
COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

Hillary Goodridge and Julie Goodridge,
David Wilson and Robert Compton,
Michael Horgan and Edward Balmelli,
Maureen Brodoff and Ellen Wade,
Gary Chalmers and Richard Linnell,
Heidi Norton and Gina Smith, and
Gloria Bailey and Linda Davies,

Plaintiffs-Appellants,

v.

Department of Public Health, Dr. Howard Koh,
in his official capacity as Commissioner of
the Department of Public Health,

Defendants-Appellees.

ON APPEAL FROM SUMMARY JUDGMENT OF THE SUPERIOR COURT

BRIEF OF AMICI CURIAE
BOSTON BAR ASSOCIATION
MASSACHUSETTS LESBIAN AND GAY BAR ASSOCIATION

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I. INTEREST OF AMICI

Boston Bar Association

The mission of the Boston Bar Association ("BBA"), founded by John Adams in 1761, is "to advance the highest standards of excellence for the legal profession, to facilitate access to justice, and to serve the community at large." The BBA, calling on the vast pool of legal expertise of its members, serves as a resource for the judiciary, as well as the legislative and executive branches of government.

The interests of the BBA in this case relate most strongly to its goal of ensuring justice for all. Same-sex couples and their families are denied a striking number of core rights and protections, which are automatically granted to married couples.

Massachusetts Lesbian and Gay Bar Association

The Massachusetts Lesbian and Gay Bar Association ("MLGBA") is a state-wide professional association of lawyers that promotes the administration of justice for all persons, educates the bar about issues affecting the lives of lesbians, gay men, bisexuals, and transgendered people and advocates for the enforcement of laws promoting equal rights for all. A key aspect of MLGBA's mission is to ensure that issues pertaining to sexual orientation are handled fairly and respectfully in the Commonwealth's courts.

II. STATEMENT OF THE ISSUE

Amici accept the Statement of the Issue as set forth in the brief of plaintiffs-appellants.

III. STATEMENT OF THE CASE AND STATEMENT OF FACTS

Amici adopt the Statement of the Case and Statement of the Facts as set forth in the brief of the plaintiffs-appellants.

IV. SUMMARY OF ARGUMENT

Massachusetts laws recognize and enforce the public commitment, intimacy, and economic interdependence of married couples, bestowing significant benefits and obligations upon parties based on marital status and providing protections for their families and children. These benefits and obligations are denied to same-sex couples because they are not allowed to marry. (pp. 3-5).

The law honors and reinforces the intimate and confidential nature of marriage by bestowing upon spouses a duty of fidelity and priority in medical decision-making, granting certain rights to a decedent's spouse, including exclusive rights or priority to bring certain tort claims when a spouse is negligently injured or killed. None of these rights extend to same-sex couples. (pp. 5-11).

The law also recognizes the economic interdependence of married couples, granting to them special property ownership protections, death

benefits, insurance and employment leave benefits, tax protections, workers' compensation benefits, veteran's benefits, and MassHealth benefits, and providing specially for public employees, their spouses and families. Divorce law provides a set of predictable and settled rules that guide the dissolution of a marriage. (pp. 11-37)

Finally, married couples enjoy a presumption of parentage for children born during the marriage and the law makes it easier for married persons to assert parenthood in general. While joint adoption exists, it is not always available. The law's refusal to acknowledge a relationship between same-sex couples denies the benefit of important protections to such couples' children. (pp. 37-41).

The justifications for extending the benefits of marriage to opposite-sex couples applies equally to same-sex couples. The denial of the right to marry thus deprives same-sex couples in Massachusetts of equal protection under the law, as a matter of statutory and constitutional law. (pp. 41-50).

V. ARGUMENT

A. INTRODUCTION

Marriage confers an array of rights and duties that dramatically alters the legal status of the persons within the marriage vis-à-vis each other, the

state, and third parties.^{1/} Marriage provides a distinct social status, triggering an expectation of mutual commitment and emotional and financial interdependence. The law buttresses these expectations. Withholding the law's recognition of the marriage commitment from same-sex couples harms those couples, their children and their families and creates an untenable disparity.^{2/}

^{1/} All an opposite-sex couple must do to obtain a marriage license in Massachusetts is take a blood test, register with the town clerk, pay a small fee, and wait three days. See G.L. c. 207, §§19, 20, 28, 28A. For such a couple, only a few conditions can prevent issuance of a marriage license. See, e.g., G.L. c. 207, §§ 1-2 (if they are closely related), G.L. c. 207, § 4 (if they are already married), G.L. c. 207, § 7 (if they are underage). Yet this easily obtained license acts as a trigger to invoke a wide-ranging regulatory scheme. The regulatory function of this scheme, as noted by Justice Johnson of the Vermont Supreme Court, is to "create public records for the orderly allocation of benefits, imposition of obligations, and distribution of property through inheritance." Baker v. Vermont, 744 A.2d 864, 899 (Vt. 1999) (Johnson, concurring and dissenting). See also Turner v. Safley, 482 U.S. 78, 94 (1987) (marriage serves as a precondition to the receipt of government benefits, ... property rights, ... and other, less tangible benefits").

^{2/} See generally Jennifer Wriggins, Marriage Law and Family Law: Anatomy, Interdependence, and Couples of the Same Gender, 41 B.C. L. Rev. 265 (March 2000) [hereinafter "Wriggins, Marriage Law"]; Craig W. Christensen, If Not Marriage: On Securing Gay and Lesbian Family Values By A "Simulacrum of Marriage", 66 Fordham L. Rev. 1699, 1745-47 (1998) (describing theoretical approaches to marriage); David L.

(Footnote continued on next page)

An examination of the legal rights, protections and obligations automatically granted to married couples under Massachusetts law is followed by an analysis of the equality, due process and property provisions of the Massachusetts Constitution and Declaration of Rights, all supportive of the profound need for this Court to extend the right to marry to same-sex couples under Massachusetts law.

B. MASSACHUSETTS LAWS THAT RECOGNIZE THE INTIMATE AND CONFIDENTIAL RELATIONSHIP BETWEEN MARRIED COUPLES DO NOT PROPERLY TAKE INTO ACCOUNT THE ANALOGOUS RELATIONSHIP BETWEEN SAME-SEX COUPLES.

Many Massachusetts laws and regulations, set forth in detail below, promote and recognize the intimate and confidential nature of a marital relationship. Failure to recognize same-sex couples in the same ways discriminates against gay and lesbian citizens. See Wriggins, Marriage Law, at 291-311.

1. The Duty Of Fidelity.

The law recognizes and enforces the public commitment of married persons that they will not be intimate with others. Adultery, although rarely prosecuted, remains a criminal offense. G.L. c. 272,

(Footnote continued from previous page)

Chambers, What If? The Legal Consequences of Marriage and the Legal Needs of Gay Male Couples, 95 Mich. L. Rev. 447 (1996) (explaining how laws support expectations for married couples); E.J. Graf, What Is Marriage For? (1999).

§ 14; see also Commonwealth v. Stowell, 389 Mass. 171, 176 (1983) (affirming constitutionality under federal law of adultery statute as applied to people who had consensual private intercourse with persons not their spouses). Adultery is also grounds for fault-based divorce. G.L. c. 208, § 1. Many same-sex couples seek to have their commitments recognized and enforced by the community. See Wriggins, Marriage Law, at 289.

2. Priority In Hospital Visitation And Medical Decision-Making Rights.

The law gives a spouse an automatic preference to make medical decisions for his disabled or incompetent spouse, absent contrary written directions in a health care proxy. See, e.g., Shine v. Vega, 429 Mass. 456, 466 (1999) (holding that in medical emergency where patient is incapable of providing consent herself, emergency physician should attempt to obtain the consent of a family member where practical)^{3/} This preference results from the recognition by the courts and the legislature that a spouse is most likely to

^{3/} Furthermore, as a matter of practice, medical institutions generally afford a married spouse unlimited access to his or her spouse in the hospital, even when others are denied.

know the wishes of the incapacitated person. Same-sex partners are not entitled to this preference.^{4/}

3. Rights Granted Upon The Death Of One Spouse.

A decedent's surviving spouse has rights superior to those of the decedent's family or next of kin. See generally Vaughn v. Vaughn, 294 Mass. 164 (1936). A surviving spouse's priority arises with respect to the disposal of the decedent's body, the right to decide about anatomical gifts, and to be present during an autopsy in certain circumstances. See generally Id.; In re Spring, 380 Mass. 629, 635 (1980); Stackhouse v. Todisco, 370 Mass. 860, 860 (1976); G.L. c. 38, § 13 (disposition of body); G.L. c. 113 § 8 (anatomical gifts); G.L. c.40 § 36A (autopsy). A surviving partner is given no such priority by courts.^{5/}

^{4/} While health care proxies are a formal, recognized manner of enabling a same-sex partner to make health care decisions on behalf of an incapacitated partner, proxies often are not prepared. See Chambers, supra note 2, at 457 ("Like most heterosexuals, most gay men and lesbians are reluctant to think about their mortality and procrastinate about remote contingencies. They fail to execute wills and powers of attorney, even though they are often aware of the unfortunate consequences of failing to act."). Even if prepared, proxies may not always be honored. See G.L. c. 201D, § 5.

^{5/} A surviving spouse holds a permanent right of "interment for his own body" in the lot or tomb owned by the deceased spouse. See G.L. c. 114, §§ 29-33.

These rights exist based on the law's recognition of a spouse's need for privacy and closure after such a loss, and knowledge of the final wishes of a deceased. While partners in same-sex couples likely have the best understanding as to their partners' last intentions, the law does not extend to them comparable legal rights to effectuate those wishes.

4. Tort Claims And Crime Victim's Rights Laws.

When a married person is wrongfully or negligently injured or killed, many tort claims are available only to the victim's surviving spouse. The assumption that an injury to one spouse is an injury to both is not extended to same-sex couples. See Feliciano v. Rosemar Silver Co., 401 Mass. 141, 142 (1987) (rejecting wrongful death claim for "de facto married couple" together for twenty years).

a. Claims based on negligently-caused death or injury of a loved one.

Spouses have either exclusive rights or priority to bring claims for loss of consortium, wrongful death, and wrongful autopsy claims arising from the negligent injury or death of a loved one. See Feliciano, 401 Mass. at 142 (rejecting loss of consortium claim by opposite-sex de facto married coupled on basis that couple refused to accept "correlative responsibilities of marriage"). This treatment manifests society's belief that intimate

relationships engender emotional and financial dependence, "both recogniz[ing] roles that already exist - the spouse as soulmate, caretaker, and confidant - and reinforc[ing] the legitimacy of the performance of those roles." Chambers, supra note 2, at 459.

Similarly, a decedent's spouse, children and next of kin, but not a same-sex partner, may recover damages for wrongful death including, but not limited to, "compensation for the loss of the reasonably expected net income, services, protection, care, assistance, society, companionship, comfort, guidance, counsel, and advice of the decedent," reasonable funeral and burial expenses, and punitive damages. G.L. c. 229, §§ 1, 2;^{6/} see also G.L. c. 228, § 1 (enumerating actions surviving death).

Absent statutory authority, a hospital and its medical personnel cannot order the autopsy of a deceased person without consent from the surviving spouse or next of kin. Kelly v. Brigham & Women's Hospital, 51 Mass. App. Ct. 297, 301 (2001). Failure to obtain the requisite spousal consent may form the basis for a wrongful autopsy claim Id. at 301-10.

^{6/} G.L. c. 229, § 2 is the exclusive remedy for the recovery of wrongful death damages.

b. Protections and rights of the families of crime victims and witnesses.

The laws guaranteeing certain protections to family members of crime victims define "family member" as a "spouse, child, stepchild, sibling, parent, stepparent, dependent . . . or legal guardian of a victim." G.L. c. 258B, § 1. A same-sex partner thus must legally establish economic dependency on the victim post-crime to receive such protections.^{7/}

This definitional exclusion of same-sex partners results in a denial of significant rights and protections afforded to other family members: reimbursement for "reasonable mental health counseling," "reasonable costs for maintaining [homemaker] services," and loss of the victim's support,^{8/} see G.L. c. 258C, §§ 3(2)(C), 3(2)(E),

^{7/} Because of the ways in which the inability to marry poses barriers to true interdependence for same-sex couples, proving the requisite dependency may be impossible. See M.V. Lee Badgett, Money, Myths, and Change: The Economic Lives of Lesbians and Gay Men, at 161 (2001) [Badgett, Myths] (noting that the inability to marry "reduce[s] the likelihood that couples would specialize or pool their time and money resources" in a way which mirrors traditional "dependence").

^{8/} In the wake of the September 11 attacks, the American Red Cross expanded eligibility for aid to family members to include "significant other" and "housemates" who share property, bank accounts, utility bills, or domestic partner registration. See Diane Cardwell, National Briefing - Washington: Red

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3(2)(F); confidentiality by court order as to their residential address, telephone number, place of employment or school G.L. c. 258B, § 3(h); a "secure waiting area" at trial, separate from that of the defendant, G.L. c. 258B, § 3(i); and of family support services for any family member who suffers "direct or threatened physical, emotional or financial harm as the result of the commission or attempted commission of a crime," G.L. c. 258, § 5. Moreover, a victim and her family members must be kept informed as to the parole eligibility and status of a defendant, G.L. c. 258B, §§ 3(s)-(t); have the right to be present at all court proceedings related to the offense committed against the victim, G.L. c. 258B, § 3(b); and if the victim is unable to do so, the victim's attorney or designated family member may make an oral or written statement. G.L. c. 279, § 4B; G.L. c. 258B, § 3(p).

5. Miscellaneous Provisions.

Massachusetts protects the intimacy and privacy of marriage even when doing so requires limiting full disclosure in the judicial process.

The testimonial exclusion statute imposes an absolute bar on one spouse's testifying about private

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Cross Policy on Gays, N.Y. Times, August 23, 2002, at sec. A, p. 14.

conversations with the other in both criminal and civil cases. G.L. c. 233, § 20. This exclusion applies even if both spouses want the evidence to be admitted.^{9/}

The impact of the statute's failure to extend these same protections to same-sex couples is two-fold: first, same-sex couples' privacy is left unprotected, and second, testimony is permitted that may be influenced by a "bias of affection." Gallagher, 402 Mass. at 460 (quoting 2 J. Wigmore, Evidence § 601 (Chadbourn rev. ed. 1979)).

State and federal law presumes that spouses' interests are aligned and that spouses may be partial to one another. For public employees, the Commonwealth requires disclosures and recusals if a public employee's family member (defined to include "the employee and his spouse, and their parents, children, brothers and sisters,") has a financial or personal stake in a matter before the public employee. See G.L. c. 268A, § 1; G. L. c. 268A, § 6 (Commonwealth employees); G. L. c. 268A, § 13 (county employees); G.L. c. 268A, § 19 (municipal

^{9/}See Gallagher v. Goldstein, 402 Mass. 457 (1988). In addition, one spouse cannot be compelled to testify in a criminal proceeding against the other about any matter. G.L. c. 233, § 20.

employees).^{10/} Marital status and presumed bias also figures into the availability of retail liquor licenses, G.L. c. 138, §§ 15, 18B, as well as the ability to recommend a private detective license, G.L. c. 147, § 24, and the ability to serve on the Massachusetts Crime Commission. Sheridan v. Gardner, 347 Mass. 8, 15 (1964) (expressing policy reasons for excluding members of a convict's immediate family).

C. SAME-SEX COUPLES ARE DEPRIVED OF THE BENEFITS AND BURDENS OF MASSACHUSETTS LAWS THAT TREAT MARRIED COUPLES AS ECONOMICALLY-INTERDEPENDENT UNITS.

Many Massachusetts laws recognize the married couple as an economic unit, and provide special treatment to them based on assumptions that they will pool assets and become economically dependent upon each other.^{11/} Basically, this translates into

^{10/} The legal presumption of shared interests is also reflected in laws requiring public officials to publicly disclose what is normally considered personal information. Public officials or candidates for public office must disclose personal financial information, including information concerning spouses and other immediate family. See Opinion of the Justices to the Senate, 375 Mass. 795 (1978).

^{11/} While unmarried couples may enter into contracts addressing property and financial matters, Wilcox v. Trautz, 427 Mass. 326 (1998), such contracts are no substitute for marriage. Even if couples could contract for "marital rights" at divorce, they cannot compel the state or third parties to treat their

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requirements that spouses support each other. See G.L. c. 273, § 1 (criminalizing as a felony the abandonment of a spouse without making arrangements for support).^{12/} Spouses are also liable for each other's debts where incurred for "necessaries" (such as food and basic clothing), G.L. c. 209, § 1 ("both spouses shall be liable jointly or severally for debts incurred on account of necessities furnished to either spouse or to a member of their family."). Even when they live together, combine resources and provide mutual emotional and financial support, same-sex couples, willing to take on marriage duties, are denied these automatic marital benefits and protections.

1. Property Ownership Protections: Tenancy By The Entirety and Homestead Protections.

Married spouses have the exclusive right to own real estate as tenants by the entirety, a form of

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relationship as a marriage. This matters especially when the issue is wrongful death, the state pension system, worker's compensation benefits and taxation.

^{12/} The duty of spousal support protects married individuals from poverty, and alleviates state support of the poor. Prior to 1986, G.L. c. 273, § 1 punished "any spouse or parent who abandons or leaves his spouse or minor child in danger of becoming a burden upon the public." See also Comm'r of Corps. & Taxation, 304 Mass. 147, 152 (1939) (arguing that "[i]t is in the public interest that such support be afforded").

ownership that provides them protection against creditors, and allows the automatic descent of real property to the surviving spouse without probate. See G.L. c. 184, § 7; see also Finn v. Finn, 348 Mass. 443, 446 (1965) (tenancy by the entirety cannot exist between unmarried persons). Same-sex couples may hold property only as joint tenants with right of survivorship, as tenants in common, or individually. See G.L. c. 184, § 7.^{13/}

While married and unmarried persons may file for homestead protection on their family home, thereby securing up to \$300,000 of equity in the property from creditors, when a married person makes such a filing, the benefit of the homestead protection extends to the declarant, a spouse and their children. G.L. c. 188, § 1. This protection continues for the benefit of the surviving spouse and children after the death of either spouse. G.L. c. 188 § 4. In contrast, if a same-sex partner files a homestead declaration, the protection expires upon that partner's death,

^{13/} These alternatives do not provide the same creditor protection and survivorship rights. See, e.g., West v. First Agr. Bank, 382 Mass. 534 (1981) (tenants in common have no survivorship rights); Ames v. Chandler, 265 Mass. 428 (1929) ("Joint tenancy" may be severed by an act of one tenant at any time); see also, Wood v. Wood, 369 Mass. 665 (1976).

requiring a subsequent filing of a new homestead declaration by the survivor.^{14/}

2. Numerous Death Benefits Granted To Married Spouses Are Denied To Same-Sex Couples.

Massachusetts law automatically provides a slate of protections to a decedent's surviving spouse and their children. By contrast, a surviving same-sex partner must bear both the extreme emotional strain of the loss of a partner and the hardship of losing access to resources and protections brought to the relationship by the decedent. See Wriggins, Marriage Law, at 289.

a. Automatic Rights of Inheritance.

Without a will, a surviving spouse is entitled automatically to inherit the deceased spouse's property. G.L. c. 190, § 1. If a will does not provide adequately for the surviving spouse, he or she may waive the will and take an "elective share"

^{14/} If a same-sex couple owns and lives in a home together, each partner may file for homestead protection, but only the first to file will secure the protection, leaving the second declarant unprotected from his or her creditors and leaving the first declarant's interest subject to an attachment by the second declarant's creditors. See Howard J. Alperin, et al., Homestead -- Generally, 14B Mass. Prac. Summary of Basic Law § 17.89 (3d ed. 2001) (despite conflicting terms in the statute "the specific requirement that only one owner may acquire a homestead should be followed").

consisting of a lifetime estate in at least one-third of the probate estate. G.L. c. 191, § 15. The surviving spouse also has the right of dower, i.e., the right to hold for life one third of all land owned by a deceased spouse at the time of death. G.L. c. 189, § 1 et seq.

b. The Administration Of Estates.

A surviving spouse has first priority to administer the estate of the deceased spouse if he or she died without a will, and must consent to any other person's appointment as administrator. G.L. c. 193, §§ 1, 2. Furthermore, the "next of kin", even if estranged from the decedent during his or her lifetime, may administer the estate of a decedent who had no surviving "spouse." Id.

c. Additional Probate Protections And Allowances.

Beyond inheritance, the law provides assistance to the surviving spouse including access to short term allowances for food, housing and clothing, and the right to occupy the home of the deceased spouse for six months without paying rent. G.L. c. 196, §§ 1, 2. A surviving spouse is also entitled to advance payments from the estate for his/her maintenance. G.L. c. 193, § 13. A same-sex partner has no such benefits unless provided for in a will. Moreover, even a will cannot provide a same-sex partner the

option given surviving spouses to receive coverage under a deceased spouse's health insurance plan for up to 36 months. See, e.g., G.L. c. 176J, § 9.

d. Presumptions of Shared Property.

The intestacy laws also track shared aspects of a married couple's financial lives, and ease the way for surviving spouses. For inheritance purposes, when a spouse dies, their vehicle is presumed to have been owned jointly with his or her spouse and passes to the spouse absent contrary testamentary instruction. G.L. c. 90D, § 15A. Wages owed to a deceased employee may be paid to the surviving spouse. See, e.g., G.L. c. 149, § 178A (generally); G.L. c. 149, § 178C (public employees); G.L. c. 35, § 19B (county employees). Similarly, after a spouse's death, a bank or credit union may pay the balance of monies in an account to the surviving spouse or next-of-kin in certain circumstances. G.L. c. 167D, § 33 (banks); G.L. c. 171, § 42 (credit unions). A surviving spouse may also register in his or her own name up to \$2,100 of securities that had been owned individually by the spouse. G.L. c. 196, § 9. A surviving spouse or heir-at-law (next-of-kin, i.e., blood relatives, but not same-sex partners) may collect payments owed to the deceased person's estate of up to \$10,000 from an insurance company owed to the deceased person's estate

which are \$10,000 or unless the estate itself makes a claim. G.L. c. 175, § 187E. Finally, a life insurance company may pay \$250 to the executor or surviving spouse for expenses associated with the funeral for the deceased spouse. G.L. c. 175, § 134.

e. Continuation of Business.

On the assumption that married couples form an economic unit, Massachusetts law allows the surviving spouse of a person engaged in a number of registered professions to carry on the business under the supervision of another professional. For example, a surviving spouse is eligible to continue the business of an insurance agent or broker (G.L. c. 175, § 174D), a pharmacist (G.L. c. 112, § 36), a dentist (G.L. c.112, § 53), an optometrist (G.L. c.112, § 73), or a funeral director (G.L. c.112, § 83).

3. Insurance Coverage and Employment Leave Benefits Provided to Married Persons but Unavailable to Same-Sex Couples.

Massachusetts laws relating to insurance and work leave are limited in scope to persons related by blood or marriage, putting many insurance and work leave benefits out of the reach of same-sex couples.

a. Health And Life Insurance.

In Massachusetts, marital status is fundamental to determining the beneficiaries under an individual health insurance plan. The general rule requires a

valid policy to "purport to insure only one person." An exception exists for "any two or more eligible members of [a] family," defined as including a "husband, wife, dependent children [. . . and any other person dependent upon the policyholder." G.L. c. 175, § 108, ¶ 2(a)(3).^{15/}

Access to health insurance is a "critical social necessity," Connors v. City of Boston, 430 Mass. 31, 43 (1999). For a significant number of Massachusetts same-sex couples, obtaining health insurance individually through their respective employers is the only way they can afford coverage.^{16/}

Even if employers do provide health benefits to their employees' same-sex partners, "only the married employees obtain the benefit of the tax exemption for the value of their partners' health coverage; the employee with a same-sex partner must report the value of the benefit to his partner as income and pay taxes on it." Chambers, supra note 2, at 475; Christensen,

^{15/} The spousal right to shared medical policies is explicitly guaranteed in Massachusetts by the inclusion of "spouse" in the term "dependent" for laws regarding health, dental and optometric insurance. G.L. c. 176B, § 1 (medical service corporations); see also G.L. c. 176M, § 1 (non-group health insurance plans); G.L. c. 176E, § 1 (dental service corporations); G.L. c. 176F, § 1 (optometric service corporations).

^{16/} See generally Badgett, Myths, at 160.

supra note 2, at 1735. See also Priv. Ltr. Rul. 9717018 (Apr. 25, 1997); Priv. Ltr. Rul. 9603011 (Jan. 19, 1996); Priv. Ltr. Rul. 9231062 (May 7, 1992). See also infra Section C.4.

Furthermore, same-sex partners of Boston municipal employees are explicitly barred from coverage under their partner-employee's group health plan. In Connors v. City of Boston, 430 Mass. 31 (1999), taxpayers challenged an executive order extending municipal employee group health insurance benefits to registered domestic partners of city employees and their dependents. The Supreme Judicial Court held that the executive order was inconsistent with the statutory definition of "dependents," under G.L. c. 32B, § 2 and, accordingly, enjoined its application. 430 Mass. at 43.

Marital status is also relevant when health benefits are lost because of employment termination or death. When an insured person is laid off or dies, his or her dependents may continue coverage for 39 weeks. G.L. c. 175, § 110G; see also G.L. c. 176A, § 8D (non-profit hospital service corporations); G.L. c. 176B, § 6A (medical service corporations). Similarly, spouses are entitled to continued health and other medical insurances even after the dissolution of the marriage through a judgment of divorce or separation. G.L. c. 175, § 110I; see also G.L. c. 176A, § 8F (non-

profit hospital service corporations); G.L. c. 176B, § 6B (medical service corporations); G.L. c. 176G, § 5A (health maintenance organizations).

Life insurance laws also acknowledge the financial and mutual interdependence of a married couple. A single life insurance policy may issue "on the lives of any two or more members of a family." G.L. c. 175, § 123; see also G.L. c. 175, § 128 (permitting certain minors to contract for life insurance only for their own benefit or for that of a spouse, child, parent, sibling or grandparent). State statutes strictly define "members of a family" as "husband, wife, children, adopted children, or step-children." G.L. c. 175, § 123.

b. Bereavement or Medical Leave.

Work leave for bereavement and medical purposes reflects the growing national consensus that familial life requires a balance between a worker's employment and home lives. See, e.g., Family and Medical Leave Act of 1993, tit. VI, § 2.^{17/} Both the Massachusetts Family and Medical Leave Act and the federal act limit qualifying leave to those individuals related by blood or marriage. Id.; G.L. c. 149, § 52D.

^{17/} See also Chambers, supra note 2, at 459; Wriggins, Marriage Law, at 280-81.

4. Tax Laws Recognize the Economic Unit of Married Couples But Fail To Do So For Same-Sex Couples.

The Federal tax system, to which the Commonwealth's system relates, "presumes that persons are either married or live their lives with a fair degree of separation." Patricia Cain, Heterosexual Privilege And The Internal Revenue Code, 34 U.S.F. L. Rev. 465, 466 (Spring 2000) [hereinafter Cain, Heterosexual Privilege]. Tax laws relating to income, gift and estate taxes treat married couples as economic units.

Married couples enjoy the benefits and conveniences of joint filing, can avoid taxes under cafeteria health insurance plans for a spouse's health insurance, and can claim unlimited marital deductions for transfers of wealth to their spouses, during lifetime and at death. Transfers of wealth incident to divorce proceedings are also not taxed. See Chambers, supra note 2, at 472-75; Ronnie Cohen & Susan B. Morris, Tax Issues from 'Father Knows Best' to Heather Has Two Mommies, Tax Notes, Aug. 30, 1999 at 1309. Because of the Defense of Marriage Act (DOMA) and the separate federal tax regime, allowing same-sex couples to marry under state law will not

immediately change federal tax laws.^{18/} Permitting marriage for same-sex couples, however, constitutes a major step toward bringing state tax law into line with the reality of financial arrangements within today's families.^{19/}

a. Joint filing.

Under the laws of the Commonwealth, married couples in Massachusetts may file state income taxes jointly. G.L. 62C, § 6. Joint filing allows spouses to combine their income, losses and exemptions, which is an economic benefit for traditional one-earner families and many two-earner families. Patricia Cain, Dependency, Taxes and Alternative Families, 5 J. Gender Race & Just. 267, 272 (Spring 2002) (demonstrating added costs, lack of guidance, and added difficulty for same-sex couples with merged finances due to inability to file joint return). As a

^{18/} Under the DOMA, enacted in 1996, federal agencies such as the Internal Revenue Service recognize marriage only between a man and a woman. However, Massachusetts could still grant these spousal benefits to married same-sex couples under state law.

^{19/} Furthermore, once any state begins allowing same-sex couples to marry, the federal government may well return to its previous practice of deferring to state definitions of marriage. See Evan Wolfson & Michael F. Melcher, DOMA's House Divided, 44-Sep. Fed. Law. 30, 33 (1997) (both Congress and federal courts deferred to state law on domestic relations in general and civil marriage in particular).

practical matter, joint filing reduces the cost of the married couples' recordkeeping and recognizes the relationship as one of commingled finances. See Cain, Heterosexual Privilege, supra at 494.

b. Estate Taxes.

The estate tax is a transfer tax imposed on the value of all property in the gross estate of a decedent at the time of death. G.L. c. 65C, § 5. An unlimited marital deduction is available for married couples under both Massachusetts and federal law. See G.L. c. 65C, § 3; I.R.C. § 2056 (2002) Same-sex couples are unable to take advantage of this economic benefit, and must pay estate and federal gift taxes on transfers of assets that married couples freely exchange without tax consequences.

5. Workers' Compensation Laws Provide Protections to Married Spouses, Not Available to Same-Sex Couples.

Workers' compensation laws form a type of insurance program designed to assist an employee and those members of the employee's "family" or "next of kin" who were wholly or partially dependent on the employee at the time of the his or her job-related injury or death. G.L. c. 152, § 1. The worker's spouse is specifically protected because the workers' compensation laws conclusively presume that he or she was wholly dependent for support upon the injured or

deceased employee. G.L. c. 152, §§ 32 (deceased spouse), 35A (injured spouse). Specifically, in the case of a deceased employee, the surviving spouse is entitled to two-thirds of the working wage of deceased employee until such time as the surviving spouse remarries. G.L. c. 152, § 31.

6. Spouses and Families of Veterans Receive Benefits Denied to Same-Sex Partners.

The recognition of the economic interdependence of married couples includes special rights and benefits granted to spouses and families of veterans. For example, veterans and their dependents (including a spouse, surviving spouse, child or parent) may receive information, and assistance regarding employment, educational options, hospitalization, medical care, pensions and other veterans' benefits from the Massachusetts Department of Veteran's Services. G.L. c. 115, §§ 1, 10. In addition, civil service laws prefer a surviving spouse or parent of a veteran killed in action or who died from service-connected disabilities. G.L. c. 31, §§ 26, 28.

7. Massachusetts Protects the Spouse And Family Of A Deceased Public Employee.

Massachusetts public employees and their families have access to a wide range of benefits designed to protect the source of family income in the event of retirement, disability, or death. Because these

protections are not available to public employees in same-sex relationships, such employees, in effect, are compensated significantly less than their married counterparts.

a. Salary and Financial Protections.

A surviving spouse of a firefighter, police officer or corrections officer killed in the performance of duty shall be paid annually the maximum salary the deceased employee could have received. G.L. c. 32, § 100. A one-time award of \$100,000 in "line of duty" benefits also shall be paid to a surviving spouse (or certain family members) of a deceased firefighter, public prosecutor, police officer or corrections officer. G.L. c. 32, § 100A. In addition, widows or widowers of employees who die after they have retired or have become disabled, are entitled to an annual allowance of \$6,000. G.L. c. 32, § 101. All such benefits paid to surviving spouses of public employees (e.g., retirement allowance, pension or annuity) may be increased as the cost of living increases. G.L. c. 32, §§ 102, 103. Despite the service of gay and lesbian public servants, their partners have no such protections.^{20/}

^{20/} In recognition of the disparate treatment of the families of gay and lesbian firefighters and police officers killed on 9/11, Congress passed and

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b. The Commonwealth Pension.

Under the Massachusetts government pension system, retired workers generally have several options for the payout of their pension. One option, the "Joint and Last Survivor Allowance", allows them to receive a smaller amount while they are alive and to name a spouse, child, or certain other relatives as a continued beneficiary after the worker's death. Under the law, the named beneficiary receives two-thirds of the benefits the retiree had been receiving after the retired employee dies. G.L. c. 32, § 12(2) Option (a); see also Jennifer Wriggins, Kinship and Marriage in Massachusetts Public Employee Retirement Law: An Analysis of the Beneficiary Provisions, and Proposals for Change, 28 New Eng. L. Rev. 991, 997-1001 (1994) [hereinafter "Wriggins, Kinship"]. This option provides maximum protection to the family of a deceased retiree. The employee, however, may only designate a beneficiary from certain limited categories of people, including a "spouse, former spouse who has not remarried, child, father, mother, sister or brother"). Id. at 1000.

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President Bush signed the Mychal Judge Act, allowing federal death benefits to be paid to the same-sex partners of emergency workers killed in the line of duty. See Elizabeth Bumiller, Unlikely Story Behind a Gay Rights Victory, N.Y. Times, Jun. 27, 2002.

Another pension option, the "Member Survivor Allowance" provides two-thirds of the employee's pension amount to a surviving spouse where the public employee-spouse dies before retirement. G.L. c. 32, § 12(2)(c), (d). The two-thirds calculation is based on what the employee would have been entitled to if he or she had died on the date of retirement. Further, the Massachusetts state pension system provides an accidental death benefit to the surviving spouse of a worker who dies because of an injury sustained or hazard undergone as part of his or her job. G.L. c. 32, § 9(1), (2)(a).^{21/}

8. MassHealth Benefits Protect The Economic Interdependence Of Married Spouses.

In Massachusetts, low-income residents turn to a state Medicaid program, MassHealth, for assistance in

^{21/} The only option for a retired worker who wishes to provide continued protection for a same-sex partner is the "Cash Refund Annuity Option." This option allows any named beneficiary to receive the unpaid balance of the monies the worker contributed to the retirement system (usually approximately 10% of the total pension), but only to the extent the worker's contribution has not already been paid out. G.L. c. 32, § 12. There is no financial justification for this different treatment of same-sex partners as the three options for those who die after retirement are actuarial equivalents, and thus are designed to cost the government exactly the same amount. Wriggins, Kinship, at 1001.

obtaining health care.^{22/} One important aspect of MassHealth is the assistance provided to elderly residents, especially where one spouse requires institutionalized health care in a medical facility, and the other remains living in the general community (the "community spouse"). See 130 C.M.R. § 515.002.^{23/}

To become eligible for MassHealth benefits, elderly individuals must first reduce all of their significant assets and income. See Tarin, 424 Mass. at 746 n.7; 130 C.M.R. 520.001; Robyn O'Neill & Lee Beneze, A Guide to Medicaid's Spousal Impoverishment Rules, 84 Ill. B.J. 22, 26 (Jan. 1996). Lawmakers have created specific protections for community spouses that are unavailable to same-sex couples.^{24/}

^{22/} The MassHealth program, part of the federal Medicaid program, provides medical assistance to individuals who have insufficient means to pay for the care and services they need. 42 U.S.C.A. § 1396 (2002); Tarin v. Comm'r of the Div. of Med. Assistance, 424 Mass. 743, 746 (1997).

^{23/}See generally 130 C.M.R. §§ 515.000-522.000 (providing rules for Medicaid eligibility, spousal income and asset protections, transfer of resources, liens, and estate recovery).

^{24/} The MassHealth regulations define a couple as "two persons married to each other according to the rules of the Commonwealth of Massachusetts," and a spouse as "a person married to the applicant or member according to the laws of the Commonwealth of Massachusetts." 130 C.M.R. § 515.001.

a. Eligibility Determinations.

In determining the eligibility of an applicant who is institutionalized and has a healthy spouse in the community, the Division of Medical Assistance ("DMA") evaluates the married couple's combined assets. 130 C.M.R. §§ 520.002, 520.016(B).^{25/} Normally, the community spouse may keep an "asset allowance" and any home shared between a community spouse and an institutionalized spouse is not considered for eligibility.^{26/} Id.; 130 C.M.R. § 520.007(G). Any further assets held by the couple -- regardless of whose name the assets are in -- are

^{25/} Some economists have argued that taking cognizance of same-sex couples' relationships in means-tested government programs would financially benefit the federal and state governments. See Badgett, Myths, at 3 (ability of state to require spousal support for married same-sex couples will reduce government expenditures on means-tested programs); M.V. Lee Badgett and Josh A. Goldfoot, For Richer, For Poorer: The Freedom to Marry Debate, 1 Angles: The Policy Journal of the Institute for Gay and Lesbian Strategic Studies 2-3 (May 1996) (exploring potential reductions spending for state and federal governments by recognizing marriage for same-sex couples).

^{26/} Property owned jointly by an institutionalized applicant or member and someone (such as a same-sex partner) not a "relative" under the MassHealth regulations may be excluded as an asset from eligibility determinations only if the joint owner would suffer an "undue hardship." 130 C.M.R. § 520.007(G) (11) (b).

considered excess assets of the applicant that must be spent down. See 130 C.M.R. § 520.016(B).

Assets held jointly by unmarried couples are counted in eligibility determinations according to the applicant's share in ownership. See 130 C.M.R. § 520.005. Where shared assets are held primarily in the name of the institutionalized partner applying for MassHealth coverage, however, the community partner does not receive an asset allowance, and the assets, less the applicant's \$2,000 entitlement, will all be considered and required to be spent down for the applicant's eligibility. See 130 C.M.R. §§ 515.011, 520.003, 520.004 (emphasis added).^{27/} These rules could potentially leave a community partner, who has historically shared finances with his or her same-sex partner, with no assets. If the home is in the institutionalized partner's name, a community partner could find him or herself without a home, or forced to buy his or her own home for fair market consideration.

^{27/} Where assets are held solely by the "community partner" in a same-sex couple, that person would be entitled to keep all of them to the state's detriment, as the institutionalized spouse's own assets would be the only ones considered for eligibility purposes. See 130 C.M.R. §§ 520.003, 520.016(B).

b. Limitations On Transfers Of Property.

Massachusetts imposes a period of Medicaid ineligibility on institutionalized persons who transferred, or whose spouses transferred, resources for less than fair market value within the last 36 months to anyone other than a permissive transferee, such as a spouse or disabled child. 130 C.M.R. § 520.019(B); 42 U.S.C.A. § 1396p(c).^{28/} A same-sex partner is not a permissible transferee. Id.

c. Efforts To Recover Benefits Provided.

Under the MassHealth program, the agency will attempt to recover the cost of benefits provided to MassHealth members, either through the use of liens on property, or recovery from the estate of a deceased MassHealth member. See 130 C.M.R. §§ 515.011, 515.012; 42 U.S.C.A. § 1396p(b); Donald N. Freedman & Emily S. Starr, Aging Or Incapacitated Client In Massachusetts: Protecting Legal Rights, Preserving Resources And Providing Health Care Options, §36.6.2 (Mass. Continuing Legal Educ. 1998). The DMA will refrain from placing a lien on a long-term-care patient's

^{28/} An exception to this prohibition may be found if an applicant demonstrates to the DMA that he or she transferred resources "exclusively for a purpose other than to qualify for MassHealth," or intended to dispose of a resource at fair-market value or for other valuable consideration. 130 C.M.R. § 520.019(F); 42 U.S.C.A. § 1396p(c) (2) (C).

former home if a spouse lives there. 130 C.M.R. § 515.012(A). Similarly, the DMA will not undertake estate recovery procedures while a deceased member's spouse remains in the marital home. 130 C.M.R. § 515.011(A) & (C). If, however, the institutionalized partner of a same-sex couple was the sole owner of the house at the time of his or her death, the house could be sold by the DMA for cost recovery regardless of whether or not the same-sex community partner still lived there. See 130 C.M.R. § 515.011.

The current regulatory scheme for Medicaid in Massachusetts protects a community spouse's economic well-being, while requiring that a spouse receiving MassHealth benefits finance as much of his or her own care as possible. The legal definition of "spouse" excludes same-sex couples from these protections, even if they are economically interdependent.

9. Divorce Law Protections Are Withheld From Same-Sex Couples.

Once a marriage is over, the law recognizes the economic interdependence of couples by providing mechanisms through the divorce process for dividing property and addressing support concerns. G.L. c. 208, §§ 20, 34, 37.^{29/} See also Badgett, Myths, at 160

^{29/} Failure to provide suitable support for one's spouse is grounds for divorce, as are desertion for a
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(if marriage ends, "institutions like alimony, property division, and child support" recognize the lifetime of "promises that promote the pooling of time and financial resources by the couple").

The divorce process contains rules and a body of law intended to provide for an equitable division of property upon divorce. G.L. c. 208, § 34. This extends to "all vested and nonvested benefits, rights, and funds accrued during the marriage." Id. Non-economic contributions are also recognized because it takes more than earnings to maintain a household. See also Drapek v. Drapek, 399 Mass. 240, 247 (1987) (judge may assign a monetary value to homemaking based on expert testimony); see also G.L. c. 208, § 34 (in allocating marital assets and alimony, "[t]he court may also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates and the contribution of each of the parties as a homemaker to the family unit"). The detailed procedures provided upon divorce, for couples with and without children, demonstrate the importance the state attaches to winding down the marriage relationship.

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year and conditions, such as habitual intoxication or imprisonment that prevent a spouse from being a provider. G.L. c. 208 §§ 1, 2.

By contrast, same-sex couples who separate do not have access to the predictable rules set out in the statutes or developed through case law. Equitable claims of unmarried persons are extremely limited and are not equivalent to the rights secured through marriage. Collins v. Guggenheim, 417 Mass. 615, 617-18 (1994) (male cohabitant could not make a claim for ownership in property of female cohabitant in whose name property was titled despite his large financial contribution to its improvement). The absence of a viable framework for winding down the relationship can harm the economically disadvantaged partner.

Economic dependency issues are also acknowledged and addressed by the existing statutory scheme. For example, one spouse may be assigned the cost of the other's counsel fees during divorce. G.L. c. 208, § 17. More importantly, alimony is available if appropriate to ensure that the less economically empowered spouse in a long-term marriage can maintain his or her standard of living. G.L. c. 208, § 34; Denniger v. Denniger, 34 Mass. App. Ct. 429, 430 (1993). There are no enforceable support obligations between former same-sex partners absent specific agreement between them.

Another "benefit" of divorce is that transfers of property between spouses or ex-spouses incident to divorce are not taxed. I.R.C. § 1041. In contrast,

the precise tax consequences of a division of property between separating same-sex couples are not governed by statute or case law and indeed are "subject to much speculation amongst practitioners." Cain, Heterosexual Privilege, at 482.

D. MASSACHUSETTS LAWS RELATING TO MARRIED PERSONS AS PARENTS --PARENTAL RIGHTS AND PROTECTION OF CHILDREN FAIL TO CONSIDER THE BEST INTERESTS OF CHILDREN OF SAME-SEX COUPLES.

When it comes to children, the law is overwhelmingly concerned with securing and promoting their best interests. Married couples are provided certain advantages which ultimately redound to the benefit of any children the couple may have.

First, as this brief has demonstrated, married couples benefit from wide-ranging legal, emotional and economic protections as well as established legal responsibilities. That structure itself supports the economic and emotional well-being of the couple and, therefore, benefits any children in the family. Second, married couples are advantaged in asserting parenthood. While nearly all the benefits and responsibilities of being a parent turn on the legal determination of parentage rather than upon being a married person, see generally G.L. c. 209C; G.L. c. 119, married persons can assert parenthood more easily than unmarried persons. Massachusetts law presumes that a child born to a married woman is the child of

the married couple. G.L. c. 209C, § 6;^{30/} G.L. c. 46, § 4B (child conceived by artificial insemination with the consent of the husband is child of both parents). Third, a child of a married couple "benefits" by application of predictable rules for custody, visitation and support if his parents divorce. G.L. c. 208, §§ 18, 19, 20, 20A, 28, 28A, and 31.

Massachusetts, like some other states, has made enormous strides to secure the interests of children regardless of the circumstances of their birth. Woodward v. Comm'r of Soc. Sec., 435 Mass. 536, 546 (2002) ("Repeatedly, forcefully, and unequivocally, the legislature has expressed its will that all children be 'entitled to the same rights and protections of the law' regardless of the accidents of their birth" (citations omitted)).^{31/}

^{30/} Because of the law's concerns with both truth and the child's best interests, where a putative father can demonstrate a "substantial parent-child relationship" by clear and convincing evidence, he may proceed with a paternity action despite the fact that the mother is married. C.C. v. A.B., 406 Mass. 679, 690 (1990).

^{31/} Acknowledging that the best interests of the child is the single most important factor in resolving such issues, Massachusetts courts have long rejected the notion that a parent's sexual orientation, standing alone, precludes him or her from being a fit parent. See, e.g., Bezio v. Patenaude, 381 Mass. 563, 578 (1980) ("In the total absence of evidence suggesting a correlation between the mother's

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With respect to same-sex couples, joint adoption of a partner's child or of a child available for adoption secures a legal relationship between the child and both parents. Adoption of Tammy, 416 Mass. 205 (1993); Adoption of Susan, 416 Mass. 1003 (1993).^{32/} While this protection is immensely important, it is not the equivalent of a presumption of parentage, which automatically confers rights and responsibilities on the parent. Adoption is not always available to couples due to lack of awareness, lack of resources, a fear of the legal system, or the resistance of another biological parent.

Unfortunately, when a relationship ends and there has not been an adoption by the non-biological parent, his or her custodial and visitation rights can be severely restricted unless the biological parent is willing to allow a continuing relationship between the

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homosexuality and her fitness as a parent, we believe the judge's finding that a lesbian household would adversely affect the children to be without basis in the record."); see also Doe v. Doe, 16 Mass. App. Ct. 499, 503-04 (1983) (noting same).

^{32/} Second-parent adoption is an increasingly common mechanism to allow same-sex partners to adopt their partners' children. "More than 20 states have formally recognized second-parent adoption and others have allowed such adoptions in individual cases, without ruling on the practice generally." John Leland, State Laws Vary, But a Broad Trend is Clear, N.Y. Times, Dec. 21, 2000, at F4.

child and the other parent or the other parent can establish a "de facto" parent status. In E.N.O. v. L.M.M., 429 Mass. 824, cert. denied, 528 U.S. 1005 (1999), this Court recognized the existence of *de facto* parents, defined as "one who has no biological relation to the child, but has participated in the child's life as a member of the child's family." Id. at 829 ("best interests calculus must include an examination of the child's relationship with both his legal and de facto parent"). The test is formidable, however. A *de facto* parent must (1) reside with the child, (2) with the consent and encouragement of the legal parent, perform a share of the caretaking functions at least as great as the legal parent, and (3) shape the child's daily routine, address his or her developmental needs, such as disciplining the child, provide for his or her education and medical care, and serve as moral guide. See id. at 829.^{33/} Absent the presumption of parentage accorded to married parents, one wonders how many married people could meet the standard of performing caretaking functions equal to those of their spouses.

^{33/} Appropriately, support obligations are now imposed on *de facto* parents. See, e.g., Connolly v. Michell, Nos. 99E-0183, 99E-0184 (Mass. Probate and Family Court, Apr. 2002).

While same-sex partners may both become parents, they still lack any cognizable legal relationship to each other that would grant to them the numerous preferences extended to married spouses to preserve the child's best interests. Ardizoni v. Raymond, 40 Mass. App. Ct. 734, 739 (1996); G.L. c. 208.

E. CONSTITUTIONAL BACKGROUND

Plaintiffs seek a declaration that the Department of Public Health's refusal to allow issuance of marriage licenses to individuals who wish to marry a person of the same sex violates the liberty and equality guarantees of Articles I, VI, VII and X of the Massachusetts Declaration of Rights.

The protections of liberty in Articles I and X of the Declaration of Rights have served this Commonwealth well since 1780. Article I provides:

All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their Lives and Liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under law shall not be denied or abridged because of sex, race, color, creed or national origin.

Mass. Const., Decl. of Rights, Art. I (as amended by Am. Art. CVI). Even more affirmatively, Article X provides in part: "Each individual of the society has a right to be protected by it in the enjoyment of his

life, liberty and property, according to standing laws. . . ". Mass. Const., Pt. 1, Art. X.

These forceful protections have led this Court to require that the state not interfere with important personal choices in the areas of procreation, sterilization, abortion, childrearing and family privacy.^{34/} These same personal choices and marriage, also are protected under the Fourteenth Amendment of the United States Constitution.^{35/} An individual's right to choose his or her marital partner -- including a partner of the same-sex -- also should be protected under the Massachusetts Constitution.

While the Brief of the Appellants makes these claims at greater length, the equality protections

^{34/} Department of Public. Welf. v. JKB, 379 Mass. 1, 3 (1979) (conceiving and raising children); Moe v. Sec'y of Admin. & Fin., 382 Mass. 629, 646 (1981) (abortion); Adoption of a Minor, 386 Mass. 741, 750 (1982) (family autonomy).

^{35/} In Loving v. Virginia, 388 U.S. 1 (1967) the United States Supreme Court struck down a miscegenation law in part because "the freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." Id. at 12. Subsequent cases confirm that the "right to marry is of fundamental importance for all individuals." Zablocki v. Redhail, 434 U.S. 374, 384 (1978) (striking a law which interfered with the right of persons to marry if they were delinquent in child support payments, despite an important state purpose).

under Articles I, VI, VII and X of the Declaration of Rights also support their claim.

First, insofar as the application of the marriage laws allows a man (Mr. A) to marry a particular woman (Ms. X), but denies a woman (Ms. B) the option to marry that same woman, the law creates a distinction based on sex.^{36/} Second, these same equality provisions,^{37/} along with federal law criteria for

^{36/} In defense of the bans on marriage by couples of different races, some states advanced an analogous equal application defense, i.e., that since both whites and blacks (or other groups) were equally disadvantaged from marrying, there was no discrimination. In rejecting that defense, the Supreme Court found the critical factor to be that the laws limited marital choice by an individual's race, and thus could not withstand equal protection. Loving, 388 U.S. at 11-12.

^{37/} Article VI provides in relevant part:

No man, or corporation, nor association of men, have any other title to obtain advantages, or particular and exclusive privileges, distinct from those of the community, than what arises from the consideration of services rendered to the public; . . .

Article VII states in part:

Government is instituted for the common good, for the protection, safety, prosperity and happiness of the people; and not for the profit, honor, or private interest of any one man, family, or class of men

These provisions together closely resemble the Common Benefits Clause upon which the Vermont Supreme Court premised its landmark ruling in Baker v. Vermont, 744 A.2d 864 (Vt. 1999).

determining whether a classification is suspect, provide ample authority to declare gay and lesbian people to be a suspect class pursuant to the first sentence of Article I. Under the federal framework, the relevant, non-exclusive factors used to determine whether a classification warrants heightened scrutiny include: (1) whether the group has been subjected to a history of purposeful unequal treatment; (2) whether the disadvantaged class is defined by a trait that "frequently bears no relation to ability to perform or contribute to society"; and (3) whether the group has "historically been relegated to such a position of political powerlessness".^{38/} Each of these three factors favor a finding of discrimination against gay men and lesbians to be "suspect." Massachusetts, too, may use a special analysis scrutiny of certain classifications to ensure that equality guarantees serve their intended function -- "nothing less than the abolition of all caste-based and invidious-based legislation." Plyler v. Doe, 457 U.S. 202, 213 (1982).

^{38/} See Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440-41 (1985); Plyler v. Doe, 457 U.S. 202, 216 n. 14 (1982); Mass. Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976); Frontiero v. Richardson, 411 U.S. 677, 684-87 (1973) (plurality); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

Third, even if this Court denied all of plaintiffs' claims, application of the marriage laws cannot withstand rational basis review because all legislative classifications must be rationally related to a legitimate state interest. Murphy v. Comm'n of Dept. of Indus. Accidents, 415 Mass. 218, 226-27 (1993).

The state's interests as articulated in the Trial Court center on (1) biological procreation; (2) optimal childrearing; and (3) conserving resources. None of these interests satisfy rational basis review and, *a fortiori*, cannot survive the heightened review required in this case.

The state's justification for excluding the plaintiffs from marriage based on biological procreation is illegitimate in that it distinguishes between biological and adoptive parenting, a distinction long ago forsaken in law. See generally G.L. c. 210, § 1 et seq. (permitting adoption and upon adoption, imposing the relationship of parent and child on the adopter and adoptee). In addition, the interest in bringing children into the world is not advanced by excluding same-sex couples from marriage. Indeed, four of the seven couples in Goodridge are parents of children; three conceived during the relationship and a fourth adopted a daughter who is now ten years old. Assuming, *arguendo*, that it is

better for children to be raised in a marriage since marriage provides a legally secure family, then it is arbitrary and irrational to exclude the children of same-sex couples from that same protection. Stated another way, penalizing children by denying their parents access to marriage fails utterly as a legitimate state interest. Finally, the state's interest in conserving resources is overbroad and discriminatory. The unsupported argument that extending the benefits of social welfare programs (funded by state and federal dollars) to same-sex couples will be too costly cannot justify denying the enormous edifice of status, common law, statutory and regulatory benefits of marriage to same-sex couples.

Given the magnitude of the constitutional violation and the real harms imposed on the Commonwealth's gay and lesbian citizens by not recognizing their right to marry, the only proper remedy is to declare that the statutes must be construed to allow qualified same-sex couples to marry under the civil marriage laws in G.L. c. 207. Any other alternative would ignore existing jurisprudence and fail to provide the full measure of liberty and equality commanded by our Declaration of Rights.

First, this Court's remedy doctrine teaches that in an as-applied challenge, a constitutional violation should be remedied by inclusion of the omitted class.

See, e.g., Commonwealth v. Chou, 433 Mass. 229 (2001). A mandate to the Legislature is not only unwarranted, but could easily founder. To require the Legislature to continually amend each of the hundreds of statutes that contain a term that turns on marital status (e.g. spouse, husband, wife, widow, widower, family, next-of-kin) and to require state agencies similarly to modify all supporting regulations would be unworkable.

Second, even if the Court ordered the legislature to provide a new marital status to same-sex couples only, as does Vermont's civil union law, that is not a model which should be followed here. The Vermont Legislature enacted the Civil Unions Law, 1999 Vermont Acts & Resolves 91, after the Vermont Supreme Court declined to rule on the issue of access to licenses and instead addressed the issue as one of equal rights and benefits under state law. Baker v. Vermont, 744 A.2d 864, 867, 886 (Vt. 1999). It provides for state certification of a civil union, treats civil union spouses as married, and requires dissolution (divorce) to terminate the union. 18 V.S.A. § 5106 (certification); 15 V.S.A. §§ 1204 (a), (b) (rights).

While civil unions are a welcome innovation for citizens of Vermont, because they are not "marriages," they fall short in symbolic and practical ways. A separate system, however well-intentioned, cannot truly parallel marriage with its legal history and

cultural status that cannot be replicated by any new law unique to one or even a few states. Nancy F. Cott, Public Vows: A History of Marriage and the Nation 1-8 (2000). Moreover, the basic message of a separate system to all Massachusetts citizens is that gay and lesbian people and families are not full, equal or valued members of the community -- and that is a message the Constitution must revile.

A practical problem with civil unions is that their legal recognition beyond Vermont's borders is uncertain. While there are powerful arguments for the portability of civil unions, to date, appellate courts in Georgia and Connecticut have refused to accord any marital rights to their residents who obtained civil unions in Vermont. Burns v. Burns, 253 Ga. App. 600 (2002), Rosengarten v. Downs, 71 Conn. App. 372 (2002), rev. granted. While same-sex couples may continue to face discrimination against their lawful marriages, marriage would give them the benefit of presumptions that a marriage is valid everywhere if valid where it was licensed and certified. See, e.g., Restatement (Second) of the Law of Conflicts of Law, § 283 (1971).

Third, a state civil union law cannot address the over 1100 provisions of federal law that provide protections or impose obligations on people based on their marital status. See U.S. GAO Report, 97-16

(Jan. 31, 1997), available at 1997 WL 67783. Finally, while there are no reported cases on this issue to date, it is likely that issues concerning federal preemption will arise in areas in which both the state and federal governments make law, such as employment and pension benefits under ERISA. Thus, even if a state attempts to protect same-sex couples through civil unions, because those citizens would not be "married" under state law, they would have no basis for federal recognition of their unions. With the grant of marriage under state law, however, such couples would have strong federal constitutional claims in favor of recognition.^{39/} Compare Williams v. North Carolina, 317 U.S. 287 (1942) (full faith and credit accorded to valid divorce judgments).

In short, only extending the right to marry to same sex couples can secure the full range of legal benefits and responsibilities established to protect spouses and families in the Commonwealth and beyond.

^{39/} So long as DOMA remains in effect, Pub. L. No. 104-199 (1996), the federal government will discriminate against same-sex couples by excluding them from the protections and benefits of federal laws and programs. It is only with "marriage" that Massachusetts citizens can request the Congress to repeal this law, or challenge its constitutionality.

VI. CONCLUSION

It is requested that this Honorable Court mandate that Massachusetts law be interpreted to recognize that marriage should be permitted same-sex couples whether determined by statutory construction or as a constitutional imperative.

Respectfully Submitted,
**BOSTON BAR ASSOCIATION and
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By their attorneys,

A large, stylized handwritten signature in black ink, appearing to read 'Peter F. Zupcofska', is written over a horizontal line.

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