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Massachusetts and Same-Sex Marriages: An Update

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An In-depth Analysis of Where Things Stand

As reported on these pages late last year, on Nov. 18, 2003, the Massachusetts Supreme Judicial Court decided *Goodridge v. Department of Public Health*, holding, in a 4-3 decision, that the denial of marriage licenses to same-sex couples in the Commonwealth of Massachusetts violated the state's constitution. The case was brought by seven gay and lesbian couples, four of whom have children, and all of whom have been in committed relationships that range from 4 to 30 years in duration. When the Department of Public Health refused to issue marriage licenses to them, the seven couples filed suit, claiming that the Commonwealth's denial of marriage licenses violated Massachusetts law.

The Good News

The high court's ruling that the ban on same-sex marriage violates the Massachusetts Constitution is the good news for members of the gay and lesbian community and advocates of the legalization of same-sex marriage. The decision, written by Chief Justice Marshall, acknowledges both the legal and emotional significance of marriage and states that denying this right to same-sex couples offends the Massachusetts Constitution's guarantee of equality before the law: "Without the right to marry — or more properly, the right to choose to marry — one is excluded from the full range of human experience and denied full protection of the laws for one's avowed commitment to an intimate and lasting human relationship." Most significantly, however, the Supreme Judicial Court directs the Massachusetts legislature to "take such action as it may deem appropriate in light of this opinion" during the next 180 days. The Supreme Judicial Court is the Commonwealth's ultimate authority on constitutional issues and as such, the Legislature cannot pass a law contrary to the court's decision. The Legislature, however, is not left powerless, and the fight for same-sex marriage in the Commonwealth is far from over.

The Bad News

The "bad news" for the gay and lesbian community may be the Supreme Judicial Court's intention to "leave intact the Legislature's broad discretion to regulate marriage." As was done in Hawaii and

Alaska, the Legislature may still initiate a movement to amend the Massachusetts Constitution to prohibit same-sex marriage. In fact, Governor Mitt Romney has publicly endorsed the Legislature's pursuit of such an amendment. That said, a constitutional amendment typically takes at least 2 years to pass and by that time, there may be thousands of legal same-sex marriages in Massachusetts. How to deal with marriages entered into prior to the passage of a constitutional amendment, if any, is only one of the many questions raised by the *Goodridge* decision.

Another way in which the Massachusetts Legislature could attempt to avoid legalizing same-sex marriage is through the passage of civil union laws. The Massachusetts Legislature, like the Vermont Legislature, could decline to revise the state marriage laws to permit same-sex marriage and instead, pass legislation authorizing civil unions. Although it is still being debated, the language and tone of the *Goodridge* decision does not appear to allow for this alternative. In support of the argument that marriage is a fundamental right, Justice Marshall cites many of the statutory benefits conferred on married couples. It is presumed that civil unions, while conferring certain benefits, would not be equivalent to marriage and would not confer all of the benefits of marriage, particularly if the federal Defense of Marriage Act is determined to be constitutional. At the end of the decision, the court concludes that, "the plaintiffs request only a declaration that their exclusion and the exclusion of other qualified same-sex couples from access to civil *marriage* [Emphasis added] violates Massachusetts law. We declare that barring an individual from the protections, benefits and obligations of civil *marriage* solely because that person would marry a person of the same sex violates the Massachusetts Constitution." [Emphasis added.] Civil unions would still deny same-sex couples access to marriage and seems to be contrary to the language of the Supreme Judicial Court's decision. Regardless, if the Legislature does authorize civil unions, the constitutionality of such legislation will likely be challenged and ruled on by the Supreme Judicial Court soon after.

The Massachusetts Legislature also may decline to act at all. The Legislature simply might ignore the 180-day deadline. As with the authorization of civil unions, it is likely that if the Legislature fails to respond to *Goodridge*, further action in the Massachusetts courts would ensue.

Complex Issues

If the Massachusetts Legislature passes neither a constitutional amendment nor civil union legislation and instead of doing nothing actually legalizes same-sex marriage, a number of complex issues remain. First, will such marriages be recognized by other states? How, if at all, will other states deal with the dissolution of such marriages? Will same-sex couples be forced to decline attractive job offers outside of Massachusetts or forgo moving to be closer to friends or family because their marriage is recognized only by Massachusetts? Is this good or bad for the Massachusetts economy? Again, there are no clear answers. The Federal Constitution provides that states are to give "full faith and credit" to the laws of other states. In 1996, President Clinton signed the Defense of Marriage Act, which provides that marriage for the purpose of federal laws must be between a man and a woman, and permits states to deny recognition of same-sex marriages validly entered into under the laws of other states. As of May 2003, 37 states had adopted a Defense of Marriage Act similar to the federal act. The constitutionality of the federal and state laws is yet to be challenged, but such a case may appear before the United States Supreme Court before the issue is resolved.

Perhaps more important than the jurisdictional consequences of the legalization of same-sex marriage

is whether and how the hundreds of benefits conferred on heterosexual married couples will be applied to same-sex married couples. As addressed in Justice Marshall's decision, marriage affects "nearly every aspect of life and death." Even if same-sex couples are permitted to marry in Massachusetts and are eligible for all of the state benefits associated with marriage, the ultimate economic benefit for such couples may be limited because the Defense of Marriage Act currently prohibits the application of federal benefits. How will the lawyers, judges and lawmakers interpret and enforce state and federal laws relating to income tax filing, property ownership, the right to inherit property at the death of a spouse, the right to wages owed a deceased employee, the pension system, alimony and the legitimacy and parentage of children? Once again, the answers to these questions are just beginning to be debated.

As estate-planning attorneys, the authors are particularly attuned to the tax planning opportunities that would become available to same-sex couples. The gift tax marital deduction would allow same-sex married couples to give unlimited amounts to a spouse free of any gift tax. Most significantly, the estate tax marital deduction would allow same-sex married couples to defer all estate taxes above the exemption until the death of the surviving spouse. To use the marital deduction fully, such couples may now want to execute revocable trusts for the benefit of the survivor where they saw no need for such trusts in the past. Similarly, same-sex married couples should be advised to rearrange the ownership of their assets so that each spouse, where applicable, owns at least the amount equal to the federal estate tax exemption (\$1500 as of 2004) in his or her own name (to the extent that such transfers are not inconsistent with federal gift tax laws). This may involve transferring certain assets out of joint ownership. To that end, these newly married couples also should be advised that owning property jointly as a married couple has different estate tax consequences than owning joint property as an unmarried couple. At the death of the first spouse, one-half of the value of jointly held property will be included in the spouse's gross estate and subject to estate tax, regardless of that spouse's contribution to the property. For unmarried individuals, the entire value of the jointly owned property will be included in the estate of the first joint owner to die, unless the parties can prove their respective financial contributions to the property - in which case only the proportionate value belonging to the decedent will be in the gross estate. In addition to how title to property is held, attorneys for same-sex married couples should consider the location of such property. For example, if a same-sex married couple resides in Massachusetts, the tax treatment of a jointly owned vacation home in Maine should be carefully examined.

Although the estate and gift tax savings available to married couples are significant, if the Massachusetts Legislature does not legalize same-sex marriage, such couples may still benefit from a well-thought-out estate plan. For instance, lifetime giving techniques including making annual exclusion gifts (now \$11,000 per recipient per year), lifetime use of the federal gift tax exemption amount (\$1,000,000) and leveraged gifting techniques such as irrevocable life insurance trusts, grantor retained annuity trusts, qualified personal residence trusts, charitable lead trusts and charitable remainder trusts. Such couples also have the ability to use leveraging techniques not available to related individuals such as grantor retained income trusts. The estate-planning documents should also confirm all beneficiary designations and asset ownership arrangements to avoid challenges by family members who are hostile to the relationship.

Prior to entering into marriage, same-sex couples also may take advantage of the protection afforded through prenuptial agreements. Such agreements are particularly helpful when one spouse has

significantly more assets than the other, or when one spouse plans to work outside of the home while the other supports the relationship without direct economic contribution. The prenuptial agreement should address the couples' financial expectations during the marriage, in the event of divorce and in the event of the death or disability of one spouse. The agreement also should address property ownership, responsibility for liabilities such as mortgages, and responsibility for health insurance and other employment benefits. While same-sex (and for that matter, heterosexual) couples who do not marry may still protect themselves through cohabitation agreements, the case law on such agreements is still developing. The validity of prenuptial agreements, while not absolute, is now widely recognized and represents just one of the many benefits that would be available to same-sex married couples.

Conclusion

The *Goodridge* decision certainly will go down in history for declaring that the denial of same-sex marriage violates the Massachusetts Constitution. More significantly, it will be remembered for initiating a complex public discussion about the broader meaning of marriage and how (if at all) to implement this constitutional right. The benefits afforded to married couples in connection with estate planning and property ownership represent only a fraction of the advantages that such couples enjoy. Those discussed in this article also demonstrate just how complex implementing this constitutional right will be, and how far-reaching the *Goodridge* decision may prove to be.

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