

Winter 2004

Same-Sex Marriage: *Goodridge v. DPH*

By Lisa Madeleine Cukier

On November 18, 2003, the Massachusetts Supreme Judicial Court in *Goodridge v. Department of Public Health*, decided that Massachusetts may not deny civil marriage and its protections and obligations from same-sex couples. According to the Court, “[E]xtending civil marriage to same-sex couples reinforces the importance of marriage to individuals and communities. 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.” The Court ruled, “limiting the protections, benefits and obligations of civil marriage to opposite-sex couples violates the basic premises of individual liberty and equality under law protected by the Massachusetts Constitution.”

The SJC stated, “we construe civil marriage to mean the voluntary union of **two persons as spouses** (emphasis added)” regardless whether those two persons are of the same sex or opposite sex. “Recognizing the right of an individual to marry a person of the same sex will not diminish the validity or dignity of opposite-sex marriage.” *Goodridge* has far-reaching impact in every aspect of life touched by law and raises legal questions regarding how a civil marriage will affect unique situations of same-sex couples.

Presumably, Massachusetts law regarding protections and obligations of married persons will apply to same-sex spouses who live in Massachusetts. For example, each same-sex spouse will be legally obligated to support each other and bear responsibility for certain of each others’ debts, and will have corresponding property rights incident to marriage. Uncertainty, however, will

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exist in some areas of law. For example, Massachusetts law presumes that marital spouses are the two parents of a child born to them during the marriage. In the case of same-sex spouses, this will be easily rebutted in a court proceeding by a biological parent seeking parental rights, custody, and visitation. For this reason, same-sex spouses will want to immediately adopt to prevent later attacks to parental status.

It is unpredictable how other states will treat same-sex spouses who marry in Massachusetts. For example, the law is unclear whether one spouse will be permitted to visit the other spouse in an out-of-state hospital in the event that a spouse becomes ill or is involved in an accident. For this reason, it is critical that same-sex spouses execute health care proxies and durable powers of attorney. It is also unclear whether other states will recognize a Massachusetts same-sex marriage when a court outside of Massachusetts is asked to adjudicate matters involving spousal shares of estates, title to property, custody and support, or loss of consortium. Given many other states’ prohibition of same-sex marriages, it is of paramount importance for same-sex spouses to execute prenuptial agreements, wills and trusts. It is never more urgent for same-sex couples to consult an attorney who is knowledgeable about issues raised by *Goodridge* for advice to fit the couple’s unique situation.

It is more certain how the federal government will treat Massachusetts same-sex marriages. In 1996, the federal government passed the Defense of

Marriage Act restricting marriage to a man and a woman. Thus, the federal government can withhold from same-sex spouses over 1,000 federal protections available to opposite-sex spouses. These include spousal pension and support under the Retirement Equity Act and the Social Security Act, spousal use of tax advantages through marital trusts, the right to make interspousal gifts without tax impact, and spousal status-based benefits available through employment law such as family leave. While Massachusetts may allow same-sex spouses to file income taxes as a married couple, the federal government will not. The question how same-sex spouses should file is further complicated if a same-sex couple relocates to another state. Moreover, foreign nationals will not have spousal standing to file an application for immigration based on same-sex marriage, and same-sex marriages involving a service-member could result in discharge from service due to the “Don’t ask don’t tell” policy.

As a result of the complications resulting from uncertain out-of-state recognition and federal prohibition of marital protections to same-sex spouses, it is critical to consult with a lawyer knowledgeable with the effect of *Goodridge* and not reflexively presume that civil marriage will pave the path ahead as it can for opposite-sex couples. ■

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Stock Options - Under Attack! Again.

By Andrew J. Merken

“Stock options are under attack.” I wrote these words ten years ago this winter in an article entitled, “The New World of Stock Options May Bring Unpleasant Surprises for Emerging Companies.” That article discussed how public and private companies were to account for and report on stock options under guidance by the Financial Accounting Standards Board (FASB) and the Securities and Exchange Commission (SEC). At the time, the FASB proposed that companies recognize a charge against earnings for all grants of stock options. The new rules included for the first time options granted under fixed plans (plans in which both the exercise price and the number of shares are fixed on the date of grant). Options granted under variable or performance-based plans (plans under which the exercise price or the number of shares is tied to performance measurements and therefore is not fixed on the date of grant) were already being treated as charges against earnings. Also at that time, the SEC instituted new rules which required substantially more disclosure about the number and value of options granted to senior executives. These proposals and changes came in 1992 and 1993 on the heels of the 1980’s stock market boom and bust fueled by the real estate markets. The article concluded that some companies would likely scale back their stock option programs in light of the impact to earnings and/or additional transparency that could ensue from the regulatory changes. As it turned out, the FASB proposal was adopted but in a much less arduous form.

Ten years later, as we are digging out from another stock market boom and bust, this time fueled by the rise in the Internet and the corporate scandals of the 1990s, the FASB and the SEC are at it again. In July 2003, the SEC approved New York Stock Exchange and Nasdaq rule changes* requiring companies to obtain stockholder approval for all new option plans, including broad-based plans, and increases in the number of options or material modifications to existing option plans. As recently as October 2003, the FASB informally proposed that beginning in 2005, companies will have to account for all stock options as an expense. It has been estimated that expensing all stock options would reduce earnings per share of a majority of private technology

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companies by up to 20% (with a small number of companies estimating a reduction of 20% or more), while a majority of public technology companies would see a reduction in earnings per share of up to 50%. In addition, the SEC has already put into place and has stated that it is working on additional changes to the public reporting of all equity compensation plans.

How are companies responding? In light of the estimated earnings reductions, additional transparency and difficulty in getting stockholder approval of additional options, companies are undertaking a number of different strategies. These diverse strategies, which are very company-specific and which in some cases have been developed with stockholder relations’ issues in mind, include the following:

- Lobbying against the proposed FASB changes. Two of the main arguments being made are:
 1. expensing options will make it even more costly to employ U.S. workers who receive options relative to foreign workers who often do not receive options from U.S. employers, resulting in more U.S. jobs being sent overseas, and
 2. expensing options will give foreign rivals a significant competitive advantage in seeking and retaining the best qualified help, as foreign companies will continue to issue options (this argument is made even though the International Accounting Standards Board, the IASB, has proposed similar changes as the FASB, impacting public companies in many other countries).

While it is currently expected that the FASB changes will be formally proposed by the end of March 2004 and adopted in final form by the end of 2004, there are a number of high profile individuals, including at least one SEC Commissioner, who have spoken out against the changes.

- Expensing options as if the FASB proposed changes had already been approved.
- Eliminating granting options altogether.

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Recently Published Articles

Articles

Giving Inter Partes Reexamination a Chance to Work, by Frederick C. Williams, *American Intellectual Property Law Association (AIPLA) Quarterly Journal*, (to be published) Spring Issue, Volume 32, Number 2.

Director Decision making in the Zone of Corporate Insolvency, by Theodore E. Dinsmoor, *Boston Bar Journal*, November 2003

Recent Client Advisories and Updates

SEC Issues MD&A Interpretive Guidance, *B&L Securities Law Update*, January 2004

Lexmark and the Remanufacturers; Copyrights, Patents and the Digital Millennium Copyright Act, *B&L Intellectual Property Update*, December 2003

Employer Quandaries on Same-Sex Marriage, *B&L Employment Solutions Update*, by Evelyn A. Haralampu, December 2003

Tax and Estate Planning for Same-Sex Marriages, *B&L Client Advisory*, by Howard D. Medwed, November 2003

Medicaid Update, *B&L Client Advisory*, October 2003

The Madrid Protocol: Effective November 2, 2003, *B&L Intellectual Property Update*, October 2003

Previous Issues of Focus

FALL 2003

Cost Effective Benefits for Part-Time Workers, by Evelyn A. Haralampu

Constructive Eviction in Commercial Leases, by Paul R. Mastrocola

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Who Owns Employee Inventions? The Employer or the Employee?

By Mark Schonfeld

It is dangerous for an employer to assume that it owns an employee's inventions merely because its employee invented them. Similarly, employees should not assume that they own inventions merely because they invented them at home. Employee-inventors present unique problems for the employer, and the answer to who owns an invention may depend on the type of invention. The rules for ownership of creations protected by a copyright differ from inventions protected by a patent. Here are some examples of the issues that can be presented by employee inventions:

1. A company hires a contract software developer for \$150,000 to create an internal business software program. The company gives the developer an office at company headquarters. Who owns the software program? Can the developer sell the software program to others, including the company's competitors?
2. Your sales manager invents a machine for use in your business, which reduces your manufacturing cost by 10%. You want to manufacture this machine and sell it throughout the industry. The sales manager says that the invention is his, not yours. Who wins?
3. An employee patents a valuable invention that he created at his employer's factory on company time. He demands a license fee from the employer to use the invention. Must the employer pay him the license fee?
4. You hire an independent web page designer to create your web page, including web graphics and text. Who owns the contents of your website – you or the designer?

These are some of the issues arising from the employee-employer relationship. It is estimated that 80% to 90% of patent inventions are the result of employee-inventors. Almost all ownership disputes can be avoided if addressed in a written agreement at the outset. But if there is no written agreement, these rules generally apply:

1. The author of the work is usually the owner of the copyright, unless the work was prepared by an employee in

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the scope of his or her employment. If so, then the work is a "work for hire" and the employer is the owner.

2. If the author is an independent contractor, and not an employee, the work does not belong to the employer. It is often difficult to distinguish between an employee and independent contractor, so employers should seek legal advice in establishing this distinction.
3. The ownership of patents is different than ownership of copyrights. In the absence of a written agreement, an employee's patentable inventions may not belong to the employer, except in special circumstances. The employee-employer relationship does not necessarily entitle the employer to ownership of inventions made by the employee.
4. If the employee was hired for the specific purpose of inventing a defined product or process, the invention belongs to the employer.
5. General inventions made at the employer's expense but not at the employer's specification are often not the property of the employer.
6. Does this mean that the employee can then stop his employer from using the invention, which he made at the employer's expense? No. The employee may have the duty to license the invention at no cost to the employer. This is called the "shop right rule." A shop right is a nonexclusive license to use, manufacture and sell an invention without financial obligation to the inventor. However, the employee retains ownership of the patent.
7. Inventions made on the employee's own time, but not at the employer's expense, can be the property of the employee, even if they relate to the employer's business.

The absence of a written agreement causes these disputes to arise. Accordingly, it is advisable to follow these guidelines in order to avoid

ownership disputes between employers, employees and independent contractors:

1. Consult your attorney. It is essential to obtain legal advice so that you can protect your intellectual property.
2. Always use written agreements which spell out the rights of employer, employee and independent contractors. Ensure that the agreements are valid under your state's law.
3. Employers should make sure that employees read and sign the written agreements, preferably before they commence their employment.
4. Employers should ensure that written employment agreements have confidentiality clauses and appropriate non-compete provisions. ■

Recently Published Articles

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Don't Forget Your E-mail: The Need for Electronic Document Retention Policies, by Victoria L. Schmidt

Fees Increase in Massachusetts... But for a Client, Some Relief, by Tracy Klay

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State "QTIP" Trust Eases Massachusetts Estate Planning Dilemma, by Clifford R. Cohen and Denise A. Lambert

Employment References: The Conditional Privilege, by Jennifer L. Laro

Early Lease Termination – A Tenant's Perspective, by Victor Bass and Christina M. Murray

Corporate Law Update, by Deanna M. Silva

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Health Care Proxies – Preparing for the Unexpected

By Norman C. Spector and Dianne L. Frade

Everyone over the age of 18 should have a Health Care Proxy. Drafting and signing one is a quick and simple process. A recent legal battle in Florida, with national press coverage, has shown once again that everyone, young or old, should have a Health Care Proxy.

Thirteen years ago, at age 26, Terry Schiavo suffered a heart attack leaving her severely brain damaged and in a near vegetative state. She was kept alive by machines and a feeding tube. Her husband and her parents went to court to deal with the husband's request to remove her feeding tube. Because she had no Health Care Proxy or living will, the courts and the politicians became decision makers for the family in a drama played out in the national media.

Massachusetts allows a person to execute a Health Care Proxy which names a health care agent, and if desired, an alternate agent, who would have full legal authority to make any health care decisions for you when you are unable to make those decisions or communicate those decisions. While Massachusetts does not accept "living wills," a Health Care Proxy can cover, if you so choose, decisions about feeding tubes, breathing apparatus and similar treatment.

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A Health Care Proxy can be a simple document. It only needs to be signed in the presence of two disinterested witnesses and does not require a notary. If you change your mind, it is easy to revoke or change. Once a Health Care Proxy has been signed, photocopies are also effective.

The time to prepare a Health Care Proxy is now – when it is not needed. Tragedies like those of Terry Schiavo can happen to young people and for that reason, everyone over 18 should have a Health Care Proxy. Once prepared, copies should be given to your health care professionals for inclusion in your medical records, to the person named in your Health Care Proxy, and kept among your readily accessible important personal records – not in a safe deposit vault. ■

Focus

Focus is published three times a year by Burns & Levinson LLP for clients and friends of the firm. This newsletter provides general information and does not constitute legal advice.

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- Reducing the number of options granted to top executives and eliminating option grants altogether to lower-level employees.
- Issuing options with terms shorter than the typical ten years and with quicker vesting schedules, which lessen the value of the options and therefore lessen the earnings reduction under the widely used Black-Scholes options-pricing formula.
- Issuing restricted stock, restricted stock units, stock-settled Stock Appreciation Rights, or phantom stock in conjunction with or completely in lieu of

stock options. For example, Microsoft announced that it will replace its option program with stock units, a promise to grant stock at a later date.

- Increasing cash awards as a compensation incentive.
- Designing alternative executive compensation packages.

Stock options have traditionally been a strong tool for companies, particularly emerging growth technology companies, to recruit, incentivize and reward key

employees and management. While it is clear that the days of huge stock option grants, not directly subject to stockholder scrutiny or control, are likely over (at least for now), the extent to which stock options will be used and the impact they will have on wealth generation during the next boom remain in large part in the hands of the FASB, with the SEC looking on to make sure that whatever the FASB decides, stockholders get more and better information. ■

*For more information on the NYSE and Nasdaq rule changes see *B&L Securities Law Update: "New NYSE and Nasdaq Rules for Stockholder Approval of Equity Compensation Plans (Spring 2003)"* http://www.burnslev.com/Publications/Advisories/Equity_Comp_July2003.pdf