

## **Civil Unions for Estate Planning Advisors**

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

- (a) A civil union is a legal relationship (750 ILCS 75/10) that provides persons with the same obligations, responsibilities, protections, and benefits given to spouses (750 ILCS 75/5).
- (b) A civil union is not a marriage. A marriage is only between a man and a woman. (750 ILCS 5/201) A marriage between same-sex persons is prohibited (750 ILCS 5/212(5)) and contrary to public policy (750 ILCS 5/213.1). Marriages prohibited in Illinois that are performed in another state are void in Illinois. (750 ILCS 5/216)
- (c) Out-of-state marriages between same-sex couples will be recognized as civil unions. (750 ILCS 75/60)

### **2. Who may enter into a civil union?**

- (a) Persons wishing to enter into a civil union must meet the following requirements:
  - (i) Must be 2 persons (750 ILCS 75/10);
  - (ii) May be same or different sex (750 ILCS 75/10);
  - (iii) Both parties must be at least 18 years of age (750 ILCS 75/25(1));
  - (iv) Neither party may be in a prior marriage, civil union, or substantially similar relationship (750 ILCS 75/25(2));
  - (v) Parties may not be ancestors, descendants, siblings, uncles or aunts, nieces or nephews, or first cousins (750 ILCS 75/25(3) – (5));
  - (vi) Non-Illinois residents who intend to reside outside of Illinois may only enter into an Illinois civil union if the laws of the jurisdiction where they reside do not prohibit it. (750 ILCS 75/35) Thus, if a state has a constitutional amendment or law prohibiting civil unions or substantially similar relationships, then a resident of that state may not enter into a civil union in Illinois.
- (b) Parties meeting the requirements must apply for a license and a certificate by completing an application (to be created by the Director of Public Health), filing it in-person with a county clerk (both parties to the civil union must appear), and paying the applicable fees. (750 ILCS 75/30)

- (b) The term “party to a civil union” is included in any definition and anywhere the following terms are used throughout the law: “‘spouse’, ‘family’, ‘immediate family’, ‘dependent’, ‘next of kin’, and other terms that denote a spousal relationship.” (750 ILCS 75/10)
- (c) A party to a civil union will receive the same legal obligations, responsibilities, protections, and benefits that are afforded or recognized by Illinois law to spouses regardless of whether they derive from statute, administrative rule, policy, common law, or any other source of civil or criminal law. (750 ILCS 75/20)
  - (i) These rules provide a clear test as to whether a law applies to a civil union:
    - (1) Is there an obligation, responsibility, protection, or benefit given to spouses in marriage?
    - (2) If yes, is the obligation, responsibility, protection, or benefit given or recognized by Illinois?
    - (3) If yes, then the law applies to the civil union.
  - (ii) Benefits and obligations provided to married couples by Illinois, but derived from a federal law or regulation, apply to parties to a civil union. The plain language of the statute states “[a] party to a civil union is entitled to the same legal obligations...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.*” (750 ILCS 75/20 (emphasis added)) The statute does not differentiate between federal and state law.
    - (1) Also the legislative transcript shows the General Assembly intended to give parties in civil unions a comprehensive set of the legal obligations, responsibilities, protections, and benefits that Illinois recognizes or affords spouses: “This provides equal access to nearly six hundred and fifty rights.” (96th General Assembly, Senate Transcript, 136th Legislative Day, 12/1/2010, p.84)
  - (iii) Benefits and obligations provided to married couples by Illinois in statutes using gender-specific language apply to parties to a civil union.
    - (1) The plain language of the civil union statute broadly states “terms used to denote a spousal relationship” are to be applied to parties to a civil union. (750 ILCS 75/10) The statute does not carve out exceptions for gender-specific terms like “husband” and “wife” that denote a spousal relationship. The legislative record also supports this view: “[t]his vote calls for us to extend, *regardless of gender*, the same legal obligations, responsibilities, protections,

Act. (750 ILCS 10/1 *et. seq.*) It may be prudent to include language in the pre-civil union agreement to have the agreement recognized as a domestic partnership agreement in states that do not recognize the legal relationship or as a pre-marital agreement for same-sex parties who are married out-of-state.

- (c) *Real Estate.* Tenancy by the entirety is available to spouses in Illinois. (765 ILCS 1005/1c) Therefore tenancy by the entirety should be available to parties to a civil union. Tenancy by the entirety offers protection from creditors' claims against one owner of the property (but not both). (735 ILCS 5/12-112)
- (d) *Insurable Interest.* Illinois common law requires any person purchasing life insurance on the life of another to have an insurable interest. Illinois law gives spouses an insurable interest to purchase insurance policies on the other spouse's life. *Bajwa v. Metropolitan Life Insurance Co.*, 208 Ill.2d 414 (2004). Parties to a civil union should have the same insurable interest.
- (e) *Privileged Communication.* Spouses may not testify as to any communication or admission made by them to each other during marriage except in certain actions. (735 ILCS 5/8-801) Parties to a civil union should have to same right to privileged communications.
- (f) *Parentage.* For children born to a spouse in marriage, both spouses in the marriage are presumed to be the parents. (750 ILCS 45/5) Therefore Illinois should give the same rights to parties in a civil union.
  - (i) Every state that recognizes marriage for same-sex couples, civil unions, or substantially similar relationships presumes both parties to the relationship are the parents of children born during the legal relationship. Iowa is the one exception, and Lambda Legal is pursuing a case, *Gartner v. Iowa Department of Public Health*, challenging the Iowa Department of Public Health's position.
  - (ii) Illinois public policy favors the presumption that both parties to a civil union are the parents of any children born in a civil union. By presuming that both parties to a civil union are parents of any children born into the relationship, the burden is on the party to the civil union to rebut the presumption of parentage, and not on the state to identify a second biological parent to support the child. However, parties to a civil union should still obtain a co-parent adoption because this law is not yet settled in Illinois, and other states that do not recognize same-sex relationships are more likely to recognize an adoption decree than a birth certificate.
- (g) *Adoption.* Illinois law requires both married spouses to be parties to an adoption (unless living separate and apart for at least 12 months). (750 ILCS 50/2) Therefore both parties to a civil union should be parties to an adoption. Same-sex couples that wish to adopt from a jurisdiction that is hostile to their relationship

- (i) Illinois requires spouses to file state tax returns in the same manner as their federal returns. (35 ILCS 502(c)(1) & (c)(3)) On June 2, 2011, the Illinois Department of Revenue is took the position that the civil union law does not change this rule. Thus, under IDR's position, parties to a civil union must continue to file their Illinois tax returns separately. Since that time, the Illinois Department of Revenue has announced this issue is under further review.
- (ii) According to the Illinois Department of Revenue, there is no obligation or benefit for spouses filing joint income tax returns because Illinois has a flat tax. Thus, there is no reason to permit parties to a civil union to file jointly. Other states recognizing same-sex relationships have a tiered tax system that provides a benefit or obligation to spouses.
- (iii) In fact, allowing parties to a civil union to file their Illinois tax return jointly may confer a benefit to the parties. When a party claims a loss on an income tax return, the couple filing a joint return receives an immediate tax benefit by lowering the joint income of the parties. A party filing separately would be required to apply the loss to past or future years' income. This situation most often occurs when a person starts a new business.
- (iv) The parties to a civil union also benefit from the knowledge that the state fully recognizes their relationship just as the state recognizes the relationship between spouses. And the ability to file Illinois tax returns jointly is a common way the state recognizes spousal relationships. Therefore IDR should allow parties to a civil union to file joint tax returns by attaching a federal joint return marked "For informational purposes only."
- (b) *Gift taxes.* Federal gift taxes are not affected by the civil union law and Illinois does not have a gift tax.
  - (i) DOMA prohibits the Federal government from recognizing Illinois civil unions. Consequently, parties to a civil union are limited to transferring \$13,000 per year to each other gift-tax free. On the positive side, grantor retained income trusts are still available to parties to a civil union.
- (c) *Estate taxes.* Federal estate taxes are not affected by the civil union law so there is no unlimited marital deduction or portability available to parties to a civil union at the federal level.
  - (i) Illinois imposes an estate tax on property with a tax *situs* in Illinois. The tax is based on the state tax credit provided in the Internal Revenue Code ("Code") as allowed on December 31, 2001 but with a \$2,000,000 exclusion amount. (35 ILCS 405/2(b)) The state tax credit is calculated after property qualifying for the unlimited marital deduction is removed

(who are taxed at the federal level but not the state level), and domestic partners (who are taxed at the federal and state levels).

**7. Guardianship.**

- (a) *Notice.* A party to a civil union should receive notice of a guardianship proceeding involving the other party to the civil union. (755 ILCS 5/11a-8)
- (b) *Custody of minor children.* The party to a civil union with a ward may not be deprived of the custody and education of the ward's minor and adult dependent children, without giving consent, unless the court finds that the party to a civil union is not a fit and competent person to have custody. (755 ILCS 5/11a-17)
- (c) *Support for a party to a civil union.* The guardian of an estate may use funds to support a party to a civil union with the ward. (755 ILCS 5/11a-18)

**8. Health care & end of life issues.**

- (a) *Health care surrogate act.* A civil union spouse is included in the line of succession after the guardian of the person for who may make health care decisions. (755 ILCS 45/25)
- (b) *Illinois power of attorney act.* A party to a civil union is automatically removed upon dissolution of civil union as the designated agent in a power of attorney for property. (755 ILCS 45/2-6) A party to a civil union is added as an interested person who may petition the court on behalf of a principal who is incapacitated and unable to control or revoke the power of attorney. (755 ILCS 45/2-10)
- (c) *Anatomical gifts.* A party to a civil union is added to the line of people who may consent to anatomical gifts after guardian of the decedent's person at the time of death. (755 ILCS 50/5)
- (d) *Disposition of remains.* A party to a civil union is added to the line of succession of people who may control the disposition of remains after the person serving as legal executor and acting according to the decedent's will. (755 ILCS 65/5)
- (e) *Autopsy.* A party to a civil union is added to the definition of a surviving relative who may authorize an autopsy. (410 ILCS 505/1(c))

**9. Death of a party.**

- (a) *Intestacy.* A party to a civil union is included in the rules of descent and distribution. (755 ILCS 5/2-1) For intestacy, the surviving party gets ½ of the estate if decedent has descendants and all of the estate if decedent had no descendants.
- (b) *Renunciation.* A party to a civil union has the power to renounce a will as a surviving spouse does. (755 ILCS 5/2-4)

is automatically recognized as obtained by both parties without gift tax consequences. This position required parties in community property states to begin income-splitting in 2010. (Chief Counsel Advice 201021050 & PLR 201021048)

- (e) Parties entering into civil unions seeking state benefits and obligations while avoiding federal benefits and obligations must beware. Eventually the federal government and Illinois will recognize same-sex marriage. When they do, Illinois may choose to discontinue civil unions or automatically convert civil unions to marriages as Connecticut did when it allowed same-sex marriage.