No. 124863

IN THE SUPREME COURT OF ILLINOIS

MATT SHARPE,	)	**On Appeal from the Appellate Court of Illinois, Fifth Judicial Circuit, No. 5-17-0321**
Petitioner,	)	
v.	)	
CRYSTAL WESTMORELAND,	)	**There heard on Appeal from the Circuit Court of the Third Judicial Circuit, Madison County, Illinois, No. 11-D-1210**
Respondent-Appellant-Respondent.	)	
GREG SHARPE,	)	
Intervenor,	)	
and	)	**The Honorable Martin Mengarelli, Judge Presiding**
KRIS FULKERSON,	)	
Intervenor-Petitioner-Appellee-Petitioner.	)	

BRIEF *AMICUS CURIAE* OF THE ILLINOIS CHAPTER OF THE AMERICAN ACADEMY OF MATRIMONIAL LAWYERS

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INTEREST OF THE *AMICUS*

Amicus curiae The Illinois Chapter of the American Academy of Matrimonial Lawyers (the "Academy") is a national, not-for-profit organization comprised of lawyers who spend a substantial percentage of their time practicing matrimonial law, and who meet certain qualifications. There are more than 1,600 Fellows in 50 states. As representatives of a portion of the legal profession, the Academy takes an active interest in matters affecting the practice of family law in Illinois. The Academy's purpose is to preserve the best interest of the family and of society, and to improve the practice, elevate the standards and advance the cause of matrimonial law. Local and national electronic and print media often contact Academy Fellows for their opinions on breaking family law issues. In recent years, the Academy has appeared as *amicus curiae* in important cases in this Court and the Appellate Court, including: In re Marriage of Best, 228 Ill. 2d 107 (2008) where this Court clarified the procedures for declaratory judgment actions involving prenuptial agreements in dissolution of marriage cases; In re Marriage of O'Brien, 2011 IL 109039, which clarified the standards for obtaining a substitution of judge; Johnston v. Weil, 241 Ill. 2d 169 (2011), where this Court confronted issues regarding mental health evaluations in child custody cases; In re Marriage of Eckersall, 2015 IL 117922, a case dealing with the appealability of interim child custody orders; In re Marriage of Altman, 2016 IL App (1st) 143076, where the First District Appellate Court held that earned fees cannot be disgorged in a pre-judgment dissolution of marriage case; In re Marriage of Goesel, 2017 IL 122046, where this Court affirmed the Altman holding; In re Marriage of Kane, 2018 IL App (2d) 180195, where the Second District Appellate Court held that attorneys are not made parties to a divorce case by filing for fees against their former clients; and Yakich v. Aulds, 2019

IL 123667, a case recently decided by this Court on *stare decisis* grounds regarding the constitutionality of the college contribution statute. The Academy authorized the filing of this brief.

INTRODUCTION

The statute in question here—the definition of "step-parent" in 750 ILCS 5/600(l) (the "step-parent statute")—was incorrectly interpreted by the Fifth District Appellate Court. First, the broad language of the Religious Freedom Protection and Civil Union Act (the "Civil Union Act"), 750 ILCS 75/1 *et seq.* (2018), was intended by the legislature to allow parties to a civil union each and every right afforded to parties to a marriage. Second, reading an exception into the Civil Union Act's broad and unequivocal language providing that civil union partners are provided *all* rights afforded to spouses violates the equal protection clause. Because of that plain meaning since the enactment of the Civil Union Act, the matrimonial bar has understood and advised their clients that the legislature's use of the words "marriage" and "civil union" is one in the same; in other words, parties to marriages and civil unions enjoy equal rights under Illinois state law.

A former matrimonial attorney, Judge Celia Gamrath of the Cook County Circuit Court, wrote the following just prior to the Civil Union Act taking effect: "After years of work and countless hours of negotiations, Gov. Pat Quinn signed into law the civil unions bill, announcing exultantly: 'We believe in civil rights . . . civil unions . . . liberty and justice for all.' The law takes effect on June 1. Regardless of your position on the matter, there is no denying that this is a significant advancement of rights and equality for gay, lesbian and transgender couples who want legal rights and protections afforded to legally married spouses. Senate Bill 1716, the Illinois Religious Freedom Protection and Civil

Unions Act, is designed to give same-sex couples the same rights and privileges of married heterosexual couples - - from fair housing and employment, to the sharing of health and pension benefits, to hospital visitation and probate and property rights. These rights would extend to non-married heterosexual couples as well, who desire the right to make medical decisions about a partner's medical care, visit a sick partner in the hospital and make funeral arrangements for a partner upon his or her death." Hon. Celia Gamrath, All In The Family: Civil Unions Have Arrived, Chicago Lawyer (April, 2011). (A1-A2) [1]

Two matrimonial practitioners stated in the Family Law Newsletter for the Illinois State Bar Association, "A couple in a civil union will receive all the legal benefits and protection, and be subject to same legal responsibilities, as are provided under Illinois law to married couples." Richard Felice (now Judge Felice) and Camilla B. Taylor, A First Look At The Illinois Civil Union Act, ISBA Family Law Newsletter, Vol. 54, No. 4, February, 2011. (A3-A6)

Another family law practitioner described the Civil Union Act as "A relatively short, relatively simple, and exceptionally comprehensive piece of legislation that creates a status analogous and equal to marriage under Illinois law - - without regard to gender - - conferring all the rights, interests, benefits and burdens available to spouses without, or short of, marriage itself." Richard A. Wilson, A Guide to the New Illinois Civil Union Law, Illinois Bar Journal, Vol. 99 No. 5, p. 232 (May, 2011). (A7-A12)

It is against the backdrop of this commentary that many thousands of potential parties to Illinois proceedings, both private and litigated, have come to rely on this

[1] References to documents included in the Appendix to this Response are designated with an "A".

understanding of Illinois law. As have the many Illinois family lawyers in advising those parties. The implications of the Appellate Court now declaring that those rights are not equal in *ad hoc*, piecemeal fashion, are not only troubling, but contrary to the express stated purpose of the Civil Union Act. This Court should reverse.

ARGUMENT

Familiar principles govern issues of general statutory construction. The primary goal of statutory construction, to which all other rules are subordinate, is to ascertain and give effect to the intention of the legislature. In re Marriage of Goesel, 2017 IL 122046, ¶ 13. This Court in determining the intent of the legislature can consider the consequences that would result from construing the statute one way or the other, and in doing so, it is presumed that the legislature did not intend absurd, inconvenient, or unjust consequences. Id. The Appellate Court's construction of the step-parent statutes excluding civil union parties would have to result in the Civil Union Act not allowing for equal rights between parties to a marriage and parties to a civil union, in complete disregard of the language of that statute.

I. Civil union parties are step-parents under the law.

Section 20 of the Civil Union Act provides as follows:

> "Protections, obligations and responsibilities. A party to a civil union is entitled to the same legal obligations, responsibilities, protections, and benefits as are afforded or recognized by the law of Illinois to spouses, whether they derive from statute, administrative rule, policy, common law, or any other source of civil or criminal law."

The legislature could not be clearer—parties to a civil union have all the same rights as parties to a marriage. When the intent of the legislature is otherwise clear, the judiciary should simply follow the statute as drafted. The Civil Union Act did not limit the rights

and responsibilities provided to civil union partners and their children to those specifically mentioned in the hundreds of statutes and other sources of law that provide such rights to a married couple as well as their children. The Appellate Court's invocation of the superior rights doctrine as support for its construction of the step-parent statute is puzzling. Whether Ms. Fullerton was Mr. Sharpe's spouse or civil union partner, she does not have a biological relationship to the minor child in this case.

However, to the extent that it was necessary to include the words "civil union" or "civil union partner," this Court possesses the authority to read language into a statute that has been omitted through legislative oversight. People v. Masterson, 207 Ill. 2d 305, 329 (2003) (reading the Sexually Violent Person Commitment Act's definition of "mental disorder" into the Sexually Dangerous Persons Act to correct legislative oversight).

The Academy, some of whose Fellows were appointed by this Court to oversee the major rewrites to Illinois' family law statutes in recent years, believes that the failure of the step-parent statute to mention partners to civil unions was merely an oversight by the legislature, if its inclusion was even necessary. The legislature did not intend that people who elect to enter into a civil union instead of a marriage would not be considered "step-parents" for purposes of Illinois family law. There would be no conceivable purpose to making this distinction—entering into a civil union over a marriage is a decision that seemingly turns on wanting, or not wanting, federal rights (tax and otherwise) and possibly insurance; it has nothing to do with what is in the best interests of a child or any other rights under state law, given the legislature's clearly stated intention in the Civil Union Act. In any event, the Appellate Court has, at least twice before, construed our state's family law statutes to include words and phrases it found were omitted by legislative oversight. See In

re Custody of Carter, 137 Ill. App. 3d 439, 442 (1985) (reading into statute a requirement of finding serious endangerment to authorize modification of child custody within 2 years of judgment despite legislature's failure to include that standard in the appropriate subsection of the modification statute); In re Marriage of Hasabnis, 322 Ill. App. 3d 582, 596 (2001) (reading requirement that attorney fee awards be "reasonable" into final contribution statute because the Court could not "envision a grant of legislative authority that tells judges to be unreasonable.")

This case should be decided based on the plain language of the Civil Union Act; but to the extent this Court finds the language of that Act insufficient, it should decide it on legislative oversight grounds. The failure to include a reference to parties to a civil union in the step-parent statute, along with many other statutes providing state law rights to married couples without specifically including the words "civil union" cannot rationally be based on any other grounds given the legislature's clearly expressed intention to afford equal rights and responsibilities to all couples – whether they have entered into a civil union or married. The Appellate Court's judgment should be reversed.

II. If the legislature did not intend civil union parties to be step-parents, the step-parent statutes violate equal protection.

If the step-parent statute includes parties to civil unions then it has passed constitutional muster. If it does not, it lacks a rational basis for the distinction drawn by the statute between parties who are married and parties who were joined by civil unions. The purpose of the step-parent statute is to require a sufficient contact between the child and a step-parent. While spouses of the child's parent clearly have that connection, there is no basis to assume that a civil union partner does not have the exact same bond with the child. To the degree that a step-parent fails to meet the test for determining whether they

should be granted visitation notwithstanding the superior rights of the parent, that would be the subject of an evidentiary hearing whether or not the person seeking visitation or parental responsibility is a step-parent because or a marriage or a civil union. But Ms. Fulkerson certainly should have the right to assert her claim. Fundamental principles of equal protection "will not tolerate a legislative classification made arbitrarily and without a reasonable basis." Jacobson v. Department of Public Aid, 269 Ill. App. 3d 359, 368 (1995) (no rational basis existed for distinction drawn by statute). Indeed, one of the stated purposes of the Illinois Marriage and Dissolution of Marriage Act is to "strengthen and preserve the integrity of marriage and safeguard family relationships." (emphasis added). 750 ILCS 5/102(2). Family relations are not limited to marriages, nor is there any rational reason to draw lines between civil unions and marriages for any purpose in Illinois, but especially when the best interests of a minor child may ultimately be at stake. The Appellate Court's judgment should be reversed.

PRAYER

WHEREFORE, *Amicus* prays that this Honorable Court reverse or vacate the Appellate Court's judgment, and for such other, further and different relief as this Court in its equity deems just and proper.

Respectfully submitted,

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CERTIFICATION OF BRIEF

I certify that this *amicus brief* conforms to the requirements of Supreme Court Rules 341(a) and (b). The length of this brief, excluding the cover page, table of contents, points and authorities, appendix, and this certification, is 8 pages.

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APPENDIX

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CHICAGO LAWYER

All in the Family: Civil unions have arrived

By Judge Celia Gamrath
Cook County Circuit Court

April 01, 2011

After years of work and countless hoursof negotiations, Gov. Pat Quinn signed into law the civil unions bill, announcing exultantly: "We believe in civil rights ... civil unions ... liberty and justice for all." The law takes effect on June 1.

Regardless of your position on the matter, there is no denying that this is a significant advancement of rights and equality for gay, lesbian and transgender couples who want legal rights and protections afforded to legally married spouses.

Senate Bill 1716, the Illinois Religious Freedom Protection and Civil Unions Act, is designed to give same-sex couples the same rights and privileges of married heterosexual couples — from fair housing and employment, to the sharing of health and pension benefits, to hospital visitation and probate and property rights. These rights would extend to nonmarried heterosexual couples as well, who desire the right to make medical decisions about a partner's medical care, visit a sick partner in the hospital and make funeral arrangements for a partner upon his or her death.

General Assembly opponents expressed concern that the civil unions bill will drastically redefine marriage, lead to legalizing same-sex marriage and negatively impact pension and health-care costs. Yes, there will be a cost associated with providing civil union partners the same legal rights and benefits provided to married couples; however, some major employers, like Barclays, Google and McDermott Will & Emery, already offer these benefits to same-sex couples.

A few have even taken steps to reimburse employees for the additional tax they must pay by adding domestic partners to their health insurance plans. Under the current tax law, spouses do not have to pay for taxes on benefits received under their spouse's plan, but domestic partners do. Employers who really want to treat homosexuals the same as heterosexuals have begun voluntarily reimbursing or "grossing up" compensation for those employees affected by the tax. This type of initiative is designed to create fairness and equity among employees.

To that end, Senate Bill 1716 grants parties to a civil union the same legal obligations, responsibilities, protections and benefits afforded to spouses. This means the practice of family law, as well as estate planning, employee benefits, health care, insurance and tax law, is about to change radically. Divorce will not only apply to heterosexual married clients, but will extend to civil union partners.

There will be an application process, license and fee required for civil unions, akin to marriage. A proceeding for the dissolution of a civil union will be titled "In re the Civil Union of ... and ..." The initial pleading will be titled "Petition for Dissolution of Civil Union of ... and ...." All other pleadings will be as provided in the Civil Practice Law.

The grounds for dissolution of marriage and invalidity of marriage will apply equally to civil unions.

So too, it seems, will all the rights and responsibilities concerning children, spousal support, division of property and attorney fees in Illinois. Because only a small number of states recognize civil unions, participants to a civil union cannot count on these protections outside of Illinois.

Illinois has made noticeable strides toward equality between same-sex and heterosexual unions. This new law gives same-sex partners the same rights and responsibilities as married people in Illinois regardless of "whether they derive from statute, administrative rule, policy, common law or any other source of civil or criminal law."

A1

However, Illinois still expressly prohibits same-sex marriages and the Illinois Uniform Premarital Agreement Act will not necessarily apply to civil unions. Accordingly, same-sex partners may wish to enter into domestic partnership or cohabitation agreements to protect and determine their rights. Salient provisions of these agreements usually include provisions concerning property, support and other rights upon dissolution of the relationship.

There is no statutory framework for drafting domestic partnership or cohabitation agreements; a model is in the works drafted by Chicago attorney Richard Wilson, based largely on the Illinois Uniform Premarital Agreement Act. To be enforceable, a cohabitation agreement must be in writing and freely and voluntarily executed. Parties may contract to almost anything so long as it is not violative of public policy and does not adversely affect child support. A cohabitation agreement would not be enforceable if it was executed under duress or coercion, is unconscionable and there was a lack of disclosure.

Lawyers and judges are wise to keep their eyes on the new laws, requirements and forms necessary to effectuate Senate Bill 1716. The Illinois Family Law Study Committee is also working to study and recommend changes to the Illinois Marriage and Dissolution of Marriage Act in light of civil unions and other policy changes over the last three decades.

It has been 30-plus years since the Illinois Marriage and Dissolution of Marriage Act was created. Clearly, the concept of family has changed, as have the rights and benefits afforded to partners — gay and straight — in a committed relationship.

February 2011 Vol. 54, No. 4

ILLINOIS STATE BAR ASSOCIATION

FAMILY LAW

The newsletter of the Illinois State Bar Association's Section on Family Law

Chair's column

By Rory Weiler

Greetings from snowy St. Charles. As I write this, the snow is flying and I'm once again reminded how "exhilarating" it is to live in the Midwest during the winter. That said, regardless of the swirling and blowing snow, the Illinois Legislature has delivered a bright beacon of hope that blazes bright through the winter's clouds. As most of you know by now, the Legislature approved a bill establishing "civil unions," a bill that Governor Quinn has promised he will sign into law. By the time you read this, it is likely that Illinois will be one of a handful of states that has (finally) granted recognition to partnerships of unmarried individuals (assuming, that is, that the Governor's promise on this issue is worth a bit more than others made on the campaign trail, but I digress).

When signed into law, the new "Illinois Religious Freedom and Civil Union Act" will place Illinois in the forefront of progressive social action to afford all of its citizens equal protection under the law. This Act was unanimously supported by our Section Council, past and present, and we are pleased to have been a part of the process which resulted in its adoption. However, while the Act greatly enhances the rights of certain individuals involved in partnerships outside of the traditional state approved marriage, it doesn't completely level the playing field between married parties and those involved in a civil union. The Federal Defense of Marriage Act and other laws still preclude complete equality, and there is still action which needs to be taken to afford unmarried individuals involved in a civil union all of the rights and equal protection that married individuals enjoy.

Clearly, much work needs to be done on a variety of levels before the June 1, 2011 effective date of the Act. County clerks and state and local officials are working on developing and implementing protocols and procedures for the registration of civil unions and other administrative and ministerial matters. The Act itself provides that the dissolution of civil unions will be sub-

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A first look at the Illinois Civil Union Act

By Richard Felice and Camilla B. Taylor

Illinois family law is in the process of changing dramatically for committed couples who are not married under Illinois law and for their children. The Illinois Legislature recently passed the Illinois Religious Freedom Protection and Civil Union Act (the "Act"), which makes available a comprehensive new legal status for same-sex and different-sex couples. Governor Quinn has stated that he will sign the law, which will go into effect on June 1, 2011.

Under Illinois' new law, a civil union is a legally recognized relationship of two people entered into by applying for and obtaining a state license from a county clerk's office, having a formal ceremony, and then getting a confirming certificate issued by the clerk's office. Both same-sex and different-sex couples will be able to enter into a civil union. A couple in a civil union will receive all the legal benefits and protections, and be subject to the same legal responsibilities, as are pro-

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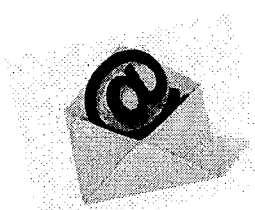

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A first look at the Illinois Civil Union Act

Continued from page 1

vided under Illinois law to married couples. However, a civil union is not a marriage. Illinois law continues to exclude lesbian and gay couples from marriage. 750 ILCS 5/201, 212(a)(5), 5/213.1.

By enacting civil unions, Illinois joins a growing number of states that provide some form of legal recognition to same-sex couples' relationships. Five states (Iowa, Massachusetts, Connecticut, New Hampshire, and Vermont) and the District of Columbia currently permit same-sex couples to marry, and legislatures in additional states will consider marriage bills this year. Other states (California, Nevada, New Jersey, Washington, Oregon, and now Illinois), while banning lesbian and gay couples from marriage, make available to these families a comprehensive lesser status titled "civil unions" or "domestic partnerships," depending on the state. Four states (Maine, Maryland, Colorado, and Wisconsin) provide more limited recognition to same-sex couples and their families under statutory schemes that accord only a few of the benefits and responsibilities of marriage. A few other states, including New York, New Mexico, and Rhode Island, will respect out-of-state marriages of same-sex couples. However, most states continue to deny legal recognition to same-sex couples' relationships, and in many of these states it remains unclear what respect, if any, an Illinois civil union will receive. Consequently, because Illinois civil union partners may travel outside of Illinois, such couples should continue to work closely with family lawyers and trusts and estates lawyers to perform adoptions and draw up legal documents to protect themselves and their children, as they may not be able to rely on their civil unions to achieve recognition of their status as a family in certain states outside of Illinois.

The rights and obligations of civil union partners in Illinois

The Act's purpose is to "provide persons entering into a civil union with the obligations, responsibilities, protections, and benefits afforded or recognized by the law of Illinois to spouses." (Section 5.) Consistent with that purpose, the Act states expressly that civil union partners are "entitled to the same legal obligations, responsibilities, protections, and benefits" as spouses, regardless of "whether they derive from statute, administrative rule, policy, common law, or any other source of civil or criminal law." (Section 20.) Following are just a few examples of the hundreds of bundled rights and obligations associated with marriage under Illinois law that now will apply to parties to a civil union:

Family Law Rights and Responsibilities

- Access throughout the state to step-parent and joint adoption on the same terms and using the same procedures as apply to different-sex married couples, and the ability to become licensed jointly as foster parents;
- Legal presumption that both partners are parents of children born into the civil union;
- Duties of joint financial support and liability for family debts arising during the relationship;
- Ability to use spousal name change procedures when entering a civil union
- Dissolution of the civil union by a domestic relations court, including access to equitable division of the relationship assets and debts;
- Right to seek maintenance upon dissolution;
- Access to custody, visitation and support orders concerning children upon dissolution;
- Protection for civil union partners and their children under domestic violence, crime victim, and crisis assistance laws; and
- Enforcement of pre-civil union agreements between civil union partners on the same terms as premarital agreements between spouses.

Medical and Death-Related Rights

- Automatic rights of hospital visitation, medical decision-making, and authority to receive information about a partner's medical condition or treatment;
- Automatic ability to authorize anatomical gifts, autopsy, and release of medical records, and to make funeral arrangements for a deceased partner;
- Right to seek money damages for a partner's wrongful death, lost financial support and companionship;

FAMILY LAW

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- Right to inherit in the absence of a will, and certain financial protections while the estate is being settled;
- Financial protections against the duty to repay public medical and nursing home costs upon death of a partner; and
- Employment-related spousal or family benefits, including spousal health insurance for public employees (although such benefits will still be taxable under federal law as income for the employee).

Other Rights and Responsibilities

- Right to file joint state income tax returns, and state tax exemption regarding value of partner health insurance;
- Right to hold real property in "tenancy by the entirety" (which offers some protection against creditors);
- Some workplace benefits, including the right to a pension for the surviving civil union partner of a firefighter or police officer, and where work injury causes death, funeral and burial expenses, and death benefits;
- Equal treatment as spouses under certain state insurance laws;
- Right not to testify against civil union partner;
- Right of an incarcerated person to phone a critically ill civil union partner; and
- Veterans' benefits that are available to spouses under state law

Rights and responsibilities of marriage that remain *unavailable* to civil union partners

- All federal rights and responsibilities, including social security survivors' and spousal benefits, certain federal spousal employment benefits, the ability to file joint federal income tax returns; exemption from income tax on the value of domestic or civil union partner health insurance; exemption from federal inheritance tax; spousal protections in bankruptcy; federal veterans' spousal benefits; authority to sponsor a spouse to immigrate; and
- Automatic legal status in many other states that purport to deny any recognition to the legal relationships of same-sex couples.

Eligibility to enter into a civil union

The requirements for entry into a civil union are similar to those for marriage. Same-sex or different-sex couples may enter into a civil union if:

- Both members of the couple are at least 18 years' old
- Neither is currently in a marriage or civil union or substantially similar legal relationship; and
- The members of the couple are not closely related to each other by blood or adoption. (Section 25.)

There is no residency requirement to enter into a civil union in Illinois. However, under 750 ILCS 5/217 and Section 35 of the Act, non-resident couples may need to demonstrate that an Illinois civil union would not be prohibited in their home state.

Do same-sex couples have to enter into a civil union if they already married in another jurisdiction or entered into a civil union or registered domestic partnership elsewhere?

Same-sex couples who have already married each other in a jurisdiction that permits such couples to marry (such as Iowa, Massachusetts, Connecticut, New Hampshire, Vermont, the District of Columbia, California in the summer of 2008, or another country, such as Canada), or who have entered into a civil union or comprehensive domestic partnership in another jurisdiction do not need to enter a new civil union in Illinois; their status will qualify as a civil union in Illinois automatically as soon as the law goes into effect on June 1, 2011. Note that for an out-of-state domestic partnership to receive respect as a civil union in Illinois, the scope of the foreign state's domestic partnership law must be similar in breadth to Illinois' civil union law, such as domestic partnership laws in California, Nevada, Washington, or Oregon. In contrast, Wisconsin registered domestic partnerships, for example, which entail far fewer rights and responsibilities, are unlikely to qualify as civil unions in Illinois. With a broad or comprehensive legal status from another state, same-sex couples do not need to take any additional steps to achieve recognition of their relationships as civil unions in Illinois.

What steps should couples take to enter into a civil union?

Both parties must appear in person to fill out an application for a license to enter into a civil union. Applications are available through any county clerk's office. The cost of applying for a civil union license varies by county, and is usually in the range of $15 to $40. As is the case for couples applying for marriage licenses, couples applying for a civil union license should bring with them a form of identification, such as a birth certificate, driver's license, or passport.

If a member of a couple previously has been married or in a civil union, he or she also should bring proof, in case the clerk asks to see it, that he or she is no longer married or in the prior marriage or civil union, such as a copy of the divorce or dissolution decree, or, if applicable, the death certificate of the deceased spouse or partner. (Same-sex couples who have married each other in another jurisdiction likely are ineligible to apply for a civil union license, and do not need to do so in any event, as a same-sex couple's out-of-state marriage qualifies as a civil union in Illinois automatically, as described above.) If a couple resides outside of Illinois, the clerk may ask the members of the couple to sign an affidavit stating that their home state does not prohibit them from entering into a civil union.

The civil union license is valid for 60 days, and is valid only in the county in which it was issued, which means that the couple's civil union ceremony must take place within that county. There is a one-day waiting period before the license becomes effective. As is the case for marriages, a court can waive this waiting period for a couple who files a petition showing sufficient cause.

Couples may choose a judge, certain public officials, or a religious official to solemnize a civil union. An officiant must complete the certificate confirming that the ceremony has been performed, and forward it to the county clerk within 10 days of the civil union ceremony. The same rules for spousal name changes on a marriage certificate will apply to a couple in a civil union when filling out the civil union certificate.

A list of county clerks offices can be found here: <www.idph.state.il.us/vitalrecords/countylisting.htm>.

Employer health insurance, pension and other employment-related benefits

Government employers must provide civil union partners the same health insurance and pension benefits accorded to spouses. It may be more challenging, however, to hold certain private employers to their obligation to treat civil union partners equally

to spouses with respect to health insurance and pensions, depending on what type of plan the private employer uses, and whether state and local nondiscrimination laws apply. Regardless of whether an employee works for a public or private employer, federal law treats the value of spousal health insurance benefits for civil union partners as taxable income to the employee. Putting health insurance and pensions aside for the moment, both government employers and most private employers must treat civil union partners equally when it comes to other employment-related benefits such as bereavement leave, paid parental leave, or spousal relocation policies.

Why might a couple be advised *not* to enter a civil union?

- If a couple wishes to adopt from a state or country that may not approve adoptions by lesbians, gay men, same-sex couples or unmarried different-sex couples;
- If one or both same-sex partners are in the U.S. military (until the complete implementation of the repeal of federal statutes and regulations known as "Don't Ask Don't Tell");
- If either member of the couple depends on public assistance;
- If either is a foreign national without permanent legal status in the U.S.;
- If either or both do not want the state law rights and mutual responsibilities the new law will provide civil union partners, or are concerned about the open questions about how state law will interact with federal laws that do not recognize same-sex couples or unmarried different-sex couples.

Dissolution of a civil union or divorce following a marriage to a same-sex spouse entered into in another state or country

Civil union partners (including those in a civil union as a result of an out-of-state marriage to a same-sex spouse) will need to file a petition for dissolution of their civil union using the same procedures that spouses use to file for divorce, except captioning their petition as "In re the Civil Union of ... and ...." (Section 50.) Civil union partners will be eligible for maintenance and court assistance in allocating child custody, awarding visitation and support, and dividing property on the same terms as apply to spouses.

Couples in civil unions should continue to work with private attorneys to draw up documents to protect themselves and their children when they travel outside of Illinois

Even though couples in civil unions in Illinois will receive the benefit of all of the legal rights, presumptions, protections, and responsibilities under Illinois law that are available to spouses, civil union partners nevertheless should be diligent in drawing up legal documents to protect themselves and their children because they may not be able to rely on their civil unions outside of Illinois. For example, if a couple in a civil union has a car accident in Nebraska, a state that denies any recognition to same-sex couples' relationships, the couple may have trouble establishing that they are authorized to receive medical information about each other or make medical decisions for an incapacitated partner. As another example, the couple may have trouble in Nebraska when they try to rely upon their civil union's spousal presumption of parentage to demonstrate that both parties are parents of children born into their civil union. Consequently, couples in civil unions (regardless of whether they have Illinois civil union certificates, or whether they are in recognized civil unions as a result of an out-of-state marriage) should continue to work with attorneys to draw up documents such as health care powers of attorney, wills, and other trusts and estates documents. Similarly, even though civil union partners both are presumed parents in Illinois from birth of children born into the civil union, a non-biological parent nevertheless should obtain an adoption decree with respect to each of the couple's children to ensure recognition of his or her parent-child relationships outside of Illinois.

The developing law

Family law practitioners need to be particularly vigilant in following the developments in the law surrounding civil unions and marriages of same-sex couples, both here in Illinois and in other states. As this article demonstrates, the Illinois Civil Union Act requires lawyers dealing with civil unions to be attuned to both the law of other states and the interplay of the civil union with other areas of the law. ■

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Family Law

A Guide to the New Illinois Civil Union Law

By **Richard A. Wilson**

Beginning June 1, the Illinois Religious Freedom Protection and Civil Union Act confers most of the rights of marriage on parties to a civil union. But definitions of "spouse" and "marriage" under federal law impose important limits on the new act, requiring special planning for "civilly unioned" couples.

The recently enacted and soon-to-be effective Illinois Religious Freedom Protection and Civil Union Act[1] (the "act" or the "Civil Union Act") is a relatively short, relatively simple, and exceptionally comprehensive piece of legislation that creates a status analogous and equal to marriage under Illinois law - without regard to gender - conferring all the rights, interests, benefits and burdens available to spouses without, or short of, marriage itself.

It's called a "civil union." Implicitly promising equality as a matter of state law, under the new act two persons - of either the same or opposite gender and both at least 18 years of age - may elect to enter into a civil union rather than a marriage. And those who do - as well as those who are already married, civilly unioned or united,[2] domestically partnered or in some analogous status conferred by the laws of another state or country - will be entitled to all of the recognitions and benefits available under Illinois law to spouses, including that which is arguably the most important if and when the time comes: divorce.

A close reading of the new act reveals that, as to both policy and formation, it is nearly identical to the existing Illinois Marriage and Dissolution of Marriage Act (IMDMA)[3] (with few relatively inconsequential exceptions discussed below) and, as to dissolution in appropriate instances, expressly incorporates applicable provisions of the IMDMA. If, as is widely assumed, the primary intent of the new law is to provide same-sex couples with the same rights and benefits afforded to opposite-sex couples under the state's laws,[4] it has accomplished just that.

In each "stage" of a civil union - formation, recognition while intact, and dissolution - the procedure by which it is obtained, maintained, and dissolved, including the substantive rights, benefits, and duties and obligations of the parties, differs little from that provided by Illinois law to parties to a marriage. As a matter of statutory construction, there isn't much the act does that the IMDMA doesn't do for those who are able to marry under Illinois law. There appear to be only two differences - one of which is an inherent and likely intended consequence of the new law, and the other an extraneous and unavoidable one, whether contemplated or not.

The first is marriage itself. By creating a separate status equivalent or equal in nearly all respects to marriage, the act nonetheless is separate, and is not and does not provide for marriage, which remains available under Illinois law solely to persons of the opposite sex.[5]

The second is the pervasive and likely inescapable reach of federal law, specifically, the Defense of Marriage Act ("DOMA").[6] The DOMA limits the application of the new act in significant ways, both by restricting the use and definition of "spouse" under federal law to two persons of the opposite sex and by permitting states to refuse to recognize same-sex marriages from other states. This produces a conflict between state and federal law where benefits, rights and interests of spouses - in areas such as taxation, social security, retirement or health care benefits from employer plans governed by federal law, immigration benefits, and the like - depend upon the marital relationship, the federal designation of spouse, or both.

This article examines the new law, which takes effect June 1, 2011,[7] in both contexts: first, its structural elements and application as a matter of state law, using marriage and dissolution (the IMDMA) as the measure; and second, the inherent conflicts or limitations in its application in all respects, specifically the unavoidable and significant impact of federal law on the union both while intact and upon dissolution.

This article considers both questions in the context of each of the three aspects of the legal relationship critical to the practitioner: The nuts and bolts of formation of a civil union; the rights, interests, and obligations of a couple who has obtained a valid civil union or a relationship entitled to reciprocal recognition; and a practical guide to dissolution.

An overview of the Civil Union Act

Generally. The Civil Union Act consists of 14 sections ranging from formalities of creation, rights and protections in recognition, and dissolution. Three provisions of the act are particularly significant.

First is the equation - or elevation - of a party to a civil union to the equivalent status of spouse "entitled to the same legal obligations, responsibilities, protections, and benefits as are afforded or recognized by the law of Illinois to spouses..."[8] in section 20. Second is the incorporation of the IMDMA for purposes of dissolution or declaration of invalidity of a civil union, in section 45. Third is the reciprocity provision, section 60, which recognizes same-sex relationships, "legally entered into" in other jurisdictions, that are "substantially similar" to a civil union in Illinois.

Formation. Assuming the parties meet the age threshold of 18 and the union is not otherwise prohibited, the manner in which a civil union is obtained or entered into is, as a matter of law, no different from a marriage. A civil union may be performed (solemnized and "certified") by the same specified officials permitted to do so under the IMDMA[9] - a judge in most instances, and in others, a county clerk or other officiant permitted by law.[10]

One difference between IMDMA and the civil union law is found at section 35 of the act ("Duties of the county clerk"), which enumerates duties and obligations of the clerk that are to be adhered to after application. Sub-paragraphs (b)

and (c) of section 35 are pro forma and consistent with similar provisions for registration of a marriage under the IMDMA.[11] The other two, however - subparagraphs (a) and (d) - have no parallel provision in the IMDMA.

The first, subparagraph (a), is not otherwise explained in the act or elsewhere, and requires that

> [(a)] [b]efore issuing a civil union license to a person the county clerk shall satisfy himself or herself by requiring affidavits or otherwise that the person is not prohibited from entering into a civil union or substantially similar legal relationship by the laws of the jurisdiction *where he or she resides.*[12]

This provision places a duty on the county clerk to determine the legal sufficiency of another jurisdiction's "substantially similar legal relationship." This may or may not be as simple as the similar duty of a clerk issuing a marriage license under the IMDMA, where he or she must obtain "satisfactory proof that the marriage is not prohibited."[13] The last, subparagraph (d), makes it a "petty offense" for "any official" who "issu[es] a license with knowledge that the parties are thus prohibited from entering into a civil union."[14]

The act contains no other requirements for formation of a civil union.

Recognition. A civil union obtained in Illinois under the act, as well as any "marriage between persons of the same sex, a civil union, or substantially similar legal relationship other than common law marriage, legally entered into in another jurisdiction" are to be recognized as civil unions in Illinois.[15] Because legal rights are implicated both in the pursuit of recognition for the relationship while intact - or for benefits based upon the status of the relationship - and also in the pursuit of rights and remedies by the parties against one another, or by third parties, upon dissolution[16] and, frankly, because not all relationships end in dissolution, it is important to consider the rights and interests of the parties to a civil union in the relationship while it is intact.

To obtain reciprocal recognition, parties to valid same-sex marriages, civil unions, or "substantially similar legal relationship[s] other than a common law marriage, legally entered into in another jurisdiction" need do nothing further under Illinois law. In fact, they are prohibited from obtaining a civil union under the new act.[17] There is no legal requirement for a party to a foreign, recognized relationship to take any affirmative act in Illinois to have that relationship formally certified, recognized, or otherwise acknowledged.

Specific rights and protections of recognition are not enumerated in the new act. Neither are they found, for the most part, in the comparable provisions of the IMDMA. The act accomplishes its provision of rights and interests by equating, without exception, the status of "party to a civil union" to a spouse under Illinois law.

Any plain reading of the act leads to the conclusion that it enables parties to a civil union to claim a right or interest wherever the word "spouse" or similar marital partner designation appears in Illinois law. This arguably includes, to name but a few, the right to acquire and own property jointly[18] - including tenancy by the entireties - the right of access to and to make decisions on behalf of the other spouse in medical contexts, rights to automatic inheritance, rights as a spouse to state-sponsored (non-federal) or administered health care benefits, and rights to spousal privileges in court including the freedom from compelled testimony.

It also applies to the presumption of parentage and right to recognition of a child as a child of the civil union to both parties jointly, along with other rights, benefits, protections, and burdens both while the relationship is intact and on dissolution, including division of the estate, spousal support, and contribution to fees.[19]

Dissolution. As with marriage, the legal rights and interests to parties to a civil union will be determined mostly in dissolution. With the enactment of the act, couples who obtain a civil union in Illinois will be able to dissolve it in Illinois - or elsewhere, by express consent to the jurisdiction of Illinois courts under section 45 (see below) - and same-sex couples from other jurisdictions who can establish residency in Illinois may now obtain a dissolution of their marriage, civil union, domestic partnership or similarly recognized legal relationship.[20] This single change in the law provides for

the first time the right to divorce otherwise available to all who marry, along with the attendant right to equitable division of property without regard to title.

The undoing of a civil union is, as with marriage under Illinois law, accomplished either by dissolution or a declaration of invalidity. Both are provided for under section 45, which states in full as follows:

> Section 45. Dissolution; declaration of invalidity. Any person who enters into a civil union in Illinois consents to the jurisdiction of the courts of Illinois for the purpose of any action relating to the civil union even if one or both parties cease to reside in this State.[21] A court shall enter a judgment of dissolution of a civil union if at the time the action is commenced it meets the grounds for dissolution set forth in Section 401 of the Illinois Marriage and Dissolution of Marriage Act. The provisions of Sections 401 through 413 of the Illinois Marriage and Dissolution of Marriage Act shall apply to a dissolution of a civil union. The provisions of Sections 301 through 306 of the Illinois Marriage and Dissolution of Marriage Act shall apply to the declaration of invalidity of a civil union.[22]

The act provides for the same procedural steps to obtain a dissolution of a civil union as a divorce. Process and procedure are governed by both the Illinois Civil Practice Act, incorporated into the new act in section 50,[23] and the IMDMA.

The only apparent difference is the name of the action: i.e., "[a] proceeding for dissolution of a civil union or declaration of invalidity of a civil union shall be entitled 'In re the Civil Union of ... and ...'."[24] As with marriage under the IMDMA, the act provides that "[t]he initial pleading in all proceedings under this Act shall be denominated a petition. A responsive pleading shall be denominated a response. All other pleadings under this Act shall be denominated as provided in the Civil Practice Law."[25]

Although it isn't mentioned in the act, a dissolution will likely be known as a "Judgment for Dissolution of Civil Union," much like its counterpart, a "Judgment for Dissolution of Marriage."

Because Illinois law previously would not[26] permit residents of the same sex to marry,[27] recognize their relationships if they chose to do so elsewhere,[28] or recognize same-sex relationships from other jurisdictions,[29] Illinoisans in failed same-sex relationships legally entered into in other jurisdictions were left with few legal protections and difficult choices. Even if they amicably parted, they could not obtain a "dissolution" or "divorce" and lacked a forum before which they could have all of their rights and interests - to property and to children - adjudicated.

A simple example of the benefit of the new law in this context is division of property. Since the reform of Illinois' marriage laws in the 1970s, the law moved from dissolution and the apportionment of marital property based upon fault to equitable division without regard to fault or, for the most part, relative financial contribution.

Thus, for example, under the IMDMA, property acquired after the date of the marriage is presumed to be marital property[30] and vests in the marital estate upon the commencement of dissolution proceedings,[31] without regard to title.[32] Upon dissolution, all marital property is equitably divided between the parties, without regard to who acquired it or in whose name title is held, with few exceptions.[33] Under the act, parties to a dissolution of a civil union are now entitled to the same treatment.[34]

Conflicts with other jurisdictions

Other states. But for the reservation of "marriage" to persons of the opposite sex, the only limitations of the new Illinois law will be in its application. This arises on two levels. The first is where the status is not recognized by another state or similar governmental entity (a typical example being the assertion of spousal rights in another jurisdiction while, for example, traveling). The second is where the fundamental status - "spouse" under Illinois law - itself is wholly at odds with the definition of "spouse" under federal law, limiting rights and interests to a party to a civil union in federal benefits and obligations, and creating a conflict between state and federal law based solely upon gender.

The new act expressly provides in section 45 that "[a]ny person who enters into a civil union in Illinois consents to the jurisdiction of the courts of Illinois for the purpose of any action relating to the civil union even if one or both parties cease to reside in this State." This provision will allow parties access to Illinois courts for the purposes of dissolving their civil union should they live in a jurisdiction where they could not otherwise do so.

Beyond that, Illinois law does little if anything to address the refusal of other jurisdictions, in particular the federal government, to recognize its grant of a civil union. Thus, to be truly protected, clients need to continue securing rights to inheritance through powers of attorney, wills, and trusts; to children through legally recognized parentage independent of the relationship (e.g., adoption or surrogacy); and to property by title. The piecemeal pursuit of securing of rights will and must continue until and unless uniform recognition occurs.

The Defense of Marriage Act. Enacted in 1996, the Defense of Marriage Act was the federal government's first enactment of substantive law pertaining to marriage, which had historically been (and continues to be) otherwise a matter of state law.[35] The DOMA contains two provisions. The first prohibits the recognition of same-sex relationships under federal law, where it expressly provides that "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."[36] The second permits states to refuse to recognize same-sex relationships from other states.[37]

The impact on same-sex couples is profound. Recent estimates have concluded that over 1,138 federal rules and benefits use the term "spouse."[38] Federal law governs everything from tax filing status (and calculation of tax rates and amounts, where state tax filings are derivative of federal return) to benefits for spouses based upon retirement or disability, or, in the context of employment, health insurance where an insured employee must pay taxes on the coverage of his or her spouse.

Thus, where the DOMA expressly limits federal recognition and provision of such benefits as a matter of federal law to "spouses," none of these benefits is available to same-sex spouses legally married or in valid, recognized same-sex relationships under state law or the laws of other jurisdictions. Under the DOMA, married same-sex couples, or those in civil unions, may also not avail themselves of, e.g., immigration sponsorship available to married Americans with foreign spouses, social security survivor benefits, or benefits from pensions or retirement plans governed by federal law.

Federal employees are not entitled to spousal benefits where the spouse does not meet the definition of the DOMA. The provision of domestic partner or spousal benefits not recognized under federal law results in taxation to the employee, which is not taxable to employees who have opposite sex spouses.

Finally and importantly, the long-established rule is that the division of the marital estate incident to a divorce is not taxable to either party.[39] But the DOMA will not allow such a benefit to same-sex couples upon dissolution. The same is true of maintenance and spousal support, both taxable to the payee under Illinois and federal law, allowing the payor to declare a deduction. Consequently, practitioners should be aware that parties to a civil union will be entitled to maintenance but will have unequal tax treatment under federal law.

Parentage and the Civil Unions Act

Like the IMDMA, the new act makes no specific provision for parentage. Obviously, one need not be married to be a parent.

There are two important points here for parties to a civil union. First, in Illinois - as in all states - a child born to a married couple is presumed to be a child of the marriage[40] and each party to the marriage is presumed to be a parent. Otherwise, parentage must be established by such means as adoption[41] or surrogacy.[42]

Second, Illinois does not recognize claims of intended parentage, including claims of de facto or psychological parentage.[43] Only a *parent* may legally act on a child's behalf, and only a parent has standing to bring or maintain an

action for custody, control, education, support,[44] or indeed any action of any kind pertaining to a child against an existing, present parent.[45]

Given the open questions of recognition both within the state and (because of DOMA) beyond, you should advise a client who is a party to a civil union to obtain a determination of parentage as to any child of the relationship in any case.[46] This is most easily accomplished by adoption.

Conclusion

The new Illinois Civil Union Act grants same sex couples the legal right to the full benefit of Illinois law available to spouses in the recognition, protection, and where necessary, dissolution of their relationships without regard to gender of the parties or whether or not either resides in Illinois.[47] For purposes of state law, a civil union is equal to marriage in nearly every respect but for gender.

Parties to a civil union enjoy the same legal protections, benefits, and burdens the state affords to married spouses - both while their relationship is intact and, as importantly, if and when it dissolves.[48]

Traditional legal advocacy on behalf of same-sex couples has included sophisticated estate planning and other legal constructs to secure rights and interests to property and to children by and between unmarried persons. After the law takes effect, the legal emphasis will shift. Parties will need advice about how to protect their rights in light of both the new state law and the limitations imposed by federal law, particularly DOMA. At presstime, challenges to DOMA were pending in three U.S. circuit courts,[49] and the Obama Administration has announced that it will no longer defend - but will continue to enforce - section 3 of DOMA.[50] Nonetheless, the law remains effective and must be taken into account.

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