

The Right of Two Individuals of the Same Sex to Marry in Massachusetts: A Seminal Court Decision and Its Impact on the Financial Planning Community

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Introduction

In a highly anticipated ruling by the Massachusetts Supreme Judicial Court, a majority of justices ruled last month that current state laws prohibiting the marriage of same-sex couples violates the Constitution of the Commonwealth of Massachusetts. The majority's opinion was unwavering and resolute: "Barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution." (*Hillary Goodridge & Others vs. Department of Public Health & Another*, SJC-08860, November 18, 2003.) With this ruling, Massachusetts has become the first state in the nation to legalize same-sex marriages.

At the heart of the Court's landmark decision is Massachusetts' venerable constitution, a constitution penned largely by John Adams 223 years ago and often referred to today as the oldest still-governing written constitution in the world. The Preamble to the Constitution tells us much about the personal rights and freedoms embedded in this historic document, and sheds light on the High Court's ruling.

"The end of the institution, maintenance, and administration of government, is to secure the existence of the body politic, to protect it, and to furnish the individuals who compose it with the power of enjoying in safety and tranquility their natural rights, and the blessings of life: and whenever these great objects are not obtained, the people have a right to alter the government, and to take measures necessary for their safety, prosperity and happiness."

The Preamble recognizes the absolute right of all citizens of the Commonwealth of Massachusetts to enjoy their "natural rights" and the "blessings of life." Within this framework of basic rights, the Supreme Judicial Court considered the following question: "Whether, consistent with the Massachusetts Constitution, the Commonwealth may deny the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish to marry."

The Court's answer to this question was unequivocal. The Commonwealth of Massachusetts may not deny the protections, benefits, and obligations conferred by civil marriage to an individual "solely because that person would marry a person of the same sex." In order to give the Massachusetts Legislature an opportunity to "take such action as it may deem appropriate in light of this opinion," the Court stayed the entry of judgment of its decision for 180 days. During this period, the Massachusetts Legislature has at least three different options available for consideration: 1) initiate a process to ban same-sex marriages by amending the Massachusetts Constitution; 2) introduce a bill to provide for the issuance of marriage licenses to same-sex couples; or 3) do nothing and let the Court's decision stand.

Amending the Massachusetts Constitution would involve a lengthy legal and political process. For example, an amendment would require a majority vote by two successive Legislatures, followed by a vote of the citizens of the Commonwealth. Most legal experts agree that this process would take at least several years to complete. On the other hand, if the Legislature does nothing, then same-sex couples could begin petitioning their local town and city clerk's offices for marriage licenses as early as this coming spring. Given the deadline imposed by the Court, the Legislature will need to decide relatively soon what option it wishes to pursue.

The Human Aspects of the Court's Decision

Although the importance of the legal aspects of this case cannot be overstated, let us not overlook the human dimension of the Court's decision. In the end, this case was about people - ordinary people, living ordinary lives. It was a case about people who went to work each day, who cared for and loved their children and parents, who participated in school activities, who served as volunteers in events sponsored by local organizations, and who held a variety of religious beliefs.

The seven couples who asked the Court to answer the question "whether the Commonwealth may deny [them] the protections, benefits, and obligations conferred by civil marriage" came from many backgrounds. They were business executives, lawyers, investment bankers, educators, therapists, and engineers. They were seven couples from five Massachusetts counties. They wanted the same rights, protections, and benefits afforded to millions of other couples living and working in the Commonwealth of Massachusetts. These seven couples have stories and life situations much like those of others, with one important exception: They were denied the right to consummate and celebrate their relationships in a civil marriage.

Who were these seven couples (at the time the lawsuit was filed)?

- Gloria Bailey, sixty years old, and Linda Davies, fifty-five years old -- in a committed relationship for thirty years.
- Maureen Brodoff, forty-nine years old, and Ellen Wade, fifty-two years old -- in a committed relationship for twenty years and living with their twelve year old daughter.
- Hillary Goodridge, forty-four years old, and Julie Goodridge, forty-three years old -- in a committed relationship for thirteen years and living with their five year old daughter.
- Gary Chalmers, thirty-five years old, and Richard Linnell, thirty-seven years old -- in a committed relationship for thirteen years and living with their eight year old daughter and Richard's mother.
- Heidi Norton, thirty-six years old, and Gina Smith, thirty-six years old -- in a committed relationship for eleven years and living with their two sons, ages five years and one year.
- Michael Horgan, forty-one years old, and David Balmelli, forty-one years old -- in a committed relationship for seven years.
- David Wilson, fifty-seven years old, and Robert Compton, fifty-one years old -- in a committed relationship for four years and had cared for David's mother in their home after a serious illness until she died.

In considering the human aspects of this case, it is important to note that each couple followed the normal procedures necessary to consummate a civil marriage. They petitioned their respective city or town clerk's office for a marriage license. They were prepared to pay the appropriate marriage license fees. Each couple completed all required forms and notices (e.g., notice of intention to marry and health forms), and presented these forms to their respective town and city clerks. Yet, each couple was denied the right to receive a marriage license, which is an absolute prerequisite to consummating a civil marriage in the Commonwealth of Massachusetts.

Why Is Civil Marriage So Important?

The right to consummate and celebrate a civil marriage in Massachusetts includes much more than a formal recognition of a couples' commitment to each other. Married couples in Massachusetts are afforded significant social, economic, and legal benefits and rights. Chief Justice Margaret H. Marshall, writing for the majority of the Justices, observed: "Marriage is a vital social institution. The exclusive commitment of two individuals to each other nurtures love and mutual support; it brings stability to our society. For those who choose to marry, and for their children, marriage provides an abundance of legal, financial, and social benefits. In turn it imposes weighty legal, financial, and social obligations."

On the other hand, couples unable to formalize their relationship through a civil marriage are forced to work "outside the system." With their financial planners and other advisors, they search for creative ways to protect themselves, their children, and their loved-ones. They seek alternative ways to manage their assets and secure their legal rights. Typically, they use a hodge-podge of financial, legal, and estate planning techniques in an effort to accomplish their planning goals and to protect themselves and their assets. These hardships were noted by Chief Justice Marshall when she stated:

“[Same-sex couples] have employed such legal means as are available to them--for example, joint adoption, powers of attorney, and joint ownership of real property--to secure aspects of their relationships. Each [individual] attests a desire to marry his or her partner in order to affirm publicly their commitment to each other and to secure the legal protections and benefits afforded to married couples and their children The benefits accessible only by way of a marriage license are enormous, touching nearly every aspect of life and death. [H]undreds of statutes are related to marriage and to marital benefits.”

Although it would be impossible to identify and explain all of the legal protections and benefits afforded to married couples and their children in this article, the following two tables highlight some of the more common ones. However, in reviewing these tables, it is important to note that the issue of spousal benefits and rights for same-sex married couples in Massachusetts will likely raise a number of questions, including those related to interpretations of the 1996 Defense of Marriage Act, a federal law that denies recognition of same-sex marriages. For example, to what extent will the Defense of Marriage Act influence the way Massachusetts employers handle the Employee Retirement Income Security Act of 1974 (ERISA) when dealing with spouses of employees of a same-sex marriage? These kinds of questions will continue to complicate the planning process for

same-sex married couples in Massachusetts until authoritative guidance is provided, either by the Legislature or through judicial rulings.

Table 1 presents a summary of some of the financial benefits and property rights available to married couples in Massachusetts, as noted by the Court. These benefits may be limited for same-sex married couples because of uncertainties surrounding the interaction of federal and state laws.

Table 1
Financial Benefits and Property Rights

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| The right to hold property as tenants by the entirety (a form of ownership that provides certain protections against creditors and allows for the automatic descent of property to the surviving spouse without probate) |
| The right to execute and secure homestead protection (securing up to \$300,000 in equity from creditors) for the benefit of one's spouse and children |
| The automatic rights to inherit the property of a deceased spouse who does not leave a will |
| The rights of elective share and of dower (which allow surviving spouses certain property rights where the decedent spouse has not made adequate provision for the survivor in a will) |
| The entitlement to wages owed to a deceased employee |
| The eligibility to continue certain businesses of a deceased spouse |
| The right to share the medical policy of one's spouse |
| The right to receive the thirty-nine week continuation of health coverage for the spouse of a person who is laid off or dies |
| The right to receive preferential options under the Commonwealth's pension system |
| The right to receive preferential benefits in the Commonwealth's medical program |
| The prohibition against the placing of a lien on long-term care patient's former home if spouse still lives there |
| Access to veterans' spousal benefits and preferences |
| Financial protections for spouses of certain Commonwealth employees (fire fighters, police officers, prosecutors, among others) killed in the performance of duty |
| The equitable division of marital property on divorce |
| Temporary and permanent alimony rights |
| The right to separate support on separation of the parties that does not result in divorce; and the right to bring claims for wrongful death and loss of consortium, and for funeral and burial expenses and punitive damages resulting from tort actions |

Table 2 presents a summary of the Court's recognition of some of the common legal rights and protections available to married couples Massachusetts.

Table 2
Legal Rights and Protections

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| The presumptions of legitimacy and parentage of children born to a married couple |
| The right to file a joint Massachusetts income tax return |
| Evidentiary rights, such as the prohibition against spouses testifying against one another about their private conversations, applicable in both civil and criminal cases |
| The qualification for bereavement or medical leave to care for individuals related by blood or marriage |
| An automatic "family member" preference to make medical decisions for an incompetent or disabled spouse who does not have a contrary health care proxy |
| The application of predictable rules of child custody, visitation, and support when married parents divorce, including temporary custody rights, temporary support rights, the right to shared custody, and so forth |
| Priority rights to administer the estate of a deceased spouse who dies without a will |
| The requirement that a surviving spouse must consent to the appointment of any other person as administrator |
| The right to interment in the lot or tomb owned by one's deceased spouse |

Children are also beneficiaries of special rules and laws associated with civil marriage. These rules often take the form of economic and social benefits as well as basic legal rights. As noted by the Court: “[M]arital children reap a measure of family stability and economic security based on their parents' legally privileged status that is largely inaccessible, or not as readily accessible, to nonmarital children. Some of these benefits are social, such as the enhanced approval that still attends the status of being a marital child. Others are material, such as the greater ease of access to family-based State and Federal benefits that attend the presumptions of one's parentage.”

Formulation of a New Legal Definition of Marriage

For centuries, Massachusetts Courts have long recognized the traditional common-law definition of marriage, which has been interpreted to mean a “lawful union of a woman and a man.” In answering the question raised by this case, the Supreme Judicial Court of Massachusetts noted that “history cannot and does not foreclose the constitutional question” about the legitimacy of this common-law definition.

In testing the legitimacy of the common-law definition of marriage, the Court noted that the Massachusetts Constitution requires, at a minimum, that:

- The exercise of the State's regulatory authority not be arbitrary or capricious;
- Under both the equality and liberty guarantees, regulatory authority must, at very least, serve a legitimate purpose in a rational way;
- A statute must bear a reasonable relation to a permissible legislative objective; and
- Any law failing to satisfy the basic standards of rationality is void.

Additionally, the Court considered the nature of civil marriage itself. As part of its analysis, the Court articulated six important points regarding the concept of “civil marriage.” These basic concepts are presented in Table 3.

Table 3
Basic Concepts of Civil Marriage

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| 1. Governments create civil marriage. |
| 2. In Massachusetts, civil marriage is, and since pre-Colonial days has been, precisely what its name implies: a wholly secular institution. <i>In Massachusetts, from very early times, the requisites of a valid marriage have been regulated by statutes of the Colony, Province, and Commonwealth. No religious ceremony has ever been required to validate a Massachusetts marriage.</i> |
| 3. There are three partners to every civil marriage: two willing spouses and an approving State. <i>Marriage is not a mere contract between two parties but a legal status from which certain rights and obligations arise.</i> |
| 4. Civil marriage is created and regulated through exercise of the police power. <i>Police power -- now more commonly termed the State's regulatory authority -- is an old-fashioned term for the Commonwealth's lawmaking authority, as bounded by the liberty and equality guarantees of the Massachusetts Constitution and its express delegation of power from the people to their government.</i> |
| 5. Civil marriage enhances the welfare of the community. It is a social institution of the highest importance. <i>Civil marriage also bestows enormous private and social advantages on those who choose to marry. Civil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Because it fulfils yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition.</i> |
| 6. Civil marriage anchors an ordered society by encouraging stable relationships over transient ones. <i>Civil marriage is central to the way the Commonwealth identifies individuals, provides for the orderly distribution of property, ensures that children and adults are cared for and supported whenever possible from private rather than public funds, and tracks important epidemiological and demographic data.</i> |

After considering these basic concepts, along with a thoughtful and deliberate reading of the Massachusetts Constitution, the Massachusetts Supreme Judicial Court concluded that the common-law definition of marriage must be abandoned. The Court also decided that a new definition of marriage, in accordance with the requirements of the Constitution, must be formulated. The Court’s new definition of marriage is as follows:

Marriage is “the voluntary union of two persons as spouses, to the exclusion of all others.”

In support of this new definition, the Court concluded: “The right to marry means little if it does not include the right to marry the person of one's choice, subject to appropriate government restrictions in the interests of public health, safety, and welfare.”

Furthermore, the Court observed that its decision does not disturb the fundamental value of marriage in our society. “That same-sex couples are willing to embrace marriage's solemn obligations of exclusivity, mutual support, and commitment to one another is a testament to the enduring place of marriage in our laws and in the human spirit.”

Finally, the Court recognized the historic significance of its decision by offering the following observation:

“We are mindful that our decision marks a **change in the history of our marriage law**. Many people hold deep-seated religious, moral, and ethical convictions that marriage should be limited to the union of one man and one woman, and that homosexual conduct is immoral. Many hold equally strong religious, moral, and ethical convictions that same-sex couples are entitled to be married, and that homosexual persons should be treated no differently than their heterosexual neighbors. Neither view answers the question before us. Our concern is with the Massachusetts Constitution as a charter of governance for every person properly within its reach. Our obligation is to define the liberty of all, not to mandate our own moral code.” (Emphasis added.)

Impact on the Financial Planning Community

Although this seminal Supreme Judicial Court decision changes the way financial planners will be able to advise same-sex couples in the future (see Tables 1 and 2 for a listing of marital benefits and rights available to married couples in Massachusetts), many of the limitations in place for same-sex couples before the decision are still present today. For example, other states may decide not to recognize same-sex marriages consummated in Massachusetts. Thus, couples may be forced to stay in Massachusetts in order to reap the social, economic, and legal benefits of the Court's ruling.

Furthermore, the Federal government does not recognize same-sex marriages. The 1996 federal Defense of Marriage Act, which denies recognition of same-sex marriages and gives states the right not to recognize marriage licenses issued to same-sex couples in other states, has far-reaching ramifications and implications. For example, if one partner in a same-sex relationship marries a foreign national in Massachusetts, the federal government could deny full citizenship rights to the foreign national partner. Additionally, all of the Federal tax laws that favor couples in a common-law marriage will continue to be unavailable to same-sex couples married in Massachusetts. Following are several examples:

- **IRA Rollover Benefits.** Under current Federal law, only a surviving spouse (as recognized by Federal law) may receive distributions from a deceased spouse's IRA and roll them to another IRA without tax. Thus, the survivor of a same-sex married couple in Massachusetts would be ineligible for this favorable tax treatment.
- **Social Security Survivor Benefits.** Under current Federal law, only married spouses (as recognized by Federal law) and their children are eligible for Social Security survivor benefits. Thus, the survivor of a same-sex married couple in Massachusetts would not be eligible for survivor benefits, including the right to receive a portion of her or his deceased's spouses Social Security income.
- **Joint Income Tax Return.** Under current Federal law, only spouses of a Federally recognized marriage are eligible to file a Federal joint income tax return;
- **Unlimited Marital Deduction.** Only a spouse of a Federally recognized marriage has the right to pass property during lifetime or at death to her or his spouse free of transfer taxation (unlimited marital deduction); and
- **Making Joint Gifts.** Only a spouse of a Federally recognized marriage has the right to "split-gift" with her or his spouse, which affords married couples the benefit of excluding from gift taxation an annual combined exclusion of \$22,000 (\$11,000 is available to single individuals).

Conclusion

In conclusion, the ruling of the Court in *Hillary Goodridge & Others vs. Department of Public Health & Another* gives reason for all financial planners to stop, think and consider how their practices will change as a result of the *Hillary* decision. On the other hand, some of the complexities of working with same-sex couples have not changed.

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Note: To address issues related to non-traditional families, the authors of this article are developing a new graduate-level course which will be offered through the Financial Planning Master's Degree Program at Bentley College. The course, *Financial Planning for Non-Traditional Families*, will be taught by Professor Neiman and will focus on developing alternative planning solutions for non-traditional families, including an examination of employee benefits, retirement and elder-care issues, income tax considerations, asset ownership, and estate and gift tax planning. Students will analyze a variety of non-traditional family scenarios.