

Civil Unions in Illinois: A Cautious Gaze Into A Possible Future

by Joseph F. Emmerth

Every year, the Illinois General Assembly is called upon to consider a multitude of proposed bills. Some large and some small, they deal with taxes, real estate, regulation of various businesses, and other issues that affect the lives of Illinois citizens to some degree. But once in a while, the General Assembly takes the opportunity to weigh in on a propo-

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sition that could change Illinois society in a profound way. HB 1826, the Illinois Religious Freedom Protection & Civil Union Act, more commonly referred to as the Civil Unions Act, is just such a bill presently before our elected representatives.¹ The Civil Unions Act proposes creating a legally recognized relationship (the “civil union”) in which people would have “all the same protections, benefits, and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil or criminal law, as are granted to spouses in marriage.”²

Currently, twenty states have laws against same-sex marriage, while one, Massachusetts, allows

couples of the same gender to marry.³ It is widely thought that civil unions came about because lawmakers, fearing what their constituents would do if they voted to legalize same-sex marriage, thought these unions would be a compromise.⁴ These laws are noteworthy not simply for their frequency, but for their attractiveness as a substitute for recognition of same-sex marriage.⁵ Numerous polls, such as one conducted in New Jersey in August of 2007, indicate that the public at large is much less hostile to “civil unions” than “same-sex marriage.”⁶ However, an additional eighteen states ban same-sex marriage, civil unions and domestic partnerships, demonstrating that, in a large portion of the public’s mind, a horse of a different color is still a candidate for the glue factory.⁷ Two states, New Mexico and Rhode Island, leave the matter undefined.⁸ Many ponder whether the issue is a relevant concern for Illinois; isn’t this an issue for the “left coast” and California to deal with?

A brief glance at results from the 2000 U.S. Census reveals telling data. Same-gender couples live in 99.3% of all U.S. Counties.⁹ Same-gender couples are raising children in at least 96% of all U.S. Counties.¹⁰ Regionally, the South has the highest percentage of same-gender couples that are parents; 36.1% of lesbian couples and 23.9% of gay couples are raising children in the South.¹¹ The second highest percentage is seen in the Midwest,



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where 34.7% of lesbian couples and 22.9% of gay couples are raising children.¹² Analyses from the National Survey of Family Growth found that 4.1 percent of men and women aged 18-45 identify themselves as gay, lesbian, or bisexual.¹³ Ultimately then, based on the statistical data alone, the proposed Civil Unions Act is a possibility that the citizens of Illinois should carefully consider. What would the passage of this bill mean to Illinois? What are some of the considerations this bill engenders? This article is an attempt to raise awareness of some issues related to this bill, both against, and in favor of civil unions in Illinois.

Issue #1: Our court system and its capacity.

Pro: All citizens, especially where issues of children are involved, should have access to the court system. With so many same-sex couples raising children in the Midwest¹⁴, and in Illinois by implication, the best interests of the children of these couples should be carefully considered. The recent implementation of Article IX of the Illinois Supreme Court Rules reaffirmed the concept that the court system should pay particular concern to the best interests of the children of a married relationship.¹⁵ If same-sex couples are going to be raising children in the state of Illinois, it makes sense that the court system should care about them as much as it does the children of married couples. Rather than require that the non-biological parent in a same-sex relationship adopt the child before the court can ad-

dress custodial concerns, the Civil Unions Act would better approximate the rights of a same-sex couple with the rights of a married couple.¹⁶ This would circumvent the problem encountered when the stay-at-home parent in a same-sex relationship gets shut out of the life of the child he or she raised because he or she is not a biological or adoptive parent. This would allow the courts to perform their mandate and protect the welfare of children raised by same-sex couples, even if one parent has not gone through the adoption process.

Con: Our court system is struggling with ever-increasing caseloads and limited physical space, which would only become worse with the enactment of the Civil Unions Act. Family law litigation, much like an actual family, has a tendency to grow over time. Ever-increasing dockets and increasingly drawn-out litigation is

one of the primary reasons the Illinois Supreme Court revised its Article IX rules, so that custodial issues and the litigation's effect on the children would be lessened.¹⁷ Assuming a rate of 4.1 percent of Illinois' population identifying itself as gay, lesbian or bisexual and a rate of civil unions and divorce that mirrors the rate of marriage and divorce of married couples; the domestic relations division would receive a deluge of new cases. Physical space is also a perennial problem. In Cook County for instance, divorce cases, parentage cases, and domestic violence cases are currently heard in separate buildings due to space limitations, despite the massive capacity of the Richard J. Daley Center. In DuPage County and in Will County, the Illinois Supreme Court has allocated additional judges based on population growth, yet both counties struggle to find physical space to put them. DuPage County has even begun a night court program for pro se litigants in domestic relations cases, in part to ease the burden on its courtrooms during the day. Kane County has enjoyed the move to a larger and more spacious court system in recent years, yet its circuit-sister, Kendall County, has recently added new judges and is battling capacity problems of its own. If, as would be expected, the Civil Unions Act produced a new stream of litigants, our current court system and its resources would face dire problems both in manpower and capacity.

Issue #2: Benefits, Retirement Plans, and Pensions.

Pro: If the Legislature passes the Illinois Civil Unions Act, individuals in civil unions will have the same rights as spouses in a marriage. This would entitle individuals in civil unions to the equitable

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division of the union's estate and assets, including IRAs, 401(k)s, Pensions, TRS plans, Stock Options, corporate interests, and other such items applicable to a married couple under the Illinois Marriage and Dissolution of Marriage Act.¹⁸ This Act would also entitle individuals to participate in their significant other's employee health plans and other vocational benefits. This would protect a stay-at-home parent in a civil union from the financial abandonment that frequently occurs now. If the stay-at-home parent has adopted the child, he or she may be entitled to child support based on residential custody, but the vehicles, real estate, retirement assets, and benefits are frequently in the name of the working parent only, leaving the stay-at-home parent in a same-sex relationship bereft of any assets. And, of course, maintenance simply does not apply to this situation under the law today, no matter how many working years the stay-at-home parent has given up to raise children, or how big the disparity in incomes. The passage of the Civil Union Act would rectify these sorts of situations, and give both parties in a same-sex union the justice, the security, and the equitable safety net that married couples enjoy in Illinois.

Con: Simply because the Civil Union Act says individuals shall enjoy the same equitable rights that married couples enjoy, that does not make it so. Legislation such as the Civil Unions Act has already been the subject of extensive litigation, usually related to three kinds of circumstances: a) businesses and preemption concerns; b) taxpayers challenging the laws; and c) attempts to mandate benefits, which raise constitutional concerns.¹⁹ For instance, when the State of Hawaii initially passed their reciprocal beneficiaries legislation, five businesses

sued, claiming that if interpreted broadly, the law would conflict with the federal Employee Retirement Income Security Act ("ERISA").²⁰ U.S. District Judge David Ezra subsequently ruled that HMOs and mutual benefit societies could not be covered under this legislation.²¹ In another example, when San Francisco passed its domestic partnership ordinance, prohibiting the city from contracting with companies that do not provide domestic partnership benefits to their employees' partners equivalent to their employees' spouses, two airlines and Federal Express sued the city.²² They asserted that the ordinance violated the U.S. Constitution by regulating out-of-state conduct; that the ordinance was preempted by ERISA; and that the ordinance was preempted by the Airline Deregulation Act and the Railway Labor Act.²³ The courts eventually held that the ordinance unconstitutionally restricted interstate commerce to the extent that it applied to out-of-state conduct, thereby exempting the airlines and Federal Express. The court also held that ERISA, and the Airline Deregulation Act preempted the ordinance (but not the Railway Labor Act).²⁴

Because the Civil Unions Act has been proposed in the State Legislature, Illinois will probably not see many of the taxpayer challenges brought in other states, where cities have generally stepped on the State's toes by passing broad ordinances that encroach on the State's powers. Lawsuits have also been brought in other states that challenge state laws based on terms such as "marriage" or "spouse", arguing that these laws violate equal protection guarantees by discriminating on the basis of sexual orientation.²⁵ These lawsuits generally fail, with the courts finding that the distinction is between married and

unmarried individuals and not between individuals of different sexual orientation; or by citing the State's legitimate interest in promoting marriage.²⁶ What these lawsuits have resulted in are two different classes of people. There are those who enjoy the benefits of the language promised under proposed legislation such as the Civil Unions Act, and there are those who don't, usually because it conflicts with some Federal law or Federal concept in their case. Unfortunately then, the likely result of a Civil Unions Act will not be one of equality with married couples, but rather further subclassification into groups of "haves" and "have-nots" with regards to benefits, pensions and retirement plans.

Issue #3: Religious Liberty.

Pro: The passage of a Civil Union Act will reflect a broader transformation within organized religion today, namely a shift from exclusion to inclusion for all of God's children. Society, religious denominations included, has become much more tolerant of homosexual individuals and same-sex relationships over the past several decades. The United Church of Christ and the Episcopal Church in America to name two denominations, have welcomed homosexuals and same-sex couples into their midst. The Episcopal Church ordained and promoted Eugene Robinson (a professed homosexual) to the rank of bishop in 2003. Many other denominations also allow homosexual individuals to join their fellowship. Some also ordain homosexuals as ministers and clergy. Many of these denominations are also currently debating whether or not to perform and recognize same-sex unions. As the perceptions and feelings of various religions and denominations to-

wards the homosexual community have evolved, it only seems fitting that society's attitudes and thoughts towards the homosexual community have evolved as well. In this day and age of increased tolerance and acceptance, common decency compels recognition of same-sex relationships and the validity of two people's commitment to each other. The Civil Unions Act would do that. More importantly, the Civil Unions Act itself imposes no requirements on religious entities to permit or recognize same-sex unions.²⁷

Con: When civil union laws include provisions for forcing non-government employers to offer benefits, religious freedom concerns are triggered. Where a religious organization or individual is an employer and morally objects to offering benefits to same-sex partners, problems would naturally arise. If an employer learned that a potential employee had a domestic partner to whom they would have to offer benefits, some religious organizations or individuals would decline to hire that person. While a religiously motivated individual who is a secular employer might believe that their potential employee's personal life is just that, the potential employer might still stop short of "supporting" that lifestyle choice by offering benefits. If state law were to forbid individuals to make that decision, people would be denied the right to act according to their religious beliefs. In Illinois, the conflict inherent in this arena has already been exposed, both by Catholic Hospitals refusing to comply with State law regarding emergency contraception²⁸, and by Pharmacists refusing to dispense the so-called "morning-after pill"²⁹, which resulted in further action by the governor.³⁰ The Civil Unions Act will just bring further conflict and litigation, as it potentially interferes with an

individual's religious liberty.

Issue #4: Public Policy Concerns.

Pro: *"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."*³¹ Very powerful words; most everyone in the U.S. has heard them at one time or another. When one looks back on the history of the United States of America, one cannot avoid seeing the long, slow, sometimes painful journey towards a more open society. Our forefathers came here, in part, to escape religious oppression. Since that time, we the people have managed to overcome the following: an oppressive monarchy; the idea that it's okay to own another human being³²; the idea that women don't matter³³; the idea that different races have different rights³⁴; the idea that two people of different races can't marry³⁵; and the idea that the State should have a say in how consenting adults express love for each other in their homes³⁶. At each step along the way, there have been people railing against the long march. Sometimes the march had to take a few steps back^{37 38}, before marching inexorably forward. The movement towards a more open society is a natural one, and one based on the ideals and beliefs upon which this nation was founded. It is an insult to the hundreds of thousands of men and women (many homosexual themselves) who have died, and continue to die defending the principles and the ideas represented by these United States of America, that we in fact attempt to prevent some individuals from committing their lives to each other and refuse to recognize that commitment, while at the same time recognizing

the commitments of others. It degrades the memory of those who have made the ultimate sacrifice and laid down their lives for the freedoms and blessings of this nation when we decide to discriminate against groups of people whose only hope and desire is to be granted the same modicum of respect and recognition afforded to other groups of similar intent. In 1776, those fifty-seven men did not gather together, knowing fully that they might die for doing so, and sign the Declaration of Independence so that their progeny and heirs might parade around as hypocrites, extolling the beauty of their ideas while denying the conclusions those ideas compel. The Civil Union Act stands for the proposition that people have the right to be treated equally, a concept that forms the bedrock of who we are as a people. Deny that, and one denies what America means, and what it has always meant, to the people of the world.

Con: Marriage is not just about conferring benefits. The laws governing marriage have always recognized its special status as a union between a woman and a man.³⁹ This makes the institution of marriage particularly well suited to further certain goals, namely procreation and childrearing.⁴⁰ Marriage also confers some measure of protection to women and children from men who would take advantage of women without being committed to women or the children that may result.⁴¹ The State, recognizing the value of marriage to the stability and maintenance of society, provides a package of benefits to those who marry.⁴²

The concept of a civil union seems to work the other way, acknowledging that some do not receive marital benefits, and then trying to create a status to identify where the benefits should go. It is, in essence, a functional redefinition

of marriage.⁴³ When the benefits traditionally reserved for married people are given out to other people based on a nonmarital status, the message is that the law no longer deems marriage to be a uniquely valuable institution.⁴⁴ As Professor William Eskridge has stated, "if marriage becomes only one more option, like a flavor of ice cream, its social position will eventually be undermined."⁴⁵ In the long run, it makes marriage obsolete. In the past, couples that wanted to ensure the legitimacy of offspring and keeping sexual relations above board had to marry.⁴⁶ With the ever-increasing tolerance of alternative statuses like civil unions and domestic partnerships, couples are able to choose the type of legal obligation they want for their relationship.⁴⁷ The attraction of marriage could be severely weakened as couples are lured into other, less demanding legal obligations.⁴⁸ Thus, in their misguided rush to place civil unions on equal footing with marriage, the Legislature risks undermining the very concept that made marriage so desirable in the first place, the privileges and benefits bestowed upon it by society for its positive contribution. Passing the Civil Unions Act will accomplish only one thing: devaluing the institution of marriage and hence, by extension, denying civil unions the legitimacy and value they seek.

Conclusion. This article has been an attempt to generate discussion on a divisive subject; to encourage deep thinking and a serious dialogue; to highlight the tiniest sampling of contested opinions. There are many related issues not touched on by this article, such as the Defense of Marriage Act⁴⁹, the full faith and credit clause of the constitution⁵⁰, the ninth amendment to the constitution⁵¹, and many more. Perhaps this article will spur further discussion of those

issues; perhaps even of issues no one has yet considered. A questioning democracy is a vibrant, healthy democracy. I urge each of you to ponder the "what ifs?" and the "what thens?" surrounding the proposed Illinois Religious Freedom Protection & Civil Union Act. Who knows what the future holds?■

¹ HB 1826, 95th Gen. Assem., Reg. Sess. (Ill. 2007)

² *Id.*, §105(a).

³ Cynthia Laird, *Pros and Cons of Gay Marriage Debated*, BAY AREA REPORTER, August 2007, <http://www.ebar.com/common/inc/article_print.php?sec=news&article=2047>.

⁴ *Id.*

⁵ William C. Duncan, *Domestic Partnership Laws in the United States: A Review and Critique*, No. 3, BYU L.R. 961 (2001).

⁶ Juan Melli, *New Poll Shows Strong Support for Marriage Equality*, August 2007, <<http://www.bluejersey.com/showDiary.do?diaryId=5453>>.

⁷ Cynthia Laird, *Pros and Cons of Gay Marriage Debated*, BAY AREA REPORTER, August 2007, <http://www.ebar.com/common/inc/article_print.php?sec=news&article=2047>.

⁸ *Id.*

⁹ United States Census - 2000.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Gary J. Gates, *The Gay, Lesbian and Bisexual Vote in 2006*, THE WILLIAMS INSTITUTE ON SEXUAL ORIENTATION LAW AND PUBLIC POLICY, UCLA School of Law (2006), www.law.ucla.edu/williamsinstitute/publications/Congressional%20Districts%20Report.pdf

¹⁴ United States Census - 2000.

¹⁵ 145 Ill. 2d R. 900-942 (2007).

¹⁶ HB 1826, 95th Gen. Assem., Reg. Sess. (Ill. 2007).

¹⁷ 145 Ill. 2d R. 900-942 (2007).

¹⁸ 750 ILCS 5/101, *et seq.* (West 2007).

¹⁹ William C. Duncan, *Domestic Partnership Laws in the United States: A Review and Critique*, No. 3, BYU L.R. 961, 979 (2001).

²⁰ David Orgon Coolidge, *The Hawaii Marriage Amendment: Its Origins, Meaning and Constitutionality*, 22 U. Haw. L. Rev. 19, 27-30 (2000).

²¹ *Id.*

²² *Air Transp. Ass'n v. City of San Francisco*, 992 F. Supp. 1149 (N.D. Cal. 1998).

²³ *Id.* at 1155.

²⁴ *Id.* at 1162-64, 1180.

²⁵ William C. Duncan, *Domestic Partnership Laws in the United States: A Review and Critique*, No. 3, BYU L.R. 961, 982-85 (2001).

²⁶ *Id.* 983-85.

²⁷ HB 1826, 95th Gen. Assem., Reg. Sess. (Ill. 2007) at §102.

²⁸ Bouchardeau, Cecile. "The 'Morning After' Pill: Catholic Hospitals Deny Rape Victims Choice", *The Chicago Reporter*, October 1993.

²⁹ Elizabeth Schultz, *Illinois Pharmacists Objecting to Morning After Pill Sue Walgreens* JURIST, January 2006, <<http://jurist.law.pitt.edu/paperchase/2006/01/illinois-pharmacists-objecting-to.php>>.

³⁰ Pam Belluck and Monica Davie, *Pharmacies Balk on After-Sex Pill and Widen Fight in Many States*, NEW YORK TIMES, April 19, 2005, <<http://www.nytimes.com/2005/04/19/national/19pill.html?ex=1271563200&en=7336fa64b8add295&ei=5088&partner=rssnyt&emc=rss>>.

³¹ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

³² U.S. CONST. amend. XIII, §1.

³³ U.S. CONST. amend. XIX, §1.

³⁴ U.S. CONST. amend. XIV, §1.

³⁵ *Loving v. Virginia*, 388 U.S. 1 (1967).

³⁶ *Lawrence v. Texas*, 539 U.S. 558 (2003).

³⁷ *Buck v. Bell*, 274 U.S. 200 (1927).

³⁸ *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

³⁹ William C. Duncan, *Domestic Partnership Laws in the United States: A Review and Critique*, No. 3, BYU L.R. 961, 987 (2001).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Hafen, Bruce C., *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 Mich. L. Rev. 463 (1983).

⁴³ William C. Duncan, *Domestic Partnership Laws in the United States: A Review and Critique*, No. 3, BYU L.R. 961, 988 (2001).

⁴⁴ *Id.* at 990.

⁴⁵ William Eskridge, Jr., *The Emerging Menu of Quasi-Marriage Options*, at http://writ.findlaw.com/commentary/20000707_eskridge.html

⁴⁶ William C. Duncan, *Domestic Partnership Laws in the United States: A Review and Critique*, No. 3, BYU L.R. 961, 990 (2001).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ 28 U.S.C. § 1738C (2007).

⁵⁰ U.S. CONST. amend. XIV, §1

⁵¹ U.S. CONST. amend. IX.