INTERIM REPORT OF THE MASSACHUSETTS BAR ASSOCIATION SAME-SEX MARRIAGE TASK FORCE

May 9, 2005

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I. Introduction

Historical Context

The Massachusetts Bar Association ("MBA") maintains a proud history of promoting civil rights for all citizens of the Commonwealth. In keeping with this tradition, the MBA House of Delegates has considered and voted on issues presented by *Goodridge v. Department of Public Health,* 440 Mass. 309 (2003) and *In the Matter of An Opinion of the Justices on Senate Bill No. 2175 "An Act Relative to Civil Unions*" 400 Mass. 1201 (2004) ("Opinion of Justices"), voicing strong opposition to defining the term "marriage" as a legal contract between a man and a woman, as well as prohibiting recognition of any other relationship as marriage or its legal equivalent. In particular, the MBA House of Delegates voted to oppose House Bill No. 472 and House Bill No. 3375 at its July 15, 1999 and June 20, 2001 Meetings, respectively. House Bill No. 472, filed in 1999, attempted to amend Chapter 207 by inserting the following to section 4:

> Section 4A. A purported marriage contracted between persons of the same sex shall be neither valid nor recognized in the Commonwealth of Massachusetts.

Similarly, House Bill No. 3375, filed in 2001, attempted to insert the following provisions to Chapter 207:

> Section 4A. A marriage is a civil contract and shall be defined as a legal relationship between one man and one woman, who consent to take each other exclusively as husband and wife, provided that each person has attained the age of 18 years, is of sound mind, and is not related by consanguinity whether by half of whole blood, not closer than the fourth degree.

> Section 4B. Any other relationship shall not be recognized as a marriage or its legal equivalent, or receive benefits exclusive to marriage in the Commonwealth of Massachusetts as a matter of public policy.

While some of the policies relating to House Bill No. 472 and House Bill No. 3375 fell outside the purview of issues presented in *Goodridge* and *Matter of Opinion of the Justices*, many of the fundamental concerns articulated by the MBA in opposition to House No. 472 and House No. 3375 are germane to same-sex marriage. The MBA based its opposition to House Bill No. 472 and House Bill No. 3375 on the fact that the proposed legislation (i) violated equal protection of the law; (ii) constituted discrimination based on gender; (iii) may have constituted discrimination based upon sexual orientation; (iv) disregarded the understanding that marriage has come to be regarded as a basic human right; and (v) failed to promote the legal security a marriage lends to a family.

Task Force Mission

MBA President Kathleen O'Donnell has emphasized the critical importance that our laws be consistent with the decision in *Goodridge*. Accordingly, she appointed the Same-Sex Marriage Task Force (the "Task Force") in August 2004. The mission of the Task Force is to unravel the tangle of legal issues *Goodridge*. The Task Force analyzed the impact *Goodridge* has on certain fields of state and Federal law, including family law, taxation, probate law, trust and estate planning, property law, municipal law and civil rights.

The Task Force also evaluated specific and more substantive concerns relating to those areas of Massachusetts law which find interplay with Federal law. Of particular interest and concern is the Federal Defense of Marriage Act ("DOMA"), which does not

recognize same sex marriages. Accordingly, matters relating to income taxation, estate taxation, gift taxation, ERISA, and Medicaid/Medicare bear significant consideration and discussion. The Task Force also considered potential reforms relating to Massachusetts law pertaining to divorce, spousal support, marriage, paternity, assisted reproduction, property ownership, statutes related to municipal ordinances, as well as the Rules of Domestic Relations Procedure and discrimination law. The Task Force's analysis of such matters is set forth from herein.

Readers should note that it is not the intention of the Task Force to provide an exhaustive analysis of the impact of *Goodridge* on the entire body of Massachusetts statutory authority. Rather, we studied those areas considered to be of principal importance. The Task Force has reviewed recommendations for specific legislative enactments in order to ensure conformity of existing law to *Goodridge*, as well as legislative proposals to effectuate necessary reform, and considered a proposed omnibus bill to address those sections of Massachusetts statutory law that may more accurately conform with *Goodridge* through importing gender neutrality to those terms which currently contain gender specificity.

Cote-Whitaker v. Department of Public Health Amici Brief

In accordance with the endorsement of the MBA House of Delegates on November 18, 2004, the Task Force jointly filed with the Boston Bar Association an amici brief in Cote-Whitaker v. Department of Public Health, No. SJC-C1436. The issues briefed in Cote-Whitacre were as follows:

1. Are the constitutional principles that were recognized in Goodridge v. Department of Public Health, 440 Mass. 309 (2003) limited in their application to residents of Massachusetts or do those principles apply equally to non-residents who

legally enter the commonwealth and seek the protections and liberties afforded under Massachusetts law?

2. Can non-resident same-sex couples constitutionally be denied the same marriage rights that are afforded under Massachusetts Law to all opposite-sex couples and to resident same-sex couples?

The MBA and BBA argued that the liberty and equality provisions of the Commonwealth's Constitution apply to all individuals within its borders, regardless of residency, and maintains that the Supreme Judicial Court should refuse to allow marriage bans in other states to dictate Massachusetts' own treatment of the marriage rights on non-residents same-sex couples. In this regard, interstate comity cannot provide any basis for enforcing laws of other states in a matter that would violate the Massachusetts Constitution. Accordingly, the brief concluded that M.G.L. c. 207 § 11 should be struck down in order to ensure that all persons, resident and non-resident individuals alike, who are within the boundaries of Massachusetts, are afforded the protections of our Constitution.

Task Force Membership

The Task Force invited all MBA Sections to assist in its work, and is grateful, in particular, for the assistance of the MBA Probate Section and Family Law Section. The Task Force emphasizes that this Interim Report is part of the Task Force's ongoing work, and contained herein is intended as legal advice for particular matters and, therefore, should not be construed as such. If any firm conclusion may be drawn from the Task Force's work, it is that much further experience and study remains ahead.

The members of the Task Force are: Mark D. Mason, Chairperson, Kathleen M. Earnshaw, Michael C. Fee, Veronica J. Fenton, Fern L. Frolin, Michele E. Granda, Janet

Kenton-Walker, Prof. Charles P. Kindregan, Karen J. Levitt, Karen L. Loewy, Paul H. Merry, Deborah A. Rudolf, Barry P. Wilensky, and Prof. Arthur D. Wolf.

II. Omnibus Legislation

The Supreme Judicial Court allowed the Legislature a period of one hundred and eighty days to implement the law set forth in *Goodridge*:

> We remand this case to the Superior Court for entry of judgment consistent with this opinion. Entry of judgment shall be stayed for one hundred and eighty days to permit the Legislature to take such action as it may deem appropriate in light of this opinion.

Goodridge, 440 Mass. at 970.

The Task Force's understanding of the foregoing pronouncement was to enable the Legislature to conform existing statutory reference to spouses, wives and husbands to Goodridge. The terms "spouse", "spouses", "husband", "wife", "husband and wife", "dependant(s)", "marriage", and "marital" appear in innumerable sections of the Massachusetts General Laws. The Task Force analyzed such terms as they appear throughout the Massachusetts General Laws in a multiplicity of contexts.

In many instances, the law set forth in *Goodridge* may be accomplished through passage of omnibus legislation which lends gender neutrality to existing gender specific language. For example, compliance of M.G.L. c. 233 § 19, relating to the spousal privilege, may be attained through such omnibus legislation. In considering such proposed legislation, the Task Force looked to similar statutory authority which has succeeded in Vermont.

Accordingly, the Task Force is considering draft statutory language to amend Chapter 4 of the General Laws to add a new section 13 as follows:

> Section 13. For all purposes relating to Massachusetts Law and except as otherwise provided, in all statutes and regulations promulgated thereunder relating to marriage or providing rights, benefits, protections or obligations to married individuals or couples, words importing gender

> shall be construed in a gender-neutral fashion, including but not limited to "husband" or "wife", which shall be construed to apply to any spouse, and "widow" or "widower", which shall be construed to apply to any surviving spouse.

In evaluating such proposed legislation, the Task Force studied similar statutory authority which has succeeded in Vermont.

III. Marriage, Separate Support and Divorce

The Task Force reviewed the provisions of the Massachusetts General Laws that pertain to marriage, separate support and divorce with a focus on those provisions that need to be amended in a manner that would not be solved solely by the passage of omnibus legislation. This review focuses on many provisions that codify the rights and obligations of "Husbands and Wives" to one another, and includes provisions regarding financial obligations and property rights between spouses which originated from the common law. The goal of the Task Force in this section is to provide a quick reference and analysis of the particular statutes, together with specific recommendations for further change. Insofar as the recommendations refer to the history development of some of the provisions, it should be noted that the Task Force did not conduct an exhaustive review of all applicable legislative history.

<u>M.G.L. Chapter 207 (Who can marry)</u>: This Chapter is primarily gender neutral except with regarding to marriages which are prohibited due to the blood relationship of the proposed spouse. They read as follows:

- <u>Section 1</u>: No man shall marry his mother, grandmother, daughter, granddaughter, sister, stepmother, grandfather's wife, wife's mother, wife's grandmother, wife's daughter, wife's granddaughter, brother's daughter, sister's daughter, father's sister or mother's sister.
- <u>Section 2</u>: No woman shall marry her father, grandfather, son, grandson, brother, stepfather, grandmother's husband, daughter's husband, granddaughter's husband, husband's grandfather, husband's son, husband's grandson, brother's son, sister's son, father's brother or mother's brother.

The public policy purpose of this statute is to prevent the inherent health and

physiological problems that arise when closely related individuals parent children together. However, some of the prohibited relationships are not related to "blood line" and may stem from other historical and societal purposes. It seems appropriate to continue the stated public policy of prohibiting marriages between "close relatives". The problem could be resolved by re-writing both sections 1 and 2 as follows: "A person shall not marry another person who is related to him or her by blood or marriage of the first or second degree", thus removing the gender-specific language, but keeping intact the definition of prohibited marriages.

M.G.L. Chapter 208 (Divorce, custody, spousal support, property division): Most of the applicable provisions of Chapter 208 are gender neutral, or would be resolved by the proposed omnibus Legislation. Additional revisions may be required as follows:

- Section 23: Currently reads, "The Court granting a divorce may allow a woman to resume her maiden name or that of a former husband". The provision should be revised as follows: "The Court granting a divorce may allow a spouse to resume his or her former name or that of a former spouse". This provision also clarifies the current laws insofar as it provides a man who chooses to change his name upon marriage with a stated remedy through which to resume his former name.
- Section 25: Currently reads. "A divorce for adultery committed by the wife shall not affect the legitimacy of the issue of the marriage, but such legitimacy, if questioned, shall be tried and determined according to the course of the common law". The Task Force questioned the need for this provision and recommends its appeal, especially in light of the enactment of

209C which addresses paternity issues and the overall statutory scheme which eliminates the term "legitimate" which regard to children born out-of-wedlock and the other pertinent sections.

Chapter 209: Husband and Wife:

The Task Force recommends that the title of this entire chapter be renamed "Spouses". Remaining sections, except as otherwise noted below are already gender neutral. For a discussion regarding the tax consequences of alimony, separate support and distribution of property see pages 19-20 herein. Other sections of chapter 209 may be amended as follows:

- Section 2: Married Woman: Power to Contract: It appears that this statute was created to eliminate the historical statutory prohibition regarding women and whether they can own property and/or enter into contracts without the consent of their husbands. This section needs to be amended as follows (proposed changes in italics): "A married *person* may make contracts, oral and written, sealed and unsealed, in the same manner as if *s/he* were sole, and may make such contracts with *his/her spouse*".
- Section 3: Transfers Between Husband and Wife: This section needs to be amended as follows: "Transfers of real and personal property between *spouses* shall be valid to the same extent as if they were sole."
- Section 4: Married Woman: Work and Labor: Presumption: This section should probably be repealed as it does not seem to have pertinence to today's labor and financial laws. In the event that it is not repealed, it should read as follows: "Work and labor performed by a married *person* for a person other than *his or her spouse* and children shall, unless there is an express

agreement to the contrary, be presumed to be performed on *his or her* separate account".

- Section 5: Married Woman: Acting as a Fiduciary: This section is antiquated and it should likely be repealed. If not, it should be amended as follows: "A married *person* may be and *executor, administrator*, guardian, conservator, trustee or receiver, and may bind *him or* herself and the estate which *he or* she represents without the any act or assent of *his or her spouse."*
- Section 6: Married Woman: Power to Sue and Be Sued: This section is antiquated and should be repealed. The second part of this section prohibits law suits between husband and wife except pursuant to a contract. This does not seem to be the current status of the law, in practice, especially since spouses sometimes engage in lawsuits for personal injury or other such actions. If it is not repealed, it should be amended as follows: "A married *person* may sue and be sued in the same manner as if *he or* she were sole. (balance should be repealed)"
- Section 7: Married Woman: Liabilities: It appears that this section comes from the historic laws that obligated a spouse to pay for necessities for a spouse even if he did not sign for credit on behalf of that spouse. The Task Force recommends that this provision be repealed. As an alternative, the Task Force recommends that this provision be amended as follows: "A married *person* shall not be liable for *his or her spouse's* debts, nor shall *his or* her property be liable to be taken on an execution against *his or* her *spouse*. But a married *person* shall be liable jointly with *his or her spouse* for debts due, to the amount of one hundred dollars in each case, for necessities

furnished with his or her knowledge or consent, if *he or she* has property to the amount of two thousand dollars or more."

- Section 8: Husband Liability for Wife's Debts: The Task Force recommends that this section be repealed. In the alternative, this provision should be amended as follows: "A *spouse* shall not be liable upon a cause of action which originated against *his or her spouse* prior to their marriage or to pay a judgment recovered against that *spouse*."

- Section 9: Husband: Liability on Contracts Concerning Separate Property of Wife:

  The Task Force recommends that this section be repealed. In the alternative, this provision should be amended as follows: "Contracts made by a *married person* relative to *his or her* separate property, trade, business, labor or services shall not bind *his or her spouse* or render *him or her or his or her* property liable therefore; but *the spouse's* separate property shall be liable on such contracts in the same manner as if *he or she were unmarried*."

- Section 31: This statute refers specifically to the rights of an abandoned Wife to (with permission of the Court) sell or encumber real estate standing solely in the name of the Husband. The Task Force recommends that this section be repealed, because, if amended to be gender and spouse neutral, it would be duplicative of Section 30 which permits a spouse to dispose of the property of a spouse if that spouse has abandoned the other without sufficient means of support for the spouse and/or minor children. Ironically, Section 30 is sufficiently gender and spouse neutral as written and does not require an amendment.

The balance of Chapter 209 is gender and spouse neutral and does not require any amendment.

IV. Retirement Plans in Divorce

In 1974, Congress enacted the Employee Retirement Income Security Act ("ERISA") as a comprehensive regulation of private employee benefit plans. ERISA superseded all state laws, and prohibited the assignment of pension benefits. In 1984, ERISA was amended by Congress so that state courts could assign pension interests in divorce cases by enacting the Retirement Equity Act of 1984 ("REA") which amended ERISA. REA authorized state courts to assign pension benefits in divorce actions by means of a qualified domestic relations order ("QDRO"). The result was an exception to the anti-alienation and anti-assignment provision of the ERISA law and Internal Revenue Code.

A QDRO is prepared and submitted to the state court for approval at the time of the divorce and is then forwarded to the employer for processing. The formula or percentage to be distributed to the non-employee spouse is spelled out in the QDRO , the terms of which must be approved by the pension plan administrator before being approved by the Court. The party drafting the QDRO must ensure that the QDRO does not provide for any benefit or option which is not allowed under the terms of the retirement plan. Generally, the employer will provide their preferred format which includes such provisions. The employer then divides the pension in accordance with the terms of the QDRO such that each party has a separate fund, or, in some cases, the alternate payee's share can be transferred to an IRA.

29 U.S.C.A. Section 1056(d)(3)(B)(ii) allows assignment of a private pension interest to an alternate payee (non-employee spouse) who is to receive benefits under a QDRO. The statute limits assignment to a judgment which relates to "the provision of child support, alimony payments, or marital property rights to a spouse, former spouse,

child, or other dependent of a participant…". Thus, assets which are normally not reachable under ERISA can be reached to satisfy arrearages or serve as security for alimony, child support or property division.

Generally, the validity of the parties' marriage is determined by the law of the place where the marriage takes place. *See Gorrasi v. Manzella*, 287 Mass. 165 (1934). When examining the question of the validity of a marriage for purposes of Federal law, however, an attorney may have to go beyond state family law concepts and examine the Federal law. Since many provisions of the Federal tax laws are often premised on the existence of a marriage, the issue of the validity of a particular marriage often arises. Massachusetts Practice Series, Vols. 1 and 2A, Family Law and Practice, Third Ed., Kindregan and Inker).

Therein lies the issue and the uncertainty with regard to same-sex marriages. Marriages that are not considered valid under Federal law may prevent division of qualified plans under ERISA for purposes of property division subsequent to divorce. One may attempt to avert such problems by creating a QDRO which is intended for payment of child support. Treatment of QDROs in same-sex divorces merits much further study.

It appears that non-qualified plans such as IRA's may be divided since they are not controlled under ERISA. There are also state, municipal, and county pension plans which will be impacted by *Goodridge*. M.G.L. c. 32 establishes the retirement plan for Massachusetts public employees. In *Contributory Retirement Board of Arlington v. Mangiacotti*, 406 Mass. 184 (1989), the Court held that a public employee may assign a portion of his/her pension under a marital agreement for the division of marital assets pursuant to M.G. L. c. 208 sec. 34. Since state and municipal pension plans are not

governed by ERISA, QDROs are inapplicable. Instead, a "Domestic Relations Order" or "DRO" is the operative document through which the assignment of benefit is made (often called a *Mangiacotti* order).

State and municipal pension plans usually include Option A, Option B, and Option C as potential retirement options. Option A provides the highest monthly allowance but no survivor benefits. Option B provides a lesser monthly allowance and a lump sum survivor benefit. An employee may designate one or more persons as his/her beneficiary, and those person(s) need not be related to the member. Option C provides the lowest monthly allowance and survivor benefits, giving the surviving beneficiary monthly payments for the rest of his/her life. However, the beneficiary must be a member's spouse, parent, sibling, child or former spouse who has not remarried. Because the statutory definitions of spouse and former spouse under the statute are gender neutral, *Goodridge* does not seem to preclude the use of DROs in same-sex marriages.

Benefit rights under a pension plan can also be assigned or attached to satisfy a support obligation, pursuant to M.G.L. c. 208, 209, 273, or other applicable statutes. A DRO can be used to accomplish such purpose. *See also Silverman v. Spiro*, 438 Mass. 725 (2003). There may be other areas of the statute where a DRO can be used to divide benefits, such as ordinary disability benefits, accidental disability benefits, and survivor benefits. The same-sex neutral language that is used with respect to retirement options is applicable in these circumstances as well. *Goodridge* does not seem to preclude the use of a DRO in these situations either.

V. Tax Treatment of Alimony, Separate Support and Property Distributions Subsequent to Divorce

Under Federal DOMA, same-sex spouses who make divorce related transfers may be subject to various federal tax consequences not encountered by their heterosexual counterparts. The income and deduction provisions of IRC §§ 71 and 215 will not be applicable to awards of alimony and separate support. Awards of lump sum amounts and property distributions may also be subject to gift tax treatment on such transfers.

Transfers of marital property rights do not automatically escape gift tax treatment. T-Reg. § 25.2512-8 states that " . . . relinquishment or promised relinquishment of dower or curtesy, or of a statutory estate created in lieu of dower or curtesy, or of other marital rights in the spouse's property or estate, shall not be considered to any extent a consideration in 'money or money's worth'". See also *Merrill v. Fahs*, 324 U.S. 308 (1945) and *Estate of Sanford v. Comm.*, 308 U.S. 39 (1939). Transfers in settlement of property rights may be subject to gift tax treatment. Spouses who qualify as married under DOMA escape gift tax treatment by application of IRC § 2523, Gift to Spouse (the "Unlimited Marital Deduction"), or IRC § 2516 ("Certain Property Settlements"). Certain property settlements are deemed transfers for full and adequate consideration of money or money's worth if pursuant to a written agreement.

Support rights are a legal obligation and may be enforced as a legal claim against an estate. The release of support rights, as distinguished from property rights, then does constitute "consideration in money or money's worth" and property transferred in exchange for such a release is not deemed a gift. Similarly, an order of the court to transfer property creates a legally enforceable obligation and is not considered a voluntary transfer. The United States Supreme Court has held that property transferred

pursuant to a court order after contested adjudication of a divorce action is not subject to gift tax application. *Harris v. Comm.*, 340 U.S. 106 (1950). In *McMurty v. Comm.*, 203 F.2d 659, 662 (1st Cir. 1953), the critical factor was that the transfer did not occur until after the entry of the divorce decree. In other cases, another critical factor was whether the court had the power to reject or modify the agreement. *See e.g. Natchez v. U.S.*, 705 F.2d 671, 674 (2nd Cir. 1983), citing *Est. of Bowers v. Comm.*, 23 T.C. 911, 922 (1955) and others. Notwithstanding the foregoing, it is unclear at this point whether an order of the court for a same-sex divorce, with or without an underlying adjudicated divorce, is sufficient to exclude property transfers from gift tax treatment.

VI. Name Change Issues

Individuals who change their names are required to report the change to the Social Security Administration to insure that all benefits and obligations are properly recorded to the correct person. Names and social security numbers must match. This most commonly comes up in the employment context, where employers report employees' names and social security numbers on a variety of state and federal reports. Same-sex couples who change their names upon marriage must report this change to Social Security and request new social security cards to insure that their records will be properly credited. Social security has apparently been issuing new cards with new names.

However, some people who then also request that the US State Department issue amended passports with their new names are being denied the issuance of such amended passports on the basis of DOMA. The State Department is requiring a court order, or documentation of the use of an assumed name for 5 years, before granting a new passport. This practice is putting individuals at risk of having passports in an old name with all other identification, (driver's license, social security card, etc.), in the new name. Individuals wishing to travel out of the country must suffer additional time and expense to obtain a court order with a new name. If willing to take the risk, such persons may travel with their passport, birth certificate, marriage certificate, and a picture ID with former name and a picture ID with current name, and simply hope for the best.

VII. Children, Parentage and Assisted Reproductive Technologies

Parentage of children born to unmarried parties is governed by Massachusetts General Laws Chapters 209C and 46. Chapter 209C concerns primarily unmarried parents; however, c. 209C § 6 provides that the husband of a woman who gives birth during the marriage or within 300 days after the end of the marriage is presumed to be the father of the child. Section 6 also requires statutory attempts to notify the birth mother's husband in order for another person to be adjudicated the father.

Since *Goodridge*, c. 209C § 6 treats same sex couples differently than opposite sex couples, because there is no concomitant presumption that the same sex spouse of a woman who gives birth is presumed to be the parent of the child. Nor is there a presumption that the same sex spouse of a man who is adjudicated the father of a child born during the marriage is also a parent. Presently, the same sex spouse of a person who gives birth during the marriage must adopt the child in order to acquire parental rights. The adoption process works, but it requires legal effort and time that is not required of opposite sex couples.

G.L.c. 46 § 4B concerns the parentage of children born of assisted reproductive technology. The statute provides, in anachronistic language, that "[a]ny child born to a married woman as a result of artificial insemination, with the consent of the husband, shall be considered the legitimate child of the mother and such husband." A child born to a married same sex couple will likely be conceived through assisted reproductive technology. Additionally, chapter 46 concerns married parents, whereas chapter 209C primarily concerns children born of unmarried parents. For these two reasons, it appears that chapter 46 is the appropriate location for substantive statutory amendments concerning same sex parentage. Additionally, amending chapter 46 will provide a venue

for necessary revision of the statutory scheme to define the rights – or lack thereof – of egg donors and gestational carriers.

The MBA Family Law Section Council has drafted proposed amendments to G.L. c. 209C § 6 and G.L. c. 46 § 4B. The goal of the proposed legislation will be to resolve the disparate treatment for same sex versus opposite sex married couples, as well as to update chapter 46 in order to include newer reproductive technologies. However, there will be situations in which a surrogate or gestational carrier mother or an identified sperm donor intends to retain parental rights. It is not clear how the draft legislation will affect those cases, but it is likely that co-adoption will continue to be required. Further, although there have been a few three-parent adoptions in Massachusetts, there is presently neither reported decision nor statutory authority for these arrangements.

The draft Family Law Section Council amendments likely will *not* include surrogacy arrangements in which a baby is born of the surrogate mother's egg and the intended father's sperm. Surrogacy arrangements are opposed by some organizations, notably the American Civil Liberties Union, because the arrangements potentially exploit poor women. In these arrangements, as in cases where a stranger to the marriage intends to retain parental rights, adoption will likely remain the best method of establishing parental rights.

<u>Proposed Amendments to Chapter 46</u>

Currently, Chapter 46: Section 4B entitled "Artificial insemination" provides:

> Section 4B. Any child born to a married woman as a result of artificial insemination with the consent of her husband, shall be considered the legitimate child of the mother and such husband.

The Family Law Section Council has proposed that the statute be rewritten as follows:

> Chapter 46: Section 4B Assisted reproductive technology.
> Section 4B. Any child born to a married person as a result of assisted reproductive technology with the written consent of his or her spouse as an intended parent shall be considered the legitimate child of the married couple. "Assisted reproductive technology" as used in this section means a method of causing pregnancy other than sexual intercourse, and shall include the use of donor sperm, egg or embryo to conceive a child, and/or the use of a gestational carrier to carry a child. A sperm, egg or embryo donor, or gestational carrier who assented in writing to said donation or resulting pregnancy is not a legal parent of a resulting child.

Change is necessary to update the statute to reflect the ruling in *Goodridge* and to include types of reproductive technology not in existence at the time the law was enacted in 1981. This revised statute would provide the children of same-sex married couples with the same protections afforded to children born to opposite-sex couples.

Similarly, Chapter 46: Section 1D entitled "Adoption of surname upon marriage" provides:

> Section 1D. Each party to a marriage may adopt any surname, including but not limited to the present or birth-given surname of either party, may retain or resume use of a present or birth-given surname, or may adopt any hyphenated combination thereof.

The Family Law Section Council has proposed the statute be rewritten as follows:

Chapter 46: Section 1D Adoption of surname upon marriage

> Section 1D. Each party to a marriage may adopt any surname, including but limited to the present or birth-given surname of either party, may retain or resume use of a present or birth-given surname, or may adopt any hyphenated combination thereof. If a party to the marriage who has changed his or her name files a certified copy of the certificate of marriage with the register of probate in the county where the parties were married or presently reside, the register of probate shall issue a certificate of change of name to the party who has changed his or her name in

> accordance with the certificate of marriage. No fee shall be charged, nor shall the party seeking the certificate of name change be required to file a petition for a name change. Notwithstanding the provisions of chapter 262, sections 34 and 40, the city or town registrar or clerk, or the register of probate shall not charge any fees for fulfilling the duties set forth in this section.

DOMA impacts whether name-changes of same-sex spouses are recognized at the federal level and by federal agencies. At present, same-sex spouses are not able to receive passports that reflect their new married names. While it is too soon to assess the impact with all federal agencies, issuance of a name change decree by the Probate Court will resolve many of these problems.

<u>M.G.L. Chapter 119 (Care and Protections and CHINS</u>):

The Task Force studied these provisions to determine whether there are specific *Goodridge* complications that arise in the care and protection of children from abuse and/or neglect by their parents and caregivers. For the most part, M.G.L. c. 119 is gender neutral and refers to parents, guardians, grandparents, etc. Section 23A refers to children born to mothers who are incarcerated and states that the infant shall be placed in the custody of D.S.S. and that D.S.S., shall make provisions for the care of said child. The Task Force does not maintain that this section needs to be revised by legislative amendment because the overall statutory scheme requires that D.S.S. place the infant with another parent or relative who is fit to care for the child.

IIX. Possible revisions of Probate Court DR Forms and Mass. R. Dom. Rel. P., Supplemental Rules and Probate Uniform Practices

The Task Force's review of the Massachusetts Rules of Domestic Relations Procedure failed to reveal any rule which would not apply equally to same-sex families as to different-sex families or parties of such families. Massachusetts Supplemental Rules of Domestic Relations Rules 404 and 405 deal with adultery. While it is not perfectly clear how they might apply to a same-sex marriage, presumably non-marital sexual relations by a same-sex married partner could be construed as adultery and therefore grounds for divorce under G.L. c. 208 §1. The remaining Supplemental Rules would apply equally to same-sex families as to different-sex families or parties of such families. The Task Force's review of the Uniform Practices of Probate Court failed to reveal any practice which would not apply equally to same-sex families as to different-sex families.

The Task Force recommends the following amendments:

Domestic Relations Forms

- *Divorce Complaint* [*CJ-D 101*]

  In the sub-section under line 6 change to read:

  ∟ grant h__ custody of the above-named child____

  ∟ allow plaintiff to resume h__ former name of ____________

- *Joint Petition for Divorce* [*CJ-D 101A*]

  Make the following changes:

  Line 1: Delete "husband and wife" and replace with "both Spouses"

  Line 6: Delete "wife to resume her" in the 5th sub-section and replace it with "____ to resume h__"

  Signature line: Delete "OF WIFE" and replace it with "SPOUSE No. 1"

Signature line: Delete “OF HUSBAND” and replace with SPOUSE No. 2”

Backface: Delete “For Wife” and replace it with “For Spouse No. 1”

Backface: Delete “For Husband” and replace it with “For Spouse No. 2”

Backface: Under “Documents filed” delete “Wife’s Financial Statement” and replace it with “Financial Statement of Spouse No. 1”

Backface: Under “Documents filed” delete “Husband’s Financial Statement” and replace it with “Financial Statement of Spouse No. 2”

- *Complaint for Annulment [CJ-D 100]*

  Line 5: Delete “pursuant to G.L.M. c. 207, §§ 1,2,3”

- *Findings Under c. 208, § 1A [CJ-D 406]*

  Line 3: Delete “wife may resume her maiden-former name” and replace it with “_____ may resume use of h__ former or maiden name _______”

- *Petition for Adoption [CJ-P 87]*

  Line 2- Delete “name of mother” and replace it with “name of parent No. 1”

  Line 2- Delete “name of father” and replace it with “name of parent No. 2”

  Line 4 – Delete “mother” and replace it with “parent No. 1”

  Line 4 – Delete “father (legal)” and replace it with “parent No. 2 (legal)”

- *Petition for Custody [CJ-P 88]*

  Line 2- Delete “name of mother” and replace it with “name of parent No. 1”

  Line 2- Delete “name of father (legal)” and replace it with “name of parent No. 2 (legal)”

  Line 2, under “if applicable” delete “name of alleged biological (putative) father” and Replace it with “name of alleged biological parent”

- *Citation under G.L. c. 210, §6 [CJ-P 93]*

Change "name of mother" to "name of parent No. 1"

Change "name of father" to "name of parent No. 2"

- *<u>Petition for Adoption</u> [CJ-P 87]*

  Line 2- Delete "Name of Mother" and replace it with "Name of Parent No. 1"

  Line 2- Delete "Name of Father" and replace it with "Name of Parent No. 2"

- *<u>Complaint for Grandparent Visitation</u> [CJ-D 105]*

  Line 2: No change really needed unless you want to replace language such as "maternal/paternal" "grandfather" or "grandmother" with "grandparent/grandparents"

  Line 4(a) Delete "defendant father" and "father" and replace them with "defendant parent" and "parent"

- *<u>Complaint to Establish Paternity</u> [CJ-D 106]*

  Title: Delete "Paternity" and replace it with "Parentage"

  Line 1, sub-section 2: Delete "mother/father" and replace it with "parent"

  Line 3, Delete "mother/father" and replace it with "parent"

  Line 5, Leave as is – deals with child born to married woman

  Line 6, sub-section 1, delete "father" and substitute "parent"

- *<u>Petition for Correction of Birth Record</u> [CJ-D 118]*

  Line 3, Delete "paternity" and substitute "parentage"

- *<u>Judgment of Paternity</u> [CJ-D 116]*

  Title: Delete "Paternity" and substitute "Parentage"

In the Task Force's opinion, the following forms appear on their face to be gender-neutral:

Complaint for Separate Support [CJ-D 102]

Summons by Publication [CJ-D 112]

Divorce/Separate Support Summons by Publication [CJ-D 112A]

Automatic Restraining Order Note to Plaintiff [CJ-D 110B]

Divorce/Separate Support Summons [CJ-D 110A]

Domestic Relations Summons [CJ-D 110]

Complaint for Support Under G.L.M. 209: 32F [CJ-D 107]

Judgment of Separate Support [CJ-D 402]

Petition for Change of Name [CJ-P 27]

Decree of Adoption [CJ-P 95]

Contempt Summons [CJ-D 113]

Complaint for Contempt [CJ-D 113]

Complaint for Modification [CJ-D 104]

Order for Service by Publication in Certain Domestic Relations Actions [CJ-D 111]

Order for Service by Publication in Certain in Divorce and Separate Support [CJ-D 111A]

Judgment of Divorce Nisi [CJ-D 403]

Judgment of Divorce Nisi Under § 1A [CJ-D 403A]

Certificate of Divorce Absolute under §1A [CJ-D 406A]

Certificate of Divorce Absolute under [CJ-D 406]

Civil Execution [CJ-D 443]

Domestic Relations Execution [CJ-D 442]

Civil/Criminal Contempt Judgment [CJ-D 404]

IX. Medicare, Medicaid – MassHealth

Medicare is fully a federal benefit program. As such, DOMA will pre-empt and prevent same-sex spouses from eligibility for any marriage related benefits and obligations. Medicaid, known as MassHealth in Massachusetts, is a state administered program that is reimbursed by federal funds. Under DOMA, married same-sex couples are not treated as each other's spouses for purposes of federal benefit programs such as Medicaid.

Under MassHealth, marital status determines a number of eligibility criteria and protections for spouses. There is a bill currently before the Legislature that would ensure equal treatment for same-sex spouses in the MassHealth program, the language of which is as follows:

> "Chapter 118E is hereby amended by adding the following new Section 53: 'All persons recognized as spouses for purposes of Massachusetts state law shall be entitled to the same level of benefits under the MassHealth program as persons recognized as spouses pursuant to federal Medicaid law."

The bill would provide MassHealth coverage to same-sex spouses with the same obligations and benefits imposed on opposite sex spouses using state-only funds. Such approach is similar to what is being done in Vermont under Vermont's Civil Union Law. Use of state-only funds would not necessarily cause any additional cost to the state because both spouses' resources would be taken into account to determine eligibility. In some cases, counting a spouse's resources will make a spouse ineligible who would otherwise have been eligible if treated as an individual. At the same time, such equal treatment offers significant protections especially for the most vulnerable, such as protections against poverty and homelessness.

In Massachusetts, the Department of Medical Assistance sent the Federal Department of Health and Human Services, Centers for Medicare & Medicaid Services ("DHHS") seven questions regarding Medicaid issues in light of *Goodridge*. DHHS responded, in sum, that DOMA governs, and that DHHS will not reimburse matching funds to Medicaid beneficiaries who are qualified in Massachusetts by reason of a same-sex marriage. A copy of DHHS's response letter dated May 28, 2004, is attached hereto as Exhibit 1. On the other hand, neither would a same-sex spouse who would otherwise qualify for coverage as an individual be denied coverage on the basis of a same-sex marriage. We have yet to see how this will actually be implemented.

X. Income Tax

The Task Force has concluded that Technical Information Release 04-17, provided by the Massachusetts Department of Revenue, is likely to adequately address discrepancies in the reporting requirements of income tax returns for same-sex couples in Massachusetts. TIR 04-17, a copy of which is appended hereto as Exhibit 2, is designed to place same-sex couples on equal footing as heterosexual married couple in the Commonwealth of Massachusetts for state income tax purposes. The Task Force notes, however, that although the TIR accomplishes a practical solution, it was not enacted by the Legislature, and therefore does not alter the underlying statutory scheme.

Forms W-2

Employers report wages to employees and the state and federal governments on Forms W-2: federal wages, social security wages, medicare wages and state wages. Each of these amounts may differ for a variety of reasons and may differ from an employee's actual gross wages. Gross wages is the salary amount actually paid to an employee before any deductions or additions. Federal wages may be reduced by amounts that an employee designates to be withheld and deposited in a qualified retirement plan. State wages are not generally reduced by such amounts. Federal wages must be increased by the value, which should be the fair market value to the beneficiary – (the non-employee same-sex spouse or domestic partner), for benefits that accrue to, and can be directly tracked to, an unmarried domestic partner or a same-sex spouse. The most common benefit so taxed to an individual employee is health insurance coverage for a domestic partner or same-sex spouse. Note, however, that the value of health benefits that accrue to a partner or same-sex spouse who otherwise qualifies as the employee's dependent are excludable from this "addition to wages" provision. Other benefits that flow to a

domestic partner or same-sex spouse are also includable in the employee's wages at their fair market value to the benefiting partner or spouse. Social security wages are subject to upper limits. Neither social security nor medicare wages should not be adjusted for contributions to a retirement plan, but are adjusted for the value of benefits, subject to the limitation for social security wages. (Medicare wages have no cap).

One possible scenario:

Example: Employee A and same-sex spouse B. A receives annual salary in the amount of $35,000, and health insurance for herself and her spouse, the total cost to the employer for the health insurance is $5,000. The cost of individual insurance is $3,000, therefore the additional cost to the employer to cover A's spouse is $2,000. A contributes $2,500 to a qualified retirement plan. Wages reportable on A's W-2 should be as follows: Federal Wages: salary: $35,000 – retirement contribution: $2,500 + B's insurance: $2,000 = $34,500. Social security and medicare wages: $35,000 + B's insurance $2,000 = $37,000; State wages: $35,000.

Employers must withhold appropriate federal income and FICA taxes on such increased wages. Some do so paycheck to paycheck, some make an annual adjustment. Although such method is reasonable, it may not pass muster. The value to the non-employee beneficiary is what that person would have to pay on the market for the particular benefit. In the case of health insurance, that would be the cost to an individual to purchase private individual coverage. Another method being used is to take the COBRA cost less 2% and use that amount for the value to the beneficiary. In sum, there is still a great deal of uncertainty in this area that warrants further study.

XII. Estate Tax Issues

It appears that the Massachusetts Department of Revenue ("DOR") acquiesces to the changes required to reflect same-sex marriage with respect to the Massachusetts estate tax. In Technical Information Release 04-17, the DOR recognizes that the Massachusetts estate tax relies on Federal law (as it is computed using the amount of the credit for state death taxes allowable to a decedent's estate as computed under I.R.C. § 2011, as in effect on December 31, 2000). Under Federal law, there are a number of estate tax provisions that give preference to married couples. Foremost is the marital deduction, which provides that there is no estate tax between spouses, provided that the surviving spouse is a US Citizen. In the event that the spouse is not a US Citizen, estate tax may be deferred by using a Qualified Domestic Trust, or QDOT, which only applies the estate tax when distributions of principal are made from the trust to the surviving spouse.

There is also the qualified joint interest rule, which provides that, when spouses own property jointly, only 50% of the property is taxed in the estate of the first spouse to die. When non-spouses own property jointly, then the property is taxed 100% at the death of the first joint-owner, except to the extent that the surviving joint-owner can prove contribution to the property. The DOR takes the position that any problems resulting from the non-recognition of same-sex marriage on the Federal return can be ameliorated by preparing a pro-forma federal estate return *as if* the same-sex marriage were federally recognized.

The Task Force perceives a problem with this approach, from an estate planning perspective, because it would impact Qualified Terminable Interest Property (Q-TIP) (and other marital deduction property, as well). The "qualified terminable interest

property" concept was designed to address the dilemma which many individuals face when forced to choose between the tax advantages of a marital deduction and the possibility that following the death of the spouse, the spouse may remarry or otherwise mismanage funds, such that the children of the decedent would not receive the remaining assets at the death of the survivor. This usually arises in a "second marriage" context, but may also arise in first marriage situations, where the testator is not comfortable with the reliability of the surviving spouse to properly administer assets.

In order for a Q-TIP election to be available, no power may exist in any person, including the surviving spouse, to appoint any part of the property to any person other than the surviving spouse during his or her lifetime, including the payment of estate taxes. A Q-TIP trust would have to provide that taxes not be paid from it, or it loses its exempt status. Thus, merely utilizing a 2000 Federal Form 706 as a “pro-forma” and calculating the tax liability “as if the individuals were married” is not enough. If a decedent places his or her entire estate in a Q-TIP trust, the trust document will have to allow that the Federal tax is payable from it. This ability to pay the Federal taxes from the Q-TIP trust will disqualify the trust for a marital deduction under Federal Law, and thus under Massachusetts law. Massachusetts law must provide that the ability to pay Federal taxes from a Q-TIP does not constitute “the appointment of any part of the property to any person other than the surviving spouse during his or her lifetime.”

These problems would also impact the Qualified Domestic Trust, which relies on the Q-TIP rules to determine the availability of the estate tax deferral for the non-US citizen surviving spouse.

XII. Gift Taxes

The aforementioned "TIF 04-17" adequately covers gift tax issues. Although Massachusetts does not have a gift tax, it does have a filing threshold, which this year is $950,000. IRC Section 2513 allows a gift made by one spouse to be considered as made one-half by the donor and one-half by the spouse for gift tax purposes. The TIF provides that spouses in a same-sex marriage who elect to have a gift of one spouse considered as made one-half by each spouse for calculating their Massachusetts estate tax obligation must file a pro forma Federal gift tax return (either Form 709 or Form 709-A) in accordance with I.R.C. § 6075(b).

XIII. Property and Municipal Law Issues

The issues are almost exclusively linguistic in this area and likely can be addressed adequately by omnibus legislation. The following are examples of the necessary specific amendments:

- G.L. c. 40L § 5; Sale of agricultural land or conversion to other use.

In defining what constitutes conversion of land from agricultural use, the statute specifically exempts continued residential use by specifically defined family members, including the surviving husband or wife. The phrase should be stricken and replaced with "surviving spouse."

- G.L. c. 41, § 34B; Identification of husbands and wives in documents and communications.

The statute requires municipal assessors to communicate explicitly with all joint owners of property, not just the husband, when property is owned by husband and wife. The ambiguity could be clarified by replacing references to husband and wife, with "spouses." The statute's first reference to "husband and wife" could be replaced with "two spouses"; and the second reference to "husband and wife" be replaced with "both of the spouses" for grammatical accuracy.

- G.L. c. 41; § 38A; Collection of account due city or town; powers and duties of tax collector.

This statute raises the same issue as prior section, except that it deals with communications from municipal tax collectors.

- G.L. c. 41, § 100B; Indemnification of retired police officers and firefighters.

The statute addresses certain benefits to retired police and firefighters, and contains numerous references to "widows" and the use of the masculine pronouns "he", "his", and "him." "Widow" could be replaced with "surviving spouse" and the pronouns

revised to gender neutral alternatives.

- G.L. c. 41, § 111I; Compensation due deceased employees; disposition.

The statute directs compensation due to a municipal employee be paid to the "husband, widow or next of kin." "Husband, widow" should be changed to "surviving spouse."

- G.L. c. 46; § 1; Certificates of birth, marriage, death and acknowledgements and adjudications of paternity; residence defined.

The statute defines the obligations of municipal clerks to collect information regarding births, marriages, deaths and adjudications of paternity. While family law and public policy issues herein require further study, ambiguities could be cured by the following actions:

Strike out the words "birth surname of the child's mother" and insert in place thereof "birth surnames of the child's parents, if different from the current legal name."

Strike out "birth surname for women" and insert "birth surname of deceased, if different from current legal name."

Strike out the word "paternity" and insert "biological or legal parentage."

Strike out "widowed or divorced" and insert "the marriage ended by the death of one spouse or divorce."

- G.L. c. 45, § 3C; Children born out of wedlock; information regarding benefits and responsibilities of parentage.

Family law concepts predominate in this statute requiring hospital administrators to furnish certain information about children born out of wedlock, but ambiguities could be cured as follows:

Strike out the word "husband" and insert "spouse."

Strike out the words "either the husband or the wife" and insert "either spouse."

Change "father" and "mother" to "parent."

Strike the word "paternity" and insert "biological or legal parentage."

Strike the words "if the mother of the child was or is" and insert "if the parents of the child were or are."

Strike the words "putative father" throughout, and insert "putative parent."

Strike the word "father" and insert "parent."

Reference to "her husband" should be changed to "her spouse." "Mother and such husband" should be changed to "spouses."

- G.L. c. 46, § 13 Correction of records.

Ministerial statute requires several alterations: "paternity" should be replaced with "parentage" in numerous places. Phrases "mother and her husband" and "wife and husband" should be replaced with "spouses."

- G.L. c. 48, § 59A; Aid to other municipalities; Authorizations; Fire departments defied; Payment for damages.

Concerning benefits to survivors of firefighters, single reference to "his widow" should be changed to "his or her surviving spouse".

- G.L. c. 48, § 81 Appropriation.

Concerning benefits to survivors of firefighters, several references to "fireman" should be changed to "firefighters" and references to "widows" should be to "their surviving spouses."

- G.L. c. 48, § 83; Allowance to families of deceased firemen; exceptions.

The Task Force recommends the same changes as for *§ 81, as well as:*

"Firemen" to "Firefighters"

"Him" to "him or her"

"His widow" to "the surviving spouse"

"Widow" to "Surviving spouse"

- G.L. c. 90, § 34A; Motor Vehicles and Aircraft/Compulsory Motor Vehicle Liability Insurance/Definitions.

In various sections of this definitional statute the legislature refers to a variety of persons who may be entitled to benefits or held liable for certain actions. Frequently the list begins "husband, wife, parent, [etc.]." The phrase "husband, wife . . ." could be replaced with "spouse."

- G.L. c. 183 § 31; Acknowledgment of married woman.

The statute provides that "the acknowledgement by a married woman may be taken in the same form as if she were sole, and without any examination separate and apart from her husband." The language could be replaced with "The acknowledgement by a married person may be taken in the same form as if he or she were sole, and without any examination separate and apart from his or her spouse."

- G.L. c. 183 § 54A; Defective discharges of mortgages held by entirety; Effect.

The statute's reference to husband and wife could be replaced by "two spouses" in the first instance and "one of the spouses" in the second instance.

- G.L. c. 184B Short form terms for wills and trusts, § 2 statutory optional fiduciary powers; limitation of powers.

This statute implicates Federal issues. Specifically, Section (1)(P) and (2) refer to federal tax deductions and other requirements of the IRC that warrant further study.

- G.L. c. 184 § 7; Creation of an estate in common, joint tenancy or tenancy by the entirety.

This statute governs the creation of estates in common, joint tenancies and tenancies by the entirety. It specifically references conveyances to "husband and wife".

The reference should be replaced with "two spouses."

- G.L. c. 185 § 47; Contents of judgment of registration.

This statute governs Land Court registration procedures and references the rights of "husband and wife." The phrase "husband or wife" should be stricken and replaced with "spouse."

- G.L. c. 185, § 77; Burdens and incidents attaching by law.

This statute provides that in the case of registered land, owners holding title as "husband and wife" are not relieved from liability to attachment or levy on execution. The reference to "husband and wife" should be replaced with "spouse."

- G.L. c. 185, § 92; Filing and registration of judgment in partition proceedings or proceedings for assignment of spouse's statutory share.

In this statute governing petitions for partition of registered land, the reference to "husband and wife" should be replaced by "spouse."

- G.L. c. 186, § 2; Assignment of dower.

Dower is "the general provision which the law makes for a widow out of the lands or tenements of her husband for her support and the nurture of her children." Eliminate the reference to "husband or widow" and replace it with "spouse or surviving spouse" and replace the reference to "wife or husband" with the term "spouse."

- G.L. c. 188 Homesteads, § 1; Right to acquire homesteads; Exemptions; Definitions.

This statute defines the homestead exemption and defines "family" as including, among other things, a "husband and wife." It should be replaced with the term "spouses."

- G.L. c. 188 Homesteads, § 4; Continuance after death of person holding homestead for benefit of spouse and minor children.

This statute refers to the survival of certain homestead benefits for a spouse and children. The reference to "widow" should be replaced with "surviving spouse."

- G.L. c. 189 Dower and curtesy, § 6; Effect of signature of married minor woman.

The statute provides that the signature of a married woman who is a minor, affixed to her by any instrument relating to the conveyance of land of her husband, shall have the same effect as if she were of full age. Reference to "married woman" may be replaced with "spouse", the phrase "by her" should be excised in its entirety, and the phrase "her husband" should be replaced by "a spouse."

- G.L. c. 246 Trustee Process, § 28; Wages and pensions; Exemptions; Exceptions.

This statute deals with exemptions from trustee process for pensions. The statute utilizes Federal law, specifically the Employee Retirement Income Security Act, and the Internal Revenue Code, to define the scope of the exemptions.

- G.L. c. 246 Trustee Process, § 32; Claims not attachable by trustee process.

The statute defines claims that are exempt from trustee process. The sixth paragraph states that credits due for the wages or services "of the wife" shall be exempt. The phrase should be replaced with "of the spouse."

- G.L. c. 255D Retail installment sales and services, § 11; Finance charges, computation, rates; multiple agreements prohibited.

Section D of this statute provides that no installment seller shall prevent any person, or any husband and wife jointly and severally, to be obligated on more than one retail installment sales agreement. The phrase "husband and wife" should be replaced with "married persons" or "two spouses."

- G.L. c. 258C Compensation of Victims of Violent Crimes, § 1; Definitions.

This statute defines dependant as a mother, father, spouse, spouse's mother,

spouse's father . . .". The phrase "spouse's mother, spouse's father" should be replaced with "spouse's parents".

XIV. Impact of Goodridge on Massachusetts Statutes Relating to Discrimination

The *Goodridge* decision may be seen in effect as a significant vindication of the purposes and intent of the Massachusetts Anti-Discrimination Act, M.G.L. c. 151B, which was passed to prohibit discrimination on account of race, color, religion, national origin, sex, sexual orientation or disability in employment, housing and public accommodation. By holding that denying the power to marry represents discrimination in violation of the constitution, the SJC upheld the intent of the statute, in particular the provision respecting sexual orientation.

The potential exists that same-sex couples will experience discrimination on account of their being married to a person of the same sex. But such discrimination in all instances would appear also to be illegal as discrimination on account of sexual orientation, a provision already included in G.L. c. 151B §4. The situation may be analogous to the frequent discrimination experienced in the recent past by couples of different races who married, which was held to violate provisions banning discrimination on account of race. *Loving v. Virginia*, 388 U.S. 1 (1967).

Research on the legislative history of c. 151B uncovered a provision in the 1989 Amendment (Section 19 thereof) which amended Section 1 ("Definitions") to provide as follows: "Nothing in this act shall be construed so as to legitimize or validate a 'homosexual marriage,' so-called, or to provide health insurance or related employee benefits to a 'homosexual spouse.'" While no specific repeal of this language was found, it also does not appear to be included in the language of the definitional portion of the statute as it exists in its current form. If this language were found still to be law, it would need to be formally repealed to make the statute consistent with *Goodridge.*

Discrimination surprisingly occurs against persons on account of their status as married persons. Women are not infrequently subjected to stereotypical thinking concerning the impact of pregnancy and child-bearing on their work capacity. But this is a type of discrimination that has tended to be handled on the basis again of sex-discrimination (even in the case of males who, as the trend towards more equally shared child-caring duties spreads, find themselves targeted). It may be that the MBA wishes to adopt a position favoring modifying the statute to include marital status as a protected class. But this would not be a direct consequence of *Goodridge*; and would go beyond the mandate of the Task Force. Accordingly, apart from the (apparently already deleted) language relating to homosexual marriage, no change appears to be necessary in the discrimination statute as a direct consequence of *Goodridge.*

XV. Conclusion

This Interim Report of the Task Force has described the many statutes in the General Laws that may need to be altered to comply with the ruling in *Goodridge v. Department of Public Health, supra*. As stated in this Report, the Task Force is considering two approaches: (1) an omnibus bill that would address most of the needed changes in one stroke; and (2) a section by section approach to particular statutes.

The Task Force's work is not complete. The Task Force will explore further the General Laws to ensure we have addressed all post-*Goodridge* questions. It will further consider the application of the omnibus and specific section approaches to conform the General Laws to *Goodridge*. Because the Task Force requires additional time to consider this complex matter, we request that the MBA allow the Task Force to complete its work. The Task Force continues to appreciate any suggestions the members of the MBA may have to bring the General Laws into compliance with the ruling in *Goodridge v. Department of Public Health, supra*.

XVI. *Acknowledgements*

The Task Force gratefully acknowledges the contributions of all of its members, and gives special thanks for the assistance of Gail E. Horowitz, Diane Española and Lee Iannacchino. Finally, the Task Force wishes to thank Kathleen O'Donnell for her strength and wisdom in making *Goodridge* compliance a significant priority during her tenure as MBA President.

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