



# The Matrimonial *strategist*<sup>®</sup>

## Same-Sex Marriage: Massachusetts Sets the Precedent

April, 2004

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[*Editor's Note: The following information was up-to-date as of press-time. Rulings on same-sex marriage are being issued daily. For the very latest news on same-sex marriages in Massachusetts and the rest of the country, as it happens, go to <http://www.ljnonline.com/> and access the interactive map.*]

One month after the highest court in Massachusetts, the Supreme Judicial Court (SJC), issued its decision on the unconstitutionality of the denial of same-sex marriage in *Goodridge v. Department of Public Health*, the Massachusetts Senate prepared draft legislation authorizing civil unions (Senate No. 2175). The legislation intended to grant same-sex couples "all the benefits, protections, rights and responsibilities afforded by the marriage laws" while still "preserving the traditional, historic nature and meaning of the institution of civil marriage." The civil union legislation created a separate, yet arguably equal, set of benefits and privileges for same-sex couples. The legislation, however, also denied same-sex couples the right to civil marriage and thereby lacked the intangible benefits of marriage that the *Goodridge* decision noted are "important components of marriage as a 'civil right.'" The Massachusetts Senate asked the SJC to review the civil union legislation and offer an advisory opinion on its constitutionality.

### Advisory Opinion

On Feb. 4, 2004, the SJC issued its advisory opinion regarding the Senate bill. The emotional decision unequivocally stated that the proposed civil union legislation was unconstitutional and that the *Goodridge* decision held that civil marriage, and nothing less or different, must be made available for same-sex couples. The SJC declared that even though civil unions would grant same-sex couples many of the same benefits as marriage, the denial of marriage was "more than semantic." Relegating same-sex couples to a separate status was unconstitutional and the court reminded the Legislature that "the history of our nation has demonstrated that separate is seldom, if ever, equal." Further, if the benefits of a civil union were truly equal to those of a civil marriage, the SJC logically noted that the Legislature would not have tried so hard to circumvent the court's decision in *Goodridge*. The decision addressed the intangible benefits of marriage ignored by the civil union legislation; the denial of marriage is not only about the denial of full protection of the laws, but about the denial of the "full range of human experience."

The SJC also addressed the argument that because same-sex marriage is neither recognized under Federal law nor under the law of many states, it should not be recognized in Massachusetts either. Each state is free to examine individual liberty in the manner which its own state constitution demands and the fact that such prejudice exists, is not an excuse to demand less than the Massachusetts Constitution requires. "Indeed, we would do a grave disservice to every Massachusetts resident, and to our constitutional duty to interpret the law, to conclude that the strong protection of individual rights guaranteed by the Massachusetts Constitution should not be available to their fullest extent in the Commonwealth because those rights may not be acknowledged elsewhere."

## Clarification

In the opinion, the SJC also took the opportunity to clarify the 180-day stay of judgment in its November 2003 opinion: "The purpose of the stay was to afford the Legislature an opportunity to conform the existing statutes to the provisions of the Goodridge decision." Accordingly, if the Legislature refuses to amend its statutes, the same-sex marriages entered into 180 days from the *Goodridge* decision are presumably legal marriages in the eyes of the Commonwealth.

## The Latest At Press Time

Now that civil union legislation, the apparent middle ground, has been declared unconstitutional, the debate has become heated. Governor Mitt Romney, various activist groups and the Catholic Church all support a constitutional amendment banning same-sex marriage. The amendment however, requires not only a vote in two successive Legislatures, but a majority of the people must approve it as well. Many public opinion polls report that a majority of Massachusetts citizens oppose a constitutional amendment banning same-sex marriage. Some are also concerned that such a constitutional amendment might foreclose civil union as a compromise. On March 11, in a joint session, members of the House and Senate moved toward amending the state's constitution to ban same-sex marriages, but allowing civil unions. Civil unions would have "entirely the same benefits, protections, rights, and responsibilities that are afforded to couples married under Massachusetts law," according to the bill that passed so far. The legislature was scheduled to hold another round of debates, amendments, and votes on March 29-31.

If the measure passed at that time, it would then be considered by the 2005-2006 legislature; if it passes then, too, it would be put on statewide ballot in November 2006.

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