

## **Becoming Civilized: Civil Unions in Illinois**

*By Nancy Chausow Shafer, Chausow Shafer, PC, Highland Park, IL*

The Illinois legislature passed, and the Governor (has)(will) sign into law, a bill establishing Civil Unions in Illinois. From a family law practitioner's perspective: What is a civil union, how will it impact people both in the LGBTQ and straight communities, and how will this new status be implemented? That is the focus of this article.

### **What is a Civil Union?**

After we celebrate a marriage, we refer to that couple as married. When we celebrate a civil union, we do not really have a useful name to refer to persons who join in a civil union. Throughout this article, the author will experiment with different terms which may or may not be adopted as common nomenclature.

A Civil Union is a status conferred by the state on two people who choose to be joined legally. For all intents and purposes under State law only, the parties to a civil union have all of the rights and responsibilities of marriage. The statute specifically provides:

*Section 5. Purposes; rules of construction. This Act shall be liberally construed and applied to promote its underlying purposes, which are to provide adequate procedures for the certification and registration of a civil union **and provide persons entering into a civil union with the obligations, responsibilities, protections, and benefits afforded or recognized by the law of Illinois to spouses.**(emphasis added)*

*Section 20. 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.*

While proponents and opponents often compare the civil union to a marriage, it is actually an entirely new legal status in Illinois. It is available to both same sex and opposite sex couples. The statute defines it as:

*"Civil union" means a legal relationship between 2 persons, of either the same or opposite sex, established pursuant to this Act.*

### **How does one become "unionized"?**

A civil union must be applied for, licensed and registered just like a marriage. There will be no "common law civil unions" just like there are no common law marriages in Illinois. You cannot find yourself accidentally in a civil union any more than you can find yourself accidentally married (other than at 2 am by an Elvis impersonator in Las Vegas). The process will involve a civil union license application, which will be a form to be created and provided by the Director of Public Health. The couple will then receive a certificate of civil union, much like a marriage certificate. This certificate form will be completed and returned to the county clerk. A civil union can be certified or solemnized by the same categories of

people who can perform marriages, in statutory terms, an “officiant” (*a person authorized to certify a civil union*). Perhaps we can call them “uniters”.

### **Union label not required**

An officiant cannot be required to perform a civil union. The religious freedom protection part of this statute (the *Illinois Religious Freedom Protection and Civil Union Act*) provides:

*Section 15. Religious freedom. Nothing in this Act shall interfere with or regulate the religious practice of any religious body. Any religious body, Indian Nation or Tribe or Native Group is free to choose whether or not to solemnize or officiate a civil union.*

### **Who is “unitable”?**

This legal status is available in Illinois for both same and opposite sex couples. This is unique in Illinois law. The other jurisdictions which have enacted civil union or domestic partnership laws have primarily not extended the definition to include opposite sex couples. Two reasons immediately come to mind. First, as the legislative history reveals, one intention was to provide for a recognized legal status for seniors who otherwise might marry, but don’t wish to lose their social security or pension benefits. This will allow them to act in the capacity of a spouse for purposes of medical care, funeral arrangements, and other aspects important to this population without the impact of federal law. A second reason stems from the successful challenges to civil union laws in other jurisdictions. One argument advanced was that to set up a separate legal status for only same sex couples is constitutionally discriminatory. It is apparently hoped that by establishing this legal status for same and opposite sex couples, this constitutional argument will be overcome. It is yet to be seen how the Illinois courts will address this argument.

The same rules for prohibited marriages in Illinois apply to civil unions. You cannot be “united” if you are under 18, already “unified” or married, or related within the same degrees of consanguinity as prohibited for marriage.

### **What does being “unified” get you?**

Scholars have reviewed all of the laws and regulations of the state, local and federal government to quantify and identify the laws which are impacted by the status of marriage. According to a 1997 report by the General Accounting Office, there are 1049 rights that accrue to heterosexual couples upon marriage that are categorically denied LGBTs - a plethora of privileges that encompass health insurance, disability insurance, federal pensions, Social Security survivors benefits, child adoption and custody, alimony support, transference of property titles, inheritance, hospital visitation, funeral arrangements, bereavement leave, the Family Medical Leave Act, and much more. The group Equality Illinois identified nearly 650 state rights, benefits and protections denied to same sex couples and their families <http://equalityillinois.org/civil.html> . This civil union status is intended to address such inequities on the state level.

### **“Un-uniting” a civil union**

Civil unions can be ended just like marriages, pursuant to the Illinois Marriage and Dissolution of Marriage Act (IMDMA). This applies to both dissolutions, which are governed by Sections 401-413 of the IMDMA, and declarations of invalidity, which fall under Sections 301-306.

All rights and responsibilities of marriage also apply to the dissolution of the relationship. This means that “united” couples need to think about maintenance and property division in a way they have never been able to address before. Several problems, though, are inherent in the differential treatment of these couples under state and federal law.

1. Maintenance: the hallmark of maintenance is the taxability and deductibility of maintenance payments. In addition to making the payment of maintenance more palatable to payors, divorce practitioners have long been able to be creative and resourceful in their use of the tax burden shift and overall tax savings permitted by the payment of maintenance. The options of unallocated family support and use of maintenance payments to sweeten property divisions are not available to same sex couples. A conundrum exists when a same sex “unit” is entitled to maintenance, but the payor cannot get favorable tax treatment for those payments and ends up paying a substantial percentage of his/her income in support and still paying tax on the whole amount.
2. Property division: another hallmark of divorce practice is the ability to divide the marital estate without immediate tax consequences. Section 1041 of the IRC makes transfers between spouses incident to a divorce a non-taxable transaction, and the recipient-spouse receives the property with the same basis as the original owner-spouse. Since the federal IRS rules do not apply to unified couples, there will likely be taxes to be computed on transfers of property on dissolution of the civil union which do not apply to married spouses.

Child support and custody laws have been applied to never married parents, so these rules will not change too much for civilly united parents. However, in the past LGBTQ couples had to adopt (in Illinois where this was allowed) the child born to the other partner, or both adopt a child jointly to be legally allocated parental rights and responsibilities. There were many situations where a formal adoption was never accomplished, and LGBTQ parents had to rely on equitable parent or other theories. With the legal relationship of a civil union, “unity” parents should not have to stretch to be treated as a legal parent.

Open questions still remain about many issues. One issue not yet addressed is the presumption of parentage which applies to married couples. In part, this presumption was created before the advent of DNA testing based on the possibility (if not probability) of biological parentage in a marriage between a man and a woman. Since there is no biological possibility of parentage in a same sex “union”, would this presumption still be applied? If not, then are we really providing all of the ***obligations, responsibilities, protections, and benefits afforded or recognized by the law of Illinois to spouses?***

## **Illinois as a uniting force**

Another unique aspect of the Illinois law is its application to couples who unite here and move elsewhere, and to those who united elsewhere and end up here. The statute provides for no residency requirement to obtain a certificate of civil union, the only restriction is that:

*Sec 35a...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.*

What is meant by this language is not clear but does not seem to prevent couples from other states where no such substantially similar legal relationship exists from coming to Illinois to be “unified”. In fact, the statute goes on to provide for dissolution of civil unions performed in Illinois to be heard here despite the lack of Illinois residence of either party at the time of the dissolution. The statute provides:

*Sec 45...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 a civil union even if one or both parties cease to reside in this State.*

Venue is to be in the county where the parties reside or where the certificate of civil union was issued, but of course, venue is not jurisdictional (Sec 55).

More importantly, the answer is in this statute to the difficult questions faced in other jurisdictions of how to address same sex marriages, civil unions and domestic partnerships created in other jurisdictions in light of DoMA and the mini-DoMA laws passed by the states. Our law specifically provides for the recognition and enforcement of other states “unifications”. Finally, the full faith and credit clause of the constitution seems to apply, at least in Illinois.

*Section 60. Reciprocity. A marriage between persons of the same sex, a civil union, or a substantially similar legal relationship other than common law marriage, legally entered into in another jurisdiction, shall be recognized in Illinois as a civil union.*

Since Illinois has only a 90 day residency requirement for dissolutions, and no residency requirement for entering into a union, the author foresees the possibility of a cottage industry and economic boom of civil union tourism in Illinois, which may have been considered by the legislature in passing this bill. After all, why should Iowa have all the fun?