

No. SJC 08860

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 Daivies,

Plaintiffs-Appellants,

v.

Department of Public Health, Dr. Howard Kohl,
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 AMICUS CURIAE
FREE MARKET FOUNDATION

Luke Stanton, BBO#
The Lawyers Building
24 Lexington Street
Waltham, Mass. 02452
(781) 736-9600

Counsel of Record

Teresa S. Collett
1303 San Jacinto
Houston, Texas 77002
(713) 646-1834
(713) 646-1766 FAX

**Attorneys for Amicus
Curia**

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I. INTEREST OF AMICUS CURIA

Free Market Foundation is a non-profit educational foundation dedicated to protecting and advancing the founding fathers' ideals of representative and limited government. This case raises issues as to whether the current system of private ordering is legally sufficient to advance most interests of the plaintiffs and whether the system is most consistent with the laws of Massachusetts' forty-nine sister states. Proper resolution of these issues directly relates to Free Market Foundation's interest in representative and limited government.

II. STATEMENT OF THE ISSUE

Amicus adopts the Statement of the Issue as set forth in the brief of the defendants-appellees.

III. STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

Amicus adopts the Statement of the Case and the Statement of the Facts set forth in the brief of the defendants-appellees.

IV. SUMMARY OF THE ARGUMENT

Massachusetts law currently provides plaintiffs the means to establish common households, share financial resources, and participate in the care and nurturing of loved ones. Issuance of marriage licenses, rather than securing additional benefits for same-sex couples, may lead

to great tax liability and less interstate recognition of their unions.

V. ARGUMENT

A. MASSACHUSETTS LAW CURRENTLY PROVIDES PLAINTIFFS EXPANSIVE LIBERTY IN THE PRIVATE ORDERING OF THEIR AFFAIRS.

Contracts, durable powers of attorney, trust agreements, and wills are the legal devices that all Massachusetts citizens must rely upon to order their private affairs in the manner most consistent with their desires. Yet plaintiffs and their amici, the Boston Bar Association and Massachusetts Lesbian and Gay Bar Association (hereinafter "Boston Bar"), argue that many rules of laws, applicable only to married couples, create valuable benefits and desirable burdens that are unavailable to plaintiffs. While this is true in a small number of cases, many of the rules of law that the Boston Bar identifies are the temporarily negotiated posture of an evolving default rule, which is only to be applied in the absence of some affirmative act of private ordering like a contract or trust agreement, or as a matter of federal law and therefore beyond the jurisdiction of this court to remedy. Good examples of evolving default rules can be found in the area of medical decisionmaking.

1. MASSACHUSETTS LAW AND MEDICAL PRACTICE PROVIDE PLAINTIFFS THE ABILITY TO CARE FOR THEIR PARTNERS DURING MEDICAL EMERGENCIES AND PERIODS OF DISABILITY.

Massachusetts law, like the law in every other state, makes generous provision for surrogate healthcare decisionmaking. The law allows any competent adult to designate another adult to act as his or her agent in making medical decisions. G.L. c. 201D, §5. Absent such designation, if the patient is unable to express his or her desires, the default rule is that medical personnel will rely upon family members to direct medical care. Shine v. Vega, 429 Mass. 456, 466 (1999). Plaintiffs may nominate their partners, or any other competent adult, to act as their guardians or conservators, should they anticipate becoming disabled. G.L. c. 201B, §3. See also Guardianship of Smith, 43 Mass.App.Ct. 493 (1997)(when future guardian nominated in a durable power attorney, court must make its appointment in accordance with the nomination absent good cause or disqualification). State law permits each of the plaintiffs to empower their partners to issue do-not-resuscitate orders if the plaintiffs become unable to do so.¹ These rights are

¹ Charles Sabatino, Survey of State EMS-DNR Laws and Protocols, J. L. MED. & ETHICS (1999). "For adult patients, 39 of the 42 states with EMS-DNR protocols (that is, all

further guaranteed by the Patient Self-Determination Act, a federal law applying to all hospitals, skilled nursing facilities, home health agencies, and hospice programs receiving Medicare funds. 42 U.S.C. 1395cc(f). Under this Act, if an entering patient has not designated a healthcare agent prior to his or her admission to the hospital or facility, the patient must be advised of his or her right to appoint an agent, and the necessary forms must be made available to the patient. Id.

Independent of this legal framework which provides ample means for plaintiffs to care for any gravely-ill partner, national medical standards recognize the importance of involving those who play a significant role in patients' lives. The Joint Commission on the Accreditation of Healthcare Organizations ("JCAHO") is an independent non-profit organization that sets the standards for American healthcare. In Massachusetts alone, almost 600 healthcare organizations, including over 100 hospitals and 250 long-term care facilities, are accredited by JCAHO. Joint Commission on the Accreditation of Healthcare Organizations, Quality Check Organization Search Criteria at <http://www.jcaho.org/qualitycheck/directry/directry.asp>

but Alaska, Montana, and Ohio) permit some form of surrogate consent to DNR orders, if the adult is otherwise

(last visited Dec. 13, 2002). Each of these organizations adheres to JCAHO standards.

JCAHO standards recognize the obligations of healthcare organizations to consult with patients and their families. Joint Commission on Accreditation of Healthcare Organizations, 2002 Comprehensive Accreditation Manual for Hospitals: The Official Handbook, Standard TX 5.2 ("Before obtaining informed consent, the risks, benefits, and potential complications, associated with procedures are discussed with the patient and family") at TX-7 (2002)(reproduced in appendix). JCAHO defines "family" as "[t]he person(s) who plays a significant role in the individual's [patient's] life. This may include a person(s) not legally related to the individual." Id. at GL-9 (reproduced in appendix). As recognized by JCAHO standards, healthcare professionals have an obligation to consult with and promote the involvement of those closest to the patient. For many unmarried individuals, those closest to the patient will be those who reside with the patient. This is true, notwithstanding the sexual preference of the patient, or the presence or absence of a sexual relationship between the patient and the person or person(s) they reside with. Cf. Eicher v. Dillon, 426

eligible."

N.Y.S.2d 517 (1980)(court asked to approve priest's directions regarding medical care of religious brother in a chronic vegetative state).

Massachusetts law and medical practice have adapted to the diversity of shared decisionmaking models found in modern American communities. Plaintiffs already have access to all the necessary legal tools to insure their ability to care for their loved ones in times of medical emergency and disability. There simply is no basis for this Court to conclude that marriage licenses must be issued in order for same-sex partners to obtain quality medical care for those they love.

2. RIGHTS RELATED TO DISPOSITION OF A DECEDENT'S BODY GIVE PRIORITY TO SPOUSE AND FAMILY ONLY ABSENT ANY DIRECTION FROM THE DECEDENT.

Similar to the default rule in medical decisionmaking, Massachusetts law presumes that people want their spouses or family members making decisions about how to dispose of their bodies upon death. G.L. c. 38 §13. However, similar to the default rule of medical decisionmaking, plaintiffs are free to prepare written instructions that specify that their partners are to make all decisions regarding the disposition of their remains, and Massachusetts law will enforce those instructions, rather than the employing the default rule. E.g. Stackhouse v. Todisco, 370 Mass. 860,

860 (1976). This has been the law of Massachusetts for almost three-quarters of a century, and has served its citizens well. Sheehan v. Commercial Travelers Mut. Acc. Assn. of America, 283 Mass. 543, 553 (1933).

B. PRIVATE ORDERING PROVIDES PLAINTIFFS AMPLE OPPORTUNITY TO ARRANGE THEIR ECONOMIC AFFAIRS TO THEIR GREATEST ADVANTAGE.

Just as the law provides plaintiffs the opportunity to authorize others to make healthcare decisions on their behalf and to direct the disposition of their bodies upon their deaths, Massachusetts law gives effect to agreements regarding the accumulation of property or other financial arrangements. Wilcox v. Trautz, 427 Mass. 326, 332 (1998).

1. DIFFERING FORMS OF CONCURRENT OWNERSHIP OF PROPERTY PROVIDE DIFFERING ADVANTAGES AND DISADVANTAGES.

Plaintiffs have the ability to craft their legal obligations to fit their individual circumstances. For couples desiring to share income and property ownership, Massachusetts law recognizes joint tenancy with rights of survivorship and inter vivos gifts. G.L. c. 184 § 7. Joint tenants enjoy rights to the whole of the property during their lifetime, and at the death of one joint tenant, the other takes the whole estate, not by descent as the heir at law of the other, but as the sole surviving tenant.

Attorney General ex rel. Treasurer and Receiver General v. Clark, 222 Mass. 291 (1915).

For those couples who want shared ownership of property during their lifetime, but want to control the disposition of the property upon their death, Massachusetts law recognizes tenancy in common. See G.L. c. 184 § 7. This form of ownership may best suit those couples where one partner has inherited a substantial amount of property and wants that property to pass to blood relatives or where a partner has children from a prior marriage that he or she wants to receive the property. Tenants in common have no survivorship rights; at death the interest of a tenant descends to his or her heirs or passes under the terms of the tenant's will. West v. First Agr. Bank 382 Mass. 534, 537 (1981).

Creditors may levy upon property held in joint tenancy and tenancy in common for up to the amount of the interest of the debtor owner. See G.L. c. 236 §12 (levy upon land held jointly or in common).

Tenancy by the entirety is not available to unmarried couples, but this form of ownership has few advantages that can not be achieved through the use of joint tenancy with rights of survivorship and homestead protection. Subject to statutory protection of the family's principle residence

and the non-debtor spouse's survivorship rights, either spouse may convey or encumber his or her interest in property held as tenants by the entirety. Coraccio v. Lowell Five Cents Sav. Bank, 415 Mass. 145, 151-22 (1993). See also G.L. c. 209 §1.

Depending upon the particular circumstances of each of the plaintiff couples, Massachusetts law allows the plaintiffs to create economic dependence or independence as best suits their family history and individual desires. Plaintiffs can accumulate and hold property jointly or separately, can acquire or extend credit to each other or with others, and order their economic affairs in the way that is most suitable for their short-term and long-term goals. It is not necessary for this court to order the issuance of marriage licenses to same-sex couples to allow plaintiffs to the exercise the freedom they already have in ordering their economic affairs.

2. CURRENT ESTATE PLANNING TOOLS ALLOW PLAINTIFFS TO DISPOSE OF PROPERTY AND CARE FOR LOVED ONES.

As in almost all other areas of law, Massachusetts law governing the disposition of decedents' estates favors those who provide specific instructions regarding their desires. See G.L. c. 191 § 1 (recognizing authority of adults to dispose of property by will). Plaintiffs, like

other adult citizens, may direct that, upon their death, all property go to their partners or other loved ones. Failure to do so results in the property being disposed of in accordance with a statutory plan of distribution. G.L. c. 191 c. §§ 2-3. The statutory plan of distribution rarely mirrors any individual's expectations or desires. See Frances H. Foster, The Family Paradigm of Inheritance Law, 80 N.C. L. Rev. 199, 263 (2001).

The legislature is the proper branch to consider Plaintiffs concerns that those residing with a decedent at the time of his or her death are more properly situated to administer his or her estate in accordance with the wishes of the decedent, and are more likely to be the objects of the decedent's affection and intended beneficiaries of his or her estate. The availability of simple estate planning mechanisms like wills and trusts evidence the ease with which Plaintiffs can order their affairs under Massachusetts law.

3. PLAINTIFFS ARE UNLIKELY TO BE DISADVANTAGED BY APPLICATION OF CURRENT FEDERAL TAX LAWS.

The Boston Bar concedes that "[b]ecause 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." Boston Bar brief at

23-24. Notwithstanding this concession, amici suggest that plaintiffs are denied the convenience and possible tax-savings enjoyed by married couples. In the area of income taxation, this suggestion ignores the "marriage penalty" imposed on couples, similar to plaintiffs, comprised of two wage-earners, with reasonably similar incomes. In the area of estate taxes, the Boston Bar ignores the current ability of every individual to transfer up to \$1 million dollars tax-free.

A. AS TWO-WAGE-EARNER COUPLES, PLAINTIFFS LIKELY PAY LESS FEDERAL INCOME TAX CURRENTLY THAN THEY WOULD IF THEIR UNIONS WERE DEEMED TO BE MARRIAGES.

All of the Plaintiffs are employed fulltime. Three of the seven share the same profession. Maureen Brodoof and Ellen Wade are lawyers. Gary Chalmers and Richard Linnell are teachers. Gloria Bailey and Linda Davies are psychotherapists. Married couples with only one wage earner enjoy a federal income tax "marriage benefit" because they pay less federal income tax jointly than they would if they were to pay separately as if they were single. Couples comprised of two wage earners suffer the "marriage penalty," paying more taxes when married than they would if paying separately as individuals. M.V. Lee Badgett and Josh A. Goldfoot, For Richer, For Poorer: The Freedom to Marry

Debate, 1 ANGLES 3 (May, 1996) available at http://www.iglss.org/pubs/angles/angels_1-2_p1.html.

Plaintiffs in this case, like most same-sex couples, are likely to incur greater federal income tax liability if they were to be recognized as married. All experts testifying before the Hawaii Commission of Sexual Orientation and the Law confirmed this conclusion. "Unless data show that most or all same-sex couples have greatly unequal income, Dr. Ghali, Professor Roth and Dr. La Croix agree that there is no reason to assume a general [federal income] tax benefit from marriage." State of Hawaii Commission on Sexual Orientation and the Law, Report on the Commission on Sexual Orientation and the Law, at <http://www.state.hi.us/lrb/rpts95/sol/cpt5a.html>.

Similarly, even if plaintiffs were recognized as married for purposes of Social Security law, it is unlikely to be to their benefit. Social security provides spousal benefits when a wage earner retires and his or her spouse is not eligible to receive better benefits based on his or her own work record. See 20 C.F.R. § 404.345-.346 (1999) (requiring a spousal relationship as prescribed by state law to be eligible for benefits). The Social Security retirement and disability benefits of a wage earner are available under certain circumstances to a spouse, child,

or parent. See id. § § 404.330, 404.345-.346 (regarding benefits for spouses); § 404.350 and § 360-365 (regarding benefits for children); § 404.370 and § 404.374 (regarding benefits for parents). However, in a two wage-earner family, typically each spouse will be better served by receiving the benefits related to his or her individual work history. Based upon the limited research available, same-sex couples likely to marry will continue to pursue two careers. "In some ways, marriage provides incentives for couples to form more traditional kinds of households that will get the [federal income tax] marriage benefit. But studies show that even if they legally marry, same gender couples are not likely to adopt that traditional form, often expressing a strong belief that both members of the couple should work outside the home. "M.V. Lee Badgett and Josh A. Goldfoot, For Richer, For Poorer: The Freedom to Marry Debate, 1 ANGLES 3 (May, 1996) available at <http://www.iglss.org/pubs/angles/angels_1-2_p1.html>.

Therefore even if plaintiffs were recognized as married under both Massachusetts and federal law, they will receive no spousal benefits from Social Security upon the retirement of one or the other partner, and will, more likely than not, pay increased federal income taxes.

B. PLAINTIFFS ARE UNLIKELY TO PAY ANY FEDERAL ESTATE TAX.

The application of laws governing federal estate taxes to same-sex couples presents a more complex issue. Currently federal law allows all United States citizens at their death to pass an unlimited amount of property to their spouses tax-free through a marital deduction, and \$1 million dollars tax-free to anyone through a unified credit. Internal Revenue Service, Introduction to Estate and Gift Taxes, Publication 950 (rev. June 1998) available at www.irs.gov/businesses/display/0,,i1%3D2%26genericId%3D12909,00.html.

The unified credit (amount that can be transferred tax-free to anyone) increases to \$1.5 million in 2004, \$2 million in 2006, and \$3 million in 2009. Id. The unlimited marital deduction allows married couples to shelter amounts over the unified credit by transferring the excess to the surviving spouse, and thus delay payment of any federal estate taxes until the death of the surviving spouse. Should the surviving spouse die, leaving assets valued in an amount less than the unified credit at the time of his or her death, the entire estate of both spouse will have passed tax-free.

For those individuals whose estates are subject to federal estate tax, depending on the year of death, the maximum tax rate ranges from 50% this year to 45% in 2007. Internal Revenue Service, 2002 Changes Increased Estate Tax Applicable Exclusion Amount, available at www.irs.gov/formspubs/display/0,,il=50&genericId=79375,00.html. Given the sizable amount of property that can pass tax-free, most estates are not subject to federal estate tax. In fact, in 1996, when the unified credit was still only \$600,000, estate tax returns were filed with the IRS in less than 2% of all decedents' estates. IRS Statistics of Income Bulletin, Spring 2001, Publication 1136, Table 17 available at www.irs.gov/pub/irs-soi/96es17yd.xls. Assuming a generous estimate of the homosexual population (5%), and assuming one-quarter of that population would marry (1.25%)² half of the quarter (.625%) would be eligible for the unlimited marital deduction at the time of their deaths, and assuming a 2% filing rate instead of something lower due to the increase of the unified credit,³ extending

² This figure is drawn from M.V. Lee Badgett, The Fiscal Impact on the State of Vermont of Allowing Same-Sex Couples to Marry at 2 (Oct. 1998) available at www.iglss.org.

³ In 1987, the most recent year in which the unified credit was raised, less than one percent of all adults dying in that year had taxable estates. IRS Statistics of Income Bulletin, Spring 2001, Publication 1136, Table 17 available at www.irs.gov/pub/irs-soi/96es17yd.xls

the marital deduction to same-sex partners would benefit less than two one-thousandths of one percent of all Americans. Only a small percentage of those ultra-rich Americans would die residents of Massachusetts. For these individuals, the savings could be substantial, but this hardly seems a compelling injustice warranting the radical step of usurping the legislative function of defining those eligible for marriage.

4. THERE IS LITTLE EVIDENCE THAT MANY SAME-SEX COUPLES ARE DEPRIVED OF EMPLOYEE-RELATED BENEFITS.

Many same-sex couples also are unlikely to receive any economic benefit from the availability of employer-sponsored insurance programs that allow employees to enroll their husbands or wives for a fee. If both partners are employed by employers providing insurance benefits, it is rarely economically advantageous for one or the other to enroll as a beneficiary under the plan sponsored by the spouse's employer. Studies of the enrollment rates of corporations extending benefits to same-sex partners, have found that enrollment increases to be in the range of one to two percent on average. Costs of Domestic Partner Benefits, Human Rights Campaign Foundation, available at www.hrc.org/worknet.dp/dp-cost.asp (last visited Dec. 17, 2002).

Similarly, plaintiffs in similar litigation in Hawaii claimed a pressing need for recognition of same-sex marriage to insure availability of benefits. Baehr v. Lewin, 852 P.2d 44,59 (Haw. 1993). Based in part upon these claims, prior to the implementation of Hawaii's statute creating the legal status of "reciprocal beneficiaries" for couples unable to marry in July 1997, the Hawaii Department of Health had estimated that "as many as 20,000 to 30,000 people might sign up." See Susan Essoyan, Hawaii Finds Slow Response to Domestic Partners Law, Dallas Morning News, Dec. 28, 1997, at 5A, available at 1997 WL 16187525. But by December 10 of that year, "just 296 couples" had registered. Id. Since then, the number has increased only modestly, to 435 as of April 27, 1999. See Auditor: Cost of Reciprocal Beneficiaries Benefits Minor, AP, Apr. 28, 1999, available in WL, Allnewsplus file.

No statistics are available regarding what percentage of this group were previously uninsured, or what savings were achieved by enrollment in the partner's benefit program. Again, while insuring a previously uninsured partner is of substantial benefit to the individuals impacted, the overall benefits to individuals from recognizing same-sex partners for employment related insurance benefits appears to be *de minimis*. Interestingly,

there appears to be no published information on the experience of companies extending benefits to same-sex partners regarding the incidence of claims or the costs related to the insurance compared to the incidence of claims and costs related to coverage of husbands or wives.

The joinder of healthcare insurance, retirement benefits, and other important financial assets to employment status is an issue of grave concern and legitimately diverse political opinion. Yet, as this court recognized in Connors v. City of Boston, 430 Mass. 31, 42-43 (1999), "Adjustments to [] new social and economic realities must come from the Legislature" Intervention by this court into this complex issue, in the guise of protecting or strengthening marriage, is both imprudent and unwarranted.

C. METHODS OF PRIVATE ORDERING PROMISE GREATER INTERSTATE RECOGNITION THAN ISSUANCE OF MARRIAGE LICENSES TO SAME-SEX COUPLES.

Notwithstanding a forty-year campaign by homosexual activists, no American state or federal legislature has ever recognized same-sex unions as marriages. Nor has any federal court. When courts in Hawaii and Alaska found a right to same-sex marriage in their states' constitutions, the people promptly amended the constitutions. See Baehr v. Lewin, 852 P.2d 44 (Haw. 1993)(equal protection clause

requires state show compelling interest in restricting marriage to one man and one woman)(outcome reversed by passage of Haw. Const. Art. I, sec. 23, "The legislature shall have the power to reserve marriage to opposite-sex couples." (added after passage in general election Nov. 3, 1998) available at www.hawaii.gov/lrb/con/condoc.html) and Brause v. Bureau of Vital Statistics, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998)(state constitutional right of privacy requires recognition of same-sex marriage)(outcome reversed by Alaska Const., Art. I, sec. 25, "To be valid or recognized in this State, a marriage may exist only between one man and one woman"(added after passage in general election Nov. 3, 1998) available at <http://www.gov.state.ak.us/litgov/akcon/table.html>)).

Only in Vermont after the state supreme court found that state's constitution required recognition of same-sex unions, were citizens denied the opportunity to express their opinion by a state-wide vote. Cary Goldberg, Vermont Senate Votes for Gay Civil Unions, NEW YORK TIMES A12 (April 11, 2000). "No opinion polls run by a neutral organization has asked specifically whether Vermonters support civil unions, but the vast majority of towns that discussed the issue in town meetings last month opposed the idea, and past polls show that a majority although a shrinking one,

opposed gay marriage." Id. Instead, the state legislature enacted a law authorizing civil unions for couples legally unable to marry, granting all the privileges and obligations of marriage. 18 Vt. Stat. Ann. §1201 et seq.

Reactions across the country were swift and unanimous. Thirty-six states have passed legislation establishing that they will not recognize same-sex unions as marriages. Ala. Code § 30-1-19 (2002); Alaska Const. art. I, § 25; Ariz. Rev. Stat. Ann. § 25-101 (West 2000); Ark. Code Ann. § 9-11-107 (2002); Ark. Code Ann. § 9-11-109 (2002); Ark. Code Ann. § 9-11-208 (2002); Cal. Fam. Code § 308.5 (West 2002); Colo. Rev. Stat. § 14-2-104 (2002); Del. Code Ann. tit. 13, § 101 (2001); Fla Stat. Ann. § 741.212 (West 2000); Ga. Code 19-3-3.1 (2002); Haw. Rev. Stat. § 572-3 (1999); Haw. Const. art. I, § 23; Idaho Code § 32-209 (2002); 750 Ill. Comp. Stat. Ann. § 5/212 (West 2000); Ind. Code § 31-11-1-1 (2002); Ia. St. 595.2 (2002); Kan. Stat. Ann. § 23-101 (1999); Ky. Rev. Stat. Ann. §§ 402.040, 404.045 (Michie 2002); La. Civ. C. art. 89 (West 2000), amended by 1999 La. Act of July 2, 1999, No. 890 § 1; Me. Rev. Stat. Ann. tit. 19-A, § 701 (West 2002); Mich. Comp. Laws Ann. § 551.1 (West 2000); Mich. Comp. Laws Ann. § 551.271 (West 2000); Minn. Stat. Ann. § 517.01; Miss. Code Ann. § 93-1-1; Mo. Rev. Stat. § 451.022 (West 2002); Mont. Code Ann. § 40-1-

401 (2002); Neb. Const. art. I, § 29; Nev. Question 2 (approved Nov. 5, 2002); (N.C. Gen. Stat. § 51-1.2 (West 2000); N.D. Cent. Code § 14-03-01 (2001); 43 Okla. St. Ann. § 3.1 (West 2000); Pa. Consol. Stat. Ann. § 1704 (West 2000); S.C. Code Ann. § 20-1-15 (West 2000); S.D. Cod. Laws § 25-1-1 (2002); Tenn. Code Ann. § 36-3-113 (2002); Utah Code Ann. § 30-1-4 (2002); Va. Code § 20-45.2 (West 2000); Wash. Rev. Code Ann. § 26.04.020 (West 2000); W.Va. Code § 48-2-603 (2002).

Similarly, when presented with the question of whether to recognize rights arising from Vermont civil unions, the courts of other states have said no. Rosengarten v. Downes, 802 A.2d 170 (Conn. App. 2002) and Burns v. Burns, 253 Ga.App. 600 (2002).

In contrast, a substantial number of courts routinely recognize contracts and wills executed in other states. See generally William A. Reppy, Jr., Choice of Law Problems Arising When Unmarried Cohabitants Change Domicile, 55 SMU L.Rev. 273 (2002) and Annotation, Conflict of Laws Respecting Wills as Affected by Statute of Forum Providing for Will Executed in Accordance with Law of Another State, 169 A.L.R. 554. Continuing this court's practice of recognizing and encouraging the development of private agreements regarding unmarried couples is the most certain

way to insure the achievement and protection of the plaintiffs' desires and expectations.

CONCLUSION

Massachusetts law currently recognizes and facilitates great personal liberty in the private ordering of the individual affairs of the plaintiffs. To the extent plaintiffs seek to develop legally enforceable economic interdependence, obligations of mutual support, and authority to care and provide for those they love, Massachusetts law allows them to do so. This case establishes no need and no constitutional warrant for this court to usurp the legislative function of defining the criteria for marriage licenses in this state.

Respectfully submitted,

Luke Stanton, BBO#
The Lawyers Building
24 Lexington Street
Waltham, Mass. 02452

Counsel for Amicus
Free Market Foundation