

Chicago Daily Law Bulletin®

Volume 157, No. 144

Monday, July 25, 2011

Be aware of what the law means to your practice

By Gemma B. Allen

June wedding bells celebrating happily-ever-afterness pealed for virtually thousands of Illinois couples. What is different in 2011 is that while most couples were joined in matrimony, others were joined in civil union.

The second group was able to effectively “tie the knot” because of a new state law, the Illinois Religious Freedom Protection and Civil Unions Act, commonly known as the civil union act. In only a few paragraphs, the law effected sweeping changes, creating a status equal to marriage, but separate from it.

The difference in legal status in Illinois is small but significant and has consequences in terms of federal rights. Lawyers in almost every area of the practice need to be aware of the differences now and also stay alert to the inevitable evolution to come.

Civil unions v. gay marriage

By choosing this path to allow parties of the same or opposite genders to enjoy the legal benefits of marriage without an actual marriage, Illinois sidestepped the political battles of other states. The move to legalize same-sex marriage won a surprise victory in New York, which became the sixth and most significant state to allow gay couples to marry. Unlike Illinois, New York has historically been a liberal state and even some Republican legislators there lent their support to gay marriage.

However, it is predicted that many political heads will roll as a result of their votes on the charged issue. Avoiding that emotional maelstrom, as Illinois did, may well have been the most pragmatic choice. Like every tactical decision, this civil union “compromise” has both strengths and weaknesses.

Its strengths are obvious. Parties to a civil union are “entitled to the same legal obligations, responsibilities, protections and benefits as are afforded or recognized by the law of Illinois to spouses.” The act proceeds to incorporate the dissolution pro-

The civil union act is likely to be a legislative step along the way toward gay marriage authorization and no one on either side of the issue misses that truth.

visions of the Illinois Marriage and Dissolution of Marriage Act and also recognizes legally sanctioned same-sex relationships from other jurisdictions.

The weaknesses of the civil union solution are mostly a result of the still unresolved conflict between those who favor and those who oppose same-sex marriage rights, which are playing out both locally and nationally.

Civil union uncertainty

A line from an old Eagles song, “Every form of refuge has its price,” seems uniquely applicable to those entering into civil unions. The price and pitfalls have mostly to do with uncertainty.

First, the federal Defense of Marriage Act (DOMA) is still the law of the land and looms large over the landscape of “spousal” rights. Under DOMA, a spouse can only be a person of the opposite sex. Therefore, when federal law refers to the rights of a “spouse,” there is an inherent conflict between federal and Illinois law as to who is protected.

Consider for a moment all the federal rights that flow from being married, including (allegedly) favorable tax treatment, retirement benefits, insurance coverage and so much else that is taken for granted regarding health and welfare by traditional couples. Experts have indicated that there may be more than 1,000 or more such benefits specifically tied to the status of a “spouse.” These benefits will not be available to members of a civil union whether in Illinois or anywhere else.

Every party entering into a civil union, and every attorney advising them, has to be aware of this dilemma. Clearly, creative lawyering will be necessary to develop methods to minimize the negative impact of

these federal limitations. Even those efforts will not guarantee outcomes, however, while the nation itself remains so divided on the fundamental underlying issue of who is or should be entitled to the classification of “spouse.”

Challenges to DOMA are being raised by legal advocates in some states; simultaneously, bans on same-sex marriages are being proposed in others. Every state is its own battlefield with its own definition of a peaceful outcome for same-sex couples. To date, the national will is unknown and the war is far from over.

Other state practices

The second area of uncertainty is the full faith and credit or lack thereof that may be accorded to Illinois civil unions in other states. The same DOMA allows other states to refuse to recognize same-sex relationships from its sister states. Illinois tried to anticipate and solve that significant problem by allowing parties who enter into civil unions here to dissolve them here, no matter where they ultimately choose to live. That might, however, be a small and expensive comfort to the average, unhappy members of a civil union if they were later living and breaking up somewhere else in the country. One can only imagine the personal, legal and enforcement conflicts that might ensue from a long-distance dissolution of a civil union.

The very uncertainties attendant to the civil union act call out for legal solutions which will necessarily be piecemeal. It appears that prenuptial agreements will be reinvented as precivil union agreements. Dissolution and estate planning will be even more imperative for couples entering into civil unions in case they move into an unfriendly state or in case the federal government becomes even more unfriendly.

It seems likely that the financial analysis and legal planning, which will be required of those in civil unions, may have a ripple effect on other couples, whether they are married or cohabiting. Palimony, classification of property and approaches to alimony, for example, vary widely from state to state. Now these state differences will be highlighted for both same-sex and heterosexual

Continued...

Gemma B. Allen is a partner in the Chicago family law firm of Ladden & Allen Chtd. She can be reached at gemmaallen@laddenallen.com.

unions because everyone will be paying more attention. The net result may well be many more contractual approaches to relationships of all types.

One relationship that clearly will need to be clarified by even more than a contract is that of parent and child in a civil union. The civil union act is not specific on the topic and its members are not technically “married,” so who are the “parents of” a child in such a union cannot be taken for granted. Case law in Illinois has been unfriendly to a nonbiological parent. The safest route to securing parental rights for same-sex couples has historically been and still is through adoption.

Other concerns

The problems inherent in the potential conflicts between Illinois law and federal

law regarding civil unions along with the problem inherent in the national angst on the topic have already begun to surface.

In Rockford, Bishop Thomas G. Doran of the Roman Catholic diocese there felt that the civil union legislation mandated Catholic Charities to terminate its foster-care program. Other similarly situated religious organizations are dealing with the same issues yet to be decided by the courts: Whether or not the agencies that get public monies can exclude potential foster parents who are openly gay.

Clearly these issues are not only about the law and they are, in fact, about a nation still divided. The civil union act is likely to be a legislative step along the way toward gay marriage authorization and no one on either side of the issue misses that truth.

All of us remember from our law school days that “separate but equal” as a doctrine applied on other civil rights issues not only failed to work, but it generated emotions, lawsuits and legal scholarship for more than 50 years.

For those who love the law, you have to love this law, no matter what your own political or religious values may be. A piece of legislation like this that mirrors the winds of change gives effective advocates a whole new playing field.

Eventually, Congress will have to step up and face this issue because there are too many rights at stake to allow continuing national confusion. Until then, the civil union act, and its day-to-day effects and effectiveness, will be shaped by the Illinois bench and bar.