not a State Constitutional Question in Rhode Island.

In an effort to bait this Court into the redefinition of “marriage,” it is argued that the definition of “marriage” is somehow a constitutional question to be addressed by this Court. (*See* ACLU Initial Brief at 8; GLAD Initial Brief at 15 n.12; Professors’ Initial

² Understanding that Title 15 is extremely damaging to their position in the case, Chambers, Ormiston, and their supporters largely ignore Title 15, or cite it in a selective light only. In point of fact, Chambers, Ormiston, the Attorney General, and the Professors completely ignore and never cite §§ 15-1-1 and 15-1-2 in their Initial Briefs.

Brief at 34-41). Yet, no cases are cited in support of any alleged “unconstitutionality” under the Rhode Island Constitution.

The definition of marriage is not a state constitutional question in Rhode Island, unlike Massachusetts and other states. The terms “marriage,” “matrimony,” “spouse,” “husband,” and “wife” do not even appear in the Rhode Island Constitution. Thus, this Court is not presented with a question of interpreting the Rhode Island Constitution.

C. The Rules of Statutory Construction Prohibit This Court From Redefining Marriage.

When construing statutes, this Court is required to make every effort to effectuate the legislative intent, while avoiding construing statutes to reach absurd results. *State v. Menard*, 888 A.2d 57, 60 (R.I. 2005). Moreover, this Court cannot look at statutory language in isolation, but must consider statutory language and schemes as a whole. *See In re Brown*, 903 A.2d 147, 149 (R.I. 2006). “[S]tatutes affecting related subjects should be interpreted to provide consistency and to effectuate the purposes intended by the Legislature.” *Dahl v. Begin*, 660 A.2d 730, 734 (R.I. 1995) (citing *In re Falstaff Brewing Corp.*, 637 A.2d 1047, 1051 (R.I. 1994)). Therefore, this Court must examine all statutes affecting marriage and family together in conjunction with the purposes and policies behind the establishment of those statutes.

As already demonstrated, a determination by this Court that same-sex “marriage” is contemplated or permitted under Rhode Island law would yield an absurd result and mar both the reading and interpretation of at least the following statutes: R.I. GEN. LAWS §§ 8-10-3, 9-17-13, 11-6-1, 15-1-1, 15-1-2, 15-1-3, 15-1-5, 15-1-6, 15-2-1, 15-2-7, 15-3-

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II. APPELLANTS AND THEIR SUPPORTING *AMICI* IGNORE BOTH THE STATUS AND ESSENTIAL COMPONENTS OF THE DOCTRINE OF COMITY IN RHODE ISLAND.

A. Appellants and Their Supporting *Amici* Ignore the Reciprocal “Golden Rule” Aspect of Comity.

Throughout all seven (7) briefs advocating this Court’s adoption of same-sex “marriage” for Rhode Island, not one mention is made about the important and necessary reciprocal and “golden rule” aspect of the doctrine of comity first adopted by this Court in *In re Jenckes*, 6 R.I. 18 (1859). To the contrary, the Appellants and their supporters argue that this Court uses the strict “place of celebration” rule—*i.e.*, strict comity a.k.a. The Vested Rights Theory—first rejected by this Court in 1889.⁴ See *O’Reilly v. New York & N.E.R. Co.*, 19 A. 244, 245 (R.I. 1889) and *Busby v. Perini Corp.*, 110 R.I. 49, 50, 290 A.2d 210, 211-12 (1972).

³ In an attempt to avoid a discussion regarding the absurd result of conferring same-sex “marriage” on existing Rhode Island law, MERI dedicates seven (7) pages of its brief discussing not what Rhode Island law is, but what MERI wants it to be. (MERI Initial Brief at 20-26). In these pages, MERI discusses failed legislation, proposed legislation, and private sector actions as some kind of reality-based substitute for actual, true Rhode Island public policy. This Court cannot base its decision regarding Rhode Island public policy on what a particular company did or did not do, or on what the Rhode Island General Assembly may or may not do next year or ten years from now. This Court’s decision must be based upon the existing law in its present form.

⁴ See Chambers Initial Brief at 9, 10; Ormiston Initial Brief at 8; ACLU Initial Brief at 4; GLAD Initial Brief at 20-21; Professors’ Initial Brief at 2, 5, 34; and Attorney General’s Initial Brief at 12.

If comity controls the disposition of this matter, the “golden rule” and reciprocal aspect of the doctrine cannot be ignored. If comity were extended in this matter, this Court would be saying—“Rhode Island will extend comity to Massachusetts same-sex ‘marriages’ because Rhode Island wants its same-sex ‘marriages’ recognized elsewhere as well.” This, of course, is a fiction since Rhode Island does not possess or recognize same-sex “marriage.”

With the inapplicability of the “golden rule” to this matter, this Court’s only potential rationale for extending comity would be to embrace same-sex “marriage” and radically redefine marriage for Rhode Islanders without the involvement of the electorate or the General Assembly. In that the question of marriage is not a constitutional one under the Rhode Island Constitution (Section I.B., *supra*), such a ruling would be beyond the purview of this Court and arguably then create a Rhode Island constitutional crisis with an invasion of the law-making authority of the General Assembly. *See Elder v. Elder*, 84 R.I. 13, 120 A.2d 815 (1956) (ordinarily a court has no right to legislate judicially and to make public policy according to its own view where the General Assembly has legislated on the subject matter); *Bandoni v. State*, 715 A.2d 580, 591 (R.I. 1998) (demonstrating judicial restraint in creating a remedy that is not provided for in the legislative enactment). *See also* R.I. Const. Art. 10, § 1; *Opinion to the Governor*, 95 R.I. 109, 185 A.2d 111 (1962) (apportionment of representation is peculiarly matter within legislative power and court may not purport to pass judgment upon suitability or wisdom of means used by the General Assembly to discharge that duty).

B. Appellants and Their Supporting *Amici* Ignore This Court’s Approach to Conflicts and Choice of Law.

As previously referenced in these *Amici*’s Initial Brief, in 1968, this Court adopted the “interest-weighting” approach to conflicts of law. *See Woodward v. Stewart*, 104 R.I. 290, 243 A.2d 917, 923 (1968), *cert. denied*, 393 U.S. 957 (1968).⁵ While *Woodward* was a case involving a tort question, this approach was soon extended to contracts as well. *See Matarese v. Calise*, 111 R.I. 551, 305 A.2d 112 (1973). In *Matarese*, this Court considered whether Rhode Island or Italian law would govern the terms of a contract executed in Italy. In analyzing this question, this Court looked at the location of the property at issue (Italy), the location of the execution of the contract (Italy), the residency of the plaintiff (Italy), and the residency of the defendant (Rhode Island). In the end, this Court was primarily concerned with the location of the performance of the contract. In ruling that Rhode Island law, not that of Italy, would control, this Court stated that:

It is a fundamental principle of conflict of laws that contracts are to be governed by the laws of the state or country in which they are made, unless made with a view to performance in another state or country, in which case they will be governed by the law of such state or country. This principle is as applicable to contracts of interstate or international carriage as to any other type of contract.

⁵ “In times not long past our reaction would have been mechanical, and we probably would have selected the local law of the ‘place of wrong’ Recently, however, we abandoned the vested rights approach under which the *lex loci delicti* invariably controlled in the choice of the applicable tort law. Today we follow the rule enunciated by the Restatement (Second) of Conflict of Laws s 145, and, wherever appropriate, we pass on the rights and liabilities of the parties with respect to an issue in tort in accordance with the local law of the state which, with respect to that issue, had the most significant relationship to the occurrence and the parties.” *Busby*, 110 R.I. at 50, 290 A.2d at 211-12 (citations omitted).

Matarese, 111 R.I. at 562, 305 A.2d at 118 (quoting Annotation, *Law of Place of Performance, Other Than That of Place Where Contract is Made and Transportation Commences, as the Governing Law of Carrier's Contract*, 72 A.L.R. 250 (1931)) (emphasis added).

In the instant case, it is clear that Chambers and Ormiston entered into their Massachusetts same-sex “marriage” contract with a “view to performance” in Rhode Island. As alleged in their briefs, they lived in Rhode Island before the contract, returned to Rhode Island following the execution of the contract, and have since resided in Rhode Island. (Chambers Initial Brief at 1-3; Ormiston Initial Brief at 1). Moreover, in that both Chambers and Ormiston are residents of Rhode Island, there are stronger ties to Rhode Island than there were in *Matarese*, necessitating the application of Rhode Island law to their contract—not strict comity. *See also Nortek, Inc. v. Molnar*, 36 F. Supp.2d 63 (D. R.I. 1999) (ruling that a contract entered into in Rhode Island would be governed by New York law since the contract was to be performed in New York).

C. *Ex Parte Chace* is Not About Procedural Technicalities, But the Pure Nature of the Union at Issue—One Man and One Woman.

Appellants and their supporting *amici* all misapprehend *Ex Parte Chace* and the essence of this Court’s holding in that matter. Aside from *Chace* being misrepresented as a “place of celebration” case (Section II.A., *supra*), the Appellants and their supporters view *Chace* in a self-serving and limited light. Repeatedly, it is argued that this Court approved of the marriage in *Chace* because certain procedural and technical requirements of Massachusetts law were fulfilled, although certain other technical requirements of

Rhode Island law were not fulfilled. (See GLAD Initial Brief at 16-17; Attorney General’s Initial Brief at 11-13; MERI Initial Brief at 16, 17; and Chambers Initial Brief at 9-10). These advocates are missing the fine point of *Chace*.

In *Chace*, this Court put aside all procedural and technical aspects of the marriage. After grappling with questions regarding the guardianship laws and whether there was an “evasion” of Rhode Island’s laws, this Court stated that “[u]pon the questions of interpretation thus raised, however, we refrain from expressing any opinion . . . it was lawfully celebrated in Massachusetts, it must be considered valid here.” *Ex Parte Chace*, 26 R.I. 351, 58 A. 978, 979 (1904). In other words, this Court was saying that it didn’t care about the procedural technicalities of the marriage. If the procedural requirements were satisfied elsewhere, it wouldn’t concern itself with the procedural requirements.

Here, there is no argument presented that Chambers and Ormiston did not fulfill any procedural or technical requirements of their same-sex “marriage” contract in Massachusetts.⁶ That question is irrelevant, having already been answered by this Court and the Family Court. What matters is whether the “union” entered into by Chambers and Ormiston is “such a union” that is “subversive to good morals, or so threatening to the fabric of society, as to fall within the exception to the general rule regarding foreign marriages.” *Id.* at 981. In other words, this Court must answer whether the “union” of

⁶ It is also upon this legal fiction that *amici* repeatedly argue regarding the absence of evasion statutes in Rhode Island. (MERI Initial Brief at 17; GLAD Initial Brief at 20, 23 n.18). This logic is lacking. The absence of evasion statutes in Rhode Island is irrelevant, but the presence of strong Rhode Island public policy against the recognition of same-sex “marriage” remains paramount. Legality in one place does not equal legality in another and evasion laws are not required to make this point.

Chambers and Ormiston is “such a union” that violates the public policy of Rhode Island. Nothing about *Chace* requires this Court to accept, adopt, or otherwise recognize the same-sex “marriage” of Chambers and Ormiston.

In arguing this point, GLAD contends that no case in the country has ever declared as “odious” or “abhorrent” a same-sex “marriage.” (GLAD Initial Brief at 30). This statement ignores the actions taken by citizens of the United States. GLAD is unable to find such a case because the collective supreme courts of the United States never received the chance to make such a declaration. With forty-five of the fifty United States enacting legislation protecting marriage as between one man and one woman (*see* <http://www.domawatch.org/stateissues/index.html>), there has been largely nothing for the courts to decide. Moreover, the courts that have decided this question have rejected any right to same-sex “marriage” (of course, excepting Massachusetts). Ninety percent (90%) of this country’s sovereign states have enacted clear legislative measures declaring same-sex “marriages” unequivocally contrary to public policy. Such a statement speaks for itself and does not require judicial recognition for validity.

Though such is clearly within its scope of review, this Court need not pass on the questions of “good morals” in answering this question. In 1904, *Chace* was decided in the height of this Court’s employment of the doctrine of comity. Decisions regarding comity invariably required this Court to make those types of decisions and policy statements. However, with the waning doctrine of comity and the adoption of a newer approach to conflicts of law questions, this Court must more appropriately look to the laws and policies of Rhode Island, as established by its citizens through their elected

representatives in the General Assembly. As is already clearly established (Section I, *supra*), Rhode Island law makes the “union” possessed by Chambers and Ormiston “such a union” which must be rejected by this Court.

III. DIVORCEMENT CANNOT BE SEPARATED FROM MARRIAGE.

A. Divorcement is a Remedy, Not a Cause of Action.

In arguing for just a “divorce,” the Appellants and their supporting advocates plead with this Court to not decide the question of whether Chambers and Ormiston possess a valid same-sex “marriage” under Rhode Island law. Alternatively, the Appellants and their supporting *amici* argue that this Court can recognize their same-sex “marriage” for the limited purpose of their divorce without making a large, public policy pronouncement. (*See* Ormiston Initial Brief at 9, 11; Chambers Initial Brief at 13; Professors’ Initial Brief at 29-34; MERI Initial Brief at 17; ACLU Initial Brief at 7; Attorney General’s Initial Brief at 6; GLAD Initial Brief at 15, 35-38). GLAD even goes so far as to characterize divorce as a “cause of action.” (GLAD Initial Brief at 15 n.12). Clearly, the Appellants and their supporters fail to comprehend the definition of divorce and its inextricable relationship to marriage.

Divorce is not a cause of action. Divorce does not exist in a vacuum and is not an available remedy to just anyone. Divorce is a remedy and its application is no different than any other contractual remedy. However, divorce is a special kind of remedy for a special kind of contract—marriage. Contractual remedies are only granted by courts where there exists a breach or breakdown of an underlying valid contractual duty. While a party may generally file a lawsuit and request the remedy of divorcement, the

underlying cause of action is one in contract. Thus, to look at divorce is to look at marriage and this is an inextricable fact that cannot be ignored or overlooked by this Court.

B. The Availability of Divorcement Depends Upon the Existence of a “Marriage,” and Nothing Else.

In his initial brief, the Attorney General asserts that this Court should not answer its own certified question:

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.

(Attorney General’s Initial Brief at 6). Moreover, in its brief, GLAD offers an equally incoherent statement:

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.

(GLAD Initial Brief at 13) (emphasis added). Like the Appellants and their other supporting *amici*, the Attorney General and GLAD fail to grasp both the principles involved in this matter and this Court’s pronouncements on the same.

Contrary to the assertion of the Attorney General, Rhode Island law expressly contemplates divorce as only “from the bond of marriage.” R.I. GEN. LAWS § 8-10-3 (1956). Moreover, “the term ‘divorce’ means primarily the dissolution or partial suspension by law of the marriage relation, and presupposes the existence of a valid marriage.” *Leckney v. Leckney*, 26 R.I. 441, 59 A. 311, 311-12 (1904) (emphasis added).

In other words, contrary to the hopes of GLAD, divorces cannot be extended as remedies

from “every conceivable circumstance” (e.g., cohabitations, same-sex “marriages,” civil unions, or any other “conceivable circumstance”).

Additionally, the existence of an underlying valid marriage in an action seeking a divorce remedy is imperative because the State of Rhode Island is a party to the lawsuit. *Frothingham v. Anthony*, 69 F.2d 506, 510-11 (1st Cir. 1934) (citing *Berger v. Berger*, 117 A. 361, 362 (R.I. 1922)). The State of Rhode Island is generally a party to a divorce action because the state “seeks the preservation of the marital status.” *Rheaume v. Rheaume*, 107 R.I. 500, 268 A.2d 437, 504 (1970). Yet, when the public policy of Rhode Island does not favor same-sex “marriages,” why would the state take an interest in such an action? It would not. The courts of Rhode Island extend jurisdiction to only those matters in which the state has an interest. Rhode Island does not have an interest in same-sex “marriage.”

CONCLUSION

All of the arguments put forth by the Appellants and their supporting *amici* assume and demand a radical redefinition of marriage. Marriage has always only meant one man and one woman and any redefinition of the term would impermissibly remove constitutional power from the General Assembly.

Notwithstanding the pleadings to the contrary, this Court cannot extend to the Appellants any remedy without first passing on the validity of the underlying contract at issue. Divorce is a remedy, not a cause of action. As a remedy, divorce can only be extended to a valid underlying marital contract. Though they allege that, without a

Rhode Island divorce, they will be left with nowhere to go,⁷ the parties do have a remedy available in Massachusetts—the same place that they so aptly and readily traveled to obtain their same-sex “marriage” to begin with.

With clear and uncontroverted public policy against same-sex “marriage,” the State of Rhode Island has no interest in the underlying subject matter of the contract presented by Chambers and Ormiston. Thus, the Family Court cannot extend jurisdiction or a remedy to them.

Respectfully submitted this the 15th day of August, 2007.

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*Motions for Admission *Pro Hac Vice* pending

⁷ Chambers’ pleads with this Court that “the parties have nowhere else to obtain a dissolution of their marriage, the Rhode Island State Courts standing alone as the means to their unhappy end.” (Chambers Initial Brief at 13). Ormiston’s more morbid view of her circumstance alleges that, in the absence of a Rhode Island divorce, the parties “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.” (Ormiston Initial Brief at 3).

CERTIFICATE OF SERVICE

I, Laura C. Harrington, hereby certify that a true and correct copy of the within has been sent to the below persons by regular mail, postage prepaid, on August 14, 2006.



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