

Parent or not? Civil unions and parentage in Illinois

By Carl W. Gilmore

Woodstock Legal Consultants

Woodstock, Illinois.

The Religious Freedom and Civil Union Act is the second time in six years Illinois departed from traditional marriage and dissolution of marriage principles embodied in the Illinois Marriage and Dissolution of Marriage Act.¹ By submitting a form to the county clerk, same-sex and heterosexual partners can obtain the same legal obligations, responsibilities, protections and benefits afforded or recognized by the law of Illinois to spouses, regardless of the source of law.²

When it comes to children, the Civil Union Act raises as many questions as it answers. With child support and placement, there can be a clear impediment to identifying parents in a civil union, one that does not exist for children subject to the IMDMA.

Although three statutory schemes are available to establish parentage, the Adoption Act is the safest route for same-sex parents to establish parental rights.

Establishment of parentage

Children born during a marriage are presumed to be children of the husband and wife in a marriage.³ This is true regardless of whether the parents marry before or after birth and regardless of whether the marriage is invalid.⁴ Illinois does not equate civil unions with marriage, and marriage between same-sex people has not been declared in harmony with public policy.⁵

Dissolution of a civil union is recognized in the new act, as is the declaration of invalidity of a civil union.⁶ The Civil Union Act does not expressly recite sections of the IMDMA

relating to custody and child support, but incorporates the IMDMA pleading requirements of the names, ages and addresses of the children,⁷ as well as provisions regarding mediation of child custody disputes and parental education programs.⁸ Tension arises between the Civil Union Act's recognizing child issues need to be decided, but also only recognizing children of a traditional, heterosexual marriage as being children of the parents by virtue of a marriage-type relationship.

Three mechanisms to establish parentage may be used to establish parentage and thereby invoke Civil Union Act protection in the event of a dissolution.

Illinois Adoption Act

For heterosexual and same-sex couples, the Adoption Act confers parental status.⁹ There is neither statutory nor common law proscription of same-sex adoptions.

Adoptions are divided into related and unrelated adoptions. Related adoptions are adoptions by specified relatives, but only one of the petitioners needs to be related to the child by blood or marriage.¹⁰ For example, the mother of a child who has a same-sex partner is related under the statute, so the same-sex couple can petition for a related adoption.

Unrelated adoptions – where neither parent is related to the child – are also governed by the Adoption Act. The only requirements for adopting parents are meeting residency requirements and being reputable people of legal age.¹¹ Recognize that married people must jointly petition unless they have lived separate and apart for 12 months.¹² As the Civil Union Act has not been interpreted, and because the rights conferred by statute to spouses are conferred to civilly unified partners, it would follow both civilly unified partners must sign the petition.

There is no residency requirement if the child is placed with the parents through an agency.¹³ One can imagine same-sex couples moving to Illinois to obtain the benefits of both the Civil Union Act and the Adoption Act.

Illinois Parentage Act

Nothing in the Civil Union Act limits application to same-sex couples. Thus, heterosexual parents can enter a civil union and subsequently have a parent-child relationship declared under the Illinois Parentage Act of 1984.¹⁴ A parentage action under IPA 84 may be brought by the child; the mother; a pregnant woman; any person who has custody of or is providing or has provided financial support to the child; or a man presumed or alleging himself to be the father of the child or expected child.¹⁵ The IPA 84 defines a parent-child relationship as one between natural or adoptive parents.¹⁶ While a same-sex petitioner may be providing support for the child, the definition of parent-child relationship excludes IPA 84 as an avenue toward parentage for same-sex couples.

Gestational Surrogacy Act

For heterosexual and same-sex parents wishing to have their own children, another option is the Gestational Surrogacy Act.¹⁷ The GSA allows parties to concurrently terminate and create parent-child relationships medically and legally through extrajudicial agreement.

A gestational surrogate agreement must meet certain criteria, chief among them being that one of the intended parents must donate his or her gametes for the surrogacy.¹⁸ The surrogate carries the child, and after birth the child is placed with the intended mother or intended father. If the surrogacy agreement meets the requirements of the GSA, the

biological mother is relieved of her parental rights and obligations, while the intended parents are given rights and obligations.¹⁹

Limiting factors may disqualify the GSA as an option for same-sex parents. For one, a GSA intended parent must have a medical need in order to qualify.²⁰ Whether an inability to bear children, because the intended parent is the same gender as his or her civil union partner, qualifies as a medical need is undetermined. The Illinois Parentage Act, which deals with artificial insemination, might be an option for a heterosexual married couple.²¹ But the IPA specifically refers to the rights of husbands and wives, implying marriage, not civil union.²² Further, it is unclear whether there can be more than one intended mother or more than one intended father.

Notwithstanding the GSA, in same-sex civil unions an adoption is likely required to establish child support, visitation and custody rights in the non-genetic same-sex parent.

Conclusion

The Adoption Act stands as the most reliable mechanism for creating parent-child relationships within civil unions. There are no limitations on same-sex adoptions, nor does Illinois law include any policy statement against same-sex adoption. None of the parentage statutory schemes were changed to coincide with the Civil Union Act. Additionally, adoption may confer benefits through federal taxation, Social Security, Medicare and other programs that are unavailable in surrogacy arrangements. Finally, adoption has the benefit of recognition in foreign states, while surrogacy parentage may not be recognized unless an adoption is completed.

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Carl W. Gilmore
Woodstock, Illinois.

Carl W. Gilmore is the author of *Illinois Parentage Law* (Illinois State Bar Association 2002) and the editorial consultant for *Disputed Paternity Proceedings* (Lexis), and has lectured on family law, adoption, paternity and surrogacy topics to the American Bar ,

Illinois State Bar and McHenry County Bar associations. Gilmore practices all types of family law with Woodstock Legal Consultants in Woodstock, and is licensed in Illinois and Wisconsin.

¹ 750 ILCS 5/101 et seq. (Lexis 2011).

² 750 ILCS 75/20 (Lexis 2011).

³ 750 ILCS 45/5(a) (Lexis 2011)

⁴ 750 ILCS 5/303 (Lexis 2011).

⁵ 750 ILCS 5/213.1 (Lexis 2011).

⁶ 750 ILCS 75/45 (Lexis 2011).

⁷ 750 ILCS 5/403(a)(4) (Lexis 2011).

⁸ 750 ILCS 5/404, 404.1 (Lexis 2011). The declaration of invalidity provisions found at 750 ILCS 5/301 et seq. are similarly incorporated.

⁹ 750 ILCS 50/1 et seq. (Lexis 2011).

¹⁰ 750 ILCS 50/1(B) (Lexis 2011).

¹¹ 750 ILCS 50/2 (Lexis 2011).

¹² 750 ILCS 50/2(A)(a)(Lexis 2011).

¹³ 750 ILCS 50/2(B)(Lexis 2011).

¹⁴ 750 ILCS 45/1 et seq. (Lexis 2011).

¹⁵ 750 ILCS 45/7(Lexis 2011).

¹⁶ 750 ILCS 45/2. (Lexis 2011).

¹⁷ 750 ILCS 47/1 et seq. (Lexis 2011).

¹⁸ 750 ILCS 47/10 (Lexis 2011).

¹⁹ 750 ILCS 47/15(b) (Lexis 2011).

²⁰ 750 ILCS 47/20(b)(2) (Lexis 2011). The Illinois Parentage Act is not the same as the IPA 84.

²¹ 750 ILCS 40/1 et seq. (Lexis 2011).

²² 750 ILCS 40/3 (Lexis 2011).