



## **Touch of Reality for Same-Sex Couples with Illinois Civil Unions**

There are a few crucial details Illinois residents in a same-sex marriage or civil union may be pleasantly surprised to learn.

*Wed, Jun 01, 2011. Published at <http://10thousandcouples.com>.*

**by Jill M. Metz, Attorney**

Four years before Illinois passed the Illinois Civil Union Act, the American Civil Liberties Union (ACLU) of Illinois, with contributions from Lambda Legal staff, drafted a civil union bill. As this civil union bill made its way through the Illinois Senate and House, the ACLU supplemented its lobby force of two staff lobbyists by hiring contract lobbyists. Polling on the question of people's support for civil unions was also paid for by the ACLU. As 2010 neared, the ACLU paid for patch-through calls from citizens to legislators and organized voter visits to legislative offices that were in swing districts because the ACLU wanted to make sure to counter the belief of some legislators that they did not have constituents in their districts interested in this legislation. The ACLU mobilized its 22,000 Illinois members through online Action Alerts about the legislation while working with other coalition members to successfully make Illinois one of the 13 states to provide protections and rights, as well as obligations, under a civil union law. On June 1, 2011, the Illinois Civil Union Act goes into effect.

Illinois' extension of the right of equality and fairness to lesbian and gay couples through the Civil Union Act is complicated by the differences in the details of Illinois' state laws, which now apply to same-sex couples who enter into a civil union, and federal laws, which still do not apply to same-sex couples regardless of whether or not they have entered into a civil union.

This article discusses these details, and explains what a civil union is and what we get from being unioned. I will also discuss my cautions about relying solely on the civil union law and what is still missing from full equality under the Civil Union Act.

### **What is a civil union?**

It is the creation of a legal relationship between two people of the same sex (it is also applicable to opposite-sex couples, but that is not the focus of this article). This legal relationship means that same-sex couples can have all the same obligations and the protections and benefits that Illinois state law grants to married couples. What it does not provide are benefits and protections

under federal law because the wrongly titled federal Defense of Marriage Act (DOMA) prohibits these protections. Because of DOMA, Illinois' state law cannot require other states to recognize a civil union; DOMA allows these states to discriminate against civil unioned spouses. Due to the discrepancy between Illinois law and the federal DOMA, people still need to do more than just rely on the civil union law to protect their assets and children. I will discuss this more later on.

Finally, a civil union is not a marriage, with the general understanding and weight that comes with that word. Marriage is a widely recognized and respected social institution. Civil unions – not so much. Civil unions are like reinventing the legal wheel, and that is what we are about to do.

## **So, what does a couple get from a civil union?**

Civil union spouses are afforded every obligation and protection provided to married couples by Illinois law. Even if Illinois had passed a marriage bill instead of a civil union bill, it could not provide any further state benefits. The way to understand this new law is as a safety net for your relationship that simply did not exist before the Civil Union Act was passed. This article will explore this safety net in two contexts, showing how civil unions provide a safety net in an estate-law context and in a family-law context.

### ***The Estate-Law Context***

For the purposes of this article, the word "estate" means your assets upon your death or disability. In this area, entering into a civil union turns the law around 180 degrees. As a couple, before civil unions, if you did not prepare estate documents, such as wills and powers of attorney, your estate did not go to your partner, your partner lost all control, you and your partner could be separated, and your partner would lose everything. Once you become unioned, without ever preparing estate documents, if an individual in the union should become disabled or die, there is a safety net of protections.

### **Disability of a Spouse**

Hospitals must look to your civil union spouse as your healthcare decision-maker before anyone else, such as parents or siblings. Without a civil union, the law sets our status as a “close friend of the patient” and relegates that status to last in line of possible decision-makers.

Estate law recognizes that spouses, which now include civil union spouses, care for each other during the end-of-life process or during disability and illness. If a guardianship is necessary because of disability, but no powers of attorney were prepared in advance, and getting access to assets and making medical decisions is necessary, civil unions now provide a safety net for the civil unioned couple. Civil union spouses have the highest priority to be appointed by the court for the role of guardian. If a biological family member begins to take matters into his or her own hands and seeks a guardianship placing him- or herself in charge, a civil union spouse must receive notice from the court, which allows the spouse to object to the appointment of the family member. Without a civil union, partners are not entitled to notice of the court proceedings and do not have an opportunity to be appointed as the guardian. You will lose control of your partner's

care and his or her assets. If you need to care for your civil union spouse at the end of his or her life and no will has been prepared or the biological family challenges the will upon your spouse's death, you have a safety net called a custodial claim that you can assert through a probate case. Civil union spouses who take care of their ill spouses for at least three years will be entitled to a claim from the spouse's estate of a minimum of \$45,000. Without a civil union, partners are not eligible to file this claim regardless of what they have financially sacrificed in order to care for their ill spouse.

## **Death of a Spouse**

Upon the death of a civil union spouse, even without a will, you have a safety net. Post-civil union, inheritance is guaranteed. Even if you own all your property jointly and name beneficiaries on other assets, such as bank accounts, the biological family can file a probate action to contest your ownership. Post-civil union, you have the right to notice of this lawsuit and are given an opportunity to object. Without a civil union and having no will, you do not inherit your partner's estate. Without a civil union, no notice is required of a lawsuit. Probate cases take time to settle and pay out money, so the safety net provides a spousal award to a civil union spouse. A civil union spouse receives a minimum of \$20,000 from the estate to pay bills while the estate goes through probate. The safety net provides for automatic estate transfer, which helps when there is no other planning, such as a will, in place, or if the will is old and does not include the spouse. Even without a will, a civil union spouses still inherits from the estate. With a will that is old and does not include the spouse, the civil union spouse can object to the will and still inherit a portion of the estate. Civil union spouses cannot be written out of an estate and can object to a will that does not include them. Without a civil union, there is no spousal award – this is significant, as the estate can take six months and more to settle.

The safety net provided by the civil union legislation will change the lives of many. Numerous people do not have wills at all, or do not have wills that are up-to-date such that they fail to accurately reflect the current wishes of the estate holder or the current assets in the estate. I received a call at my office from a gentleman whose life partner had just died. The man was in his mid-60s and living closeted in a small town. His friends and family did not know that he and his partner were a couple. All of the assets in the estate of his partner were in his partner's sole name – the couple's home, his partner's investments, and his retirement money. There was no will. The biological family of this gentleman's partner swooped in to take everything that had previously belonged to both of them but was titled solely in his partner's name. This gentleman was suffering the emotional loss of a life partner whom he loved. Prior to the civil union legislation, there was no safety net and nothing in the law to prevent this gentleman from also suffering the loss of assets that he and his partner had obtained while together.

The civil union law was not passed in time for this gentleman and thousands of other same-sex couples who suffered similar fates while opposite-sex couples enjoyed legal and social protections from the loss of assets and mementos upon the death of their spouse. Now, there is a safety net that allows inheritance even without a will, allows a custodial claim, and allows a spousal award.

## ***The Family-Law Context***

There are two aspects to the family-law context: when families come together and when they come apart. Here, the safety net does not solely impact the two people in a civil union but also impacts their children. Children born to one person in a civil union are considered the children of both people in the civil union, even without a second parent adoption -- although I will have some caveats to impart later in this article about the benefits of completing a second parent adoption.

A civil union increases the right one has to the income and assets earned by your civil union spouse, and to financial benefits upon the death of your civil union spouse. Income earned by either person in a civil union is considered the income of both parties. Assets accumulated by either person after the civil union is performed are considered the assets of both parties. You can jointly own your primary residence as tenants by the entirety, which will protect it from creditors. You have the right to make medical decisions for each other. You have the right to share the same room in a nursing home or assisted living facility. You have the right to the Illinois state-governed pension of your civil union spouse if he or she is covered as a teacher, police officer, firefighter, or state, county, or municipal employee. Further, you have the right to sue for your spouse's wrongful death.

Many of these benefits are not available without a civil union or without other legal documents, like powers of attorney, and other legal processes, like second parent adoptions.

Beyond the rights one acquires, civil unions also come with obligations. For example, civil union couples are jointly and separately liable for family expenses, including medical expenses. Your income and assets acquired during the union are presumed to be jointly owned with your civil union spouse in the event of the dissolution of your relationship.



When families come apart, one of the greatest rights afforded to those who participated in a civil union is the right to a divorce through the court system. Prior to the civil union law, lawyers had to file various suits in different divisions of the court system to cover all of the issues in the dissolution of a same-sex partnership. Custody cases were filed in the divorce division, under the Dissolution of Marriage Act, which only settled custody, visitation, child support, and medical insurance for children. Real estate issues and other property issues required a case to be filed in the Chancery Division, using theories of constructive trust and other equitable arguments. No area of law allowed maintenance or alimony to be awarded.

The safety net afforded by the civil union law allows one legal action to resolve all the typical divorce issues, and the courts may award:

- Continued health insurance coverage after a divorce;
- Maintenance (also called alimony);
- Division of union property; and
- Resolution to all issues surrounding children.

Under the civil union law, since it is a state law that is not applicable to federal programs, there are still some problems that will be solved only with a reversal of the federal DOMA. For example, maintenance payments are not deductible on federal tax returns pursuant to a civil union dissolution, while such tax deductions are standard in the dissolution of marriages. There are no protections from a civil union spouse who changes his or her federal pension to leave out the other spouse, which is a protection that married individuals receive. And while assets can be divided by agreement or judgment, in a civil union, such a division is a taxable event, unlike the transfer of marital assets, which has no tax consequences.



### ***Differences Between Full Marriage Rights and Rights Afforded Under the Civil Union Law***

Although there are significant benefits from civil unions, I have some cautions. Even after you enter into a civil union, couples still need to complete a second parent adoption and couples still need to execute powers of attorney and wills. Why is this? Because our civil union safety net is not honored by the federal government or by all states.

As of this writing, there are five states and the District of Columbia which issue marriage licenses to same-sex couples. Two states won't marry us but will recognize a marriage from

another state. Six states offer a civil union-like license. Three states provide lesser protections. The rest of the states and many other countries will not honor our unions. Therefore, if you travel or move to one of these states, or if you travel or move abroad, your parent-child relationship is at risk without a second parent adoption, and your civil union spousal relationship is at risk without executed powers of attorney and wills.

To be clear, the following federal benefits are not available to same-sex couples, even in states that recognize same-sex marriages or unions:

- We do not receive social security, survivor, and spousal benefits because they are federal government-run programs;
- We do not receive federal veterans' spousal benefits for the same reason;
- We do not receive immigration rights associated with marriage;
- We do not receive federal spousal employment benefits;
- There is no exemption from the inheritance tax, which is granted by federal law and constitutes a recognition of no limit on gifts at death for a married spouse;
- There are no exemptions on gifts to spouses during your lifetime;
- We do not receive health insurance coverage for our union spouse without being taxed on it; and
- We cannot file joint federal tax returns – or receive the related tax reductions. Instead, we will prepare a joint federal return to determine our state taxes but actually file separate federal returns.

To change this, DOMA must be repealed by Congress or overturned by the Courts. Illinois can do no more.

## **Answers to Other Important Questions**



### **I want a marriage license; should I wait?**

What if you really want to be married, as opposed to having a civil union? Should you wait? As a lawyer who practices in this area, my answer is not to wait for marriage. When we eventually receive marriage equality in Illinois, you will be allowed to get married. In the meantime, you will gain huge legal benefits from civil unions that we did not have before the law was passed.

Civil rights movements make gains one step at a time – don't deny yourselves the gains available now while you wait for the end goal. You should also note that if you get married in another state or country that Illinois will only recognize that marriage as a civil union.

### **My spouse and I got married in another state or country; what do we do?**

Some of you may have gone to a state or a country where marriage is legal. The new law takes care of you. As of June 1, 2011, your marriage is recognized in Illinois as a civil union. You do not need to register or take any action to have the civil union law apply to your relationship.

### **I have ended a relationship with a person I was married to; what do I do?**

If you married or civil unioned a person with whom you are now no longer in a relationship and you have not legally dissolved the relationship, please be aware that, as of June 1, 2011, you are civilly unioned in Illinois and our domestic-relation laws apply to you. In other words, as of June 1, you may have marital property and obligations for maintenance with this other person. You need to file for a divorce.

### **How do you get a civil union?**

On or after June 1, 2011, any two people 18 years or older who are not too closely related to each other and not in a civil union or marriage with a different person can get a license. Both people must go to their local County Clerk's office to complete the application and pay the fee. The Clerk's office will issue you a license and instructions for securing your certificate of civil union. The license is good for 60 days during which time it must be solemnized by a person who agrees to perform the service and who is either a judge, a retired judge, a County Clerk, or a religious pastor, priest, minister, rabbi, or other religious authorized person. For those of us who have friends who live out of state, they may also come to Illinois and get a civil union as long as their state does not prohibit such a union. Please keep in mind that if you used the Domestic Partnership registry in your county or with your employer, it does not turn into a civil union after June 1.

### **Conclusion**

Just like heterosexual couples, we now have the option to form relationships to which state laws apply. We also have laws that still discriminate against us, and civil unions may complicate those legal matters. For example, the military may use civil unions as evidence to discharge until the repeal of "Don't ask, Don't tell" is fully implemented. Civil unions may complicate immigration issues and adoptions in states and countries where same-sex couples are not allowed to adopt. Civil unions are not a magic wand that will remove all prejudice and discrimination. Nor do the laws that apply to civil unioned couples provide the most comprehensive legal protections. They only provide a safety net. Wills, trusts, powers of attorney, pre-nuptial agreements, post-nuptial agreements, and second parent adoptions provide the most comprehensive legal protections, even for people in a civil union.

That said, civil unions are a huge and important step in protections and toward ending prejudice and discrimination. I attended the ceremony at which the Illinois governor signed the Civil Union bill. Present was not only the governor, but also the Illinois lieutenant governor, attorney general, speaker of the Illinois House, president of the Illinois Senate, sponsors of the bill, and legislators. Many of them spoke eloquently about the corrections of a terrible wrong inflicted by the government on all of us. (*You can listen to the full January 31, 2010, ceremony here.*)

*Civil Unions are a step in a just direction.*

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Ms. Metz is President of the Board of Directors for the American Civil Liberties Union (ACLU) of Illinois, Commissioner of Special Service Area #26, and a tireless advocate for civil unions, marriage equality, and support of LGBT groups in the Chicago area.