

ILLINOIS CIVIL UNION ACT

Expected and Unexpected Consequences

As the summer of 2011 draws near, so does the June 1 effective date of the Illinois Religious Freedom Protection and Civil Union Act (the “Civil Union Act”). This law affects not just gay and lesbian couples and their families, but some opposite-sex couples who have chosen not to marry for financial reasons.

The essential provision of the new Civil Union Act is to treat a partner who enters into civil union as a “spouse” for all purposes under Illinois law. The new statute is therefore very wide ranging. Its effects reverberate across real estate law, health care law, estate planning, and employee benefits. Even criminal law is changed because of the Civil Union Act. Now the “spousal privilege” applies to partners in a civil union, meaning that one partner cannot testify about conversations with his or her partner in an Illinois criminal proceeding.

Although the law corrects some inequalities between married couples and couples who cannot legally marry, this balance is imperfect. Significantly, the extension of “spousal” status to partners in an Illinois civil union does not extend to any federal law issues. In other words, under the federal Defense of Marriage Act, known as “DOMA,” civil union partners are not treated as married or as spouses under federal law. This means, for example, that such partners are not entitled to any federal tax treatment applicable to married couples and are not entitled to survivorship benefits under Social Security, veterans’ benefits, or other federal benefits law. Moreover, the Civil Union Act permits dissolution of a civil union – *i.e.*, divorce – under Illinois law, but partners dissolving a civil union will not be entitled to the federal tax treatment that applies when a divorcing couple divides their property and one former spouse pays alimony or maintenance to the other. This dissonance between state and federal law is complicating, to say the least.

Some of the benefits of entering into a civil union are discussed below. It is important to note, though, that the existence of the Illinois Civil Union Act does not obviate the need for a couple to plan for their property, health care issues, and estates. Just as complete planning benefits and protects married couples and their families, it is equally advisable for partners who have joined in civil union.

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1. Estate Planning Issues

A partner in a civil union is now a spouse for all purposes of Illinois probate law. This means that such a partner has new rights:

- If one partner in a civil union dies without a Will, the other partner will receive the “spousal” share of the deceased partner’s estate: one-half of the estate if the decedent had descendants, or the entire estate if the deceased partner had no descendants.
- A partner in a civil union has the right to renounce his or her partner’s Will if unsatisfied with its terms. In that case, the surviving partner would receive – in lieu of the Will’s provisions – one-third of the estate if the decedent left descendants, or one-half of the estate if the deceased partner had no descendants.
- If a partner dies without naming an executor of his or her estate, the surviving partner has preference to serve.
- A surviving partner is now entitled to a “spousal allowance” in the amount of at least \$20,000 from a deceased partner’s estate. This allowance is paid for the surviving partner’s support before creditors and other beneficiaries are paid from the estate.
- A surviving partner now has the right to control the burial or cremation of a deceased partner’s remains, unless the deceased person had designated someone else as agent or executor.

HINT: *These measures generally put partners in a civil union on par with a married people in one context: when a couple has not done their estate planning and one dies with no Will or an outdated Will. Despite this equality, it is far better for couples to complete their own estate planning rather than rely on state laws that provide a default treatment. Couples should have Wills, and powers of attorney to fulfill their wishes, put trusts in place to protect their children and other loved ones, and achieve estate tax savings where applicable. Having a complete estate plan should also protect the couple if they move to a state that does not recognize gay marriage, domestic partnerships, or civil unions.*

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2. Health Care Decisions

Some gay and lesbian partners have had difficulty visiting their partners in the hospital, in the face of a family's opposition. Moreover, these partners have sometimes been excluded from the process of making decisions for a loved one who is incapacitated. Under the Illinois Civil Union Act, these partners are now spouses for these purposes. If an incapacitated person does not have a health care power of attorney, then his or her partner has high priority to be the decision maker – second in line only in those rare cases when the patient already has a court-appointed guardian. The partners will also have access to each other in the hospital.

HINT: Despite this development, all couples – same sex or opposite sex – are normally better off with properly executed powers of attorney for health care. This takes the guesswork out of partners' decision-making authority, and enables individuals to indicate their wishes about treatment and end-of-life decisions. A gay or lesbian couple with health care powers of attorney can also be better prepared if injury or illness occurs when travelling to a state that does not recognize gay marriage, domestic partnerships, or civil unions.

3. Real Property Title

Under Illinois law, multiple parties may own real estate as tenants in common or as joint tenants with right of survivorship. Only married couples, however, may own their homestead as “tenants by the entirety.” This is a special form of title that offers some protection from creditors. Only the creditors of both spouses can reach the real estate to satisfy a judgment. In other words, if only one spouse becomes liable for a debt or judgment, the couple's home held in tenancy by the entirety should remain safe from the indebted spouse's creditor, so long as they both occupy the home, are considered as legal spouses, and survive. This form of title will now be available to partners in a civil union.

HINT: Partners in a civil union who own real estate may wish to re-convey it into their names as tenants by the entirety. This should provide asset protection for the property that previously was available only to married spouses. However, couples should consult their tax advisor before deeding the property. Because federal law does not view civil union partners as married, there could be gift tax consequences if value is transferred from one spouse to another.

4. Life Insurance

Illinois law exempts from the claims of creditors the proceeds and cash value of life insurance and annuities payable to a spouse, and now to a partner in a civil union.

5. Issues for Opposite-Sex Couples

In some cases, the Illinois Civil Union Act may appeal for financial reasons to opposite-sex couples who have not married. Specifically, some widows, widowers or divorcees choose not to remarry because of the resulting loss of Social Security survivor's benefits or other benefits. Because an Illinois civil union will not be recognized under federal law, a person who enters into an Illinois civil union should not be seen as "married" for Social Security purposes. The individual should still be entitled to benefits based on the former spouse's quarters of work. Similarly, if a retiree is receiving a survivorship interest in a pension from the federal government or from a state that does not recognize civil unions entered into in other states, the retiree should be able to enter into a civil union with a new partner without losing those benefits.

HINT: Entering into a civil union instead of remarrying in order to avoid loss of survivor's benefits is undoubtedly an unforeseen yet powerful use of the Illinois Civil Union Act. Be sure to review the terms of your benefits – and the federal government's current position on this issue – closely with counsel before taking this step.

For more information about the Civil Union Act, please contact us at (312) 704-9400.



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