



## Estate-planning, other implications of the civil union law

Legally speaking, civil union partners will step into the shoes of spouses in most cases, students of the legislation say.

Shortly before this issue of the IBJ went to press, the Illinois Senate followed the House in passing SB 1716, the Religious Freedom Protection and Civil Union Act. Governor Quinn said he plans a ceremony in early 2011 at which he'll sign the bill into law.

The new law will provide couples of the same or opposite sexes with the option of entering into a civil union that will provide them with the same rights, responsibilities, protections, and benefits that marriage provides under state law, whether common law, statute, or administrative policy or regulation. It also mandates legal recognition of civil unions, marriages between persons of the same sex, or any other substantially similar legal relationship other than common law marriage that two persons enter into in any other jurisdiction. Couples will be able to dissolve their civil unions under the provisions of the Illinois Marriage and Dissolution of Marriage Act.

### Health Care Surrogate Act, guardianships, and more

Longtime member and current vice-chair of ISBA's Trusts and Estates Section Council Ray Koenig highlighted some of the more significant aspects of the new statute for probate lawyers.

One of the most important results, Koenig said, will be that couples who have done no estate planning but have entered into civil unions will immediately jump to the head of the line for purposes of decision making under the

Health Care Surrogate Act (HCSA), 755 ILCS 40/1 et seq.

That statute, which establishes a priority for patients and their surrogates to make decisions about medical treatment and end-of-life care, including decisions to continue or withhold life-sustaining measures, without court involvement, currently assigns the partner of an unmarried patient to the category of "close friend" (see 755 ILCS 40/10). Under the HCSA, that's the last level of decision-making priority. 755 ILCS 40/25. The patient's guardian of the person and spouse fall into the first and second priority, respectively. Once the new law takes effect, patients' civil union partners will stand in the same shoes as spouses.

Though the guardianship statute does not direct any priority, Koenig says that in his experience, courts generally prefer to appoint spouses as guardians, and he anticipates that courts will follow the new law's explicit intent that partners in civil unions are to be treated as spouses. And, he says, if anyone else, such as siblings or parents, begins guardianship proceedings against a person in a civil union, the person's partner will now have to be given notice.

Koenig notes that the rights of partners in civil unions will extend to post-mortem proceedings. Just as widowed spouses may do, widowed civil union partners will now have the right to contest or renounce their partners' wills.

### Not for same-sex couples only

Though the new law's appeal to same-sex couples, who may not yet marry under Illinois law, is obvious, some cou-

ples of the opposite sex, too, may find the law's provisions appealing.

"Go to any senior citizens center," state representative Gregory Harris, the bill's principal sponsor, said, and you'll find seniors who have formed new relationships after the deaths of their spouses but who have decided against marriage for financial reasons. "If they remarry, they could lose their pensions or Social Security benefits. But without marriage, they have no legal rights to be with their new partners in the hospital," Harris said. Because federal law doesn't recognize civil unions as equivalent to marriage, those in that situation may find that entering into a civil union provides them with the best of both worlds, enabling them to protect their retirement income and other benefits and also be able to be with their new partners in the hospital and, if necessary, make health care decisions for them, Harris and Koenig said.

"For those of us who do estate planning," Koenig says, "this has made our clients' lives much easier and simpler and allows us to take legal steps that reflect the reality of their lives." He adds that those who are considering entering or who do enter into civil unions should call their estate planner and come in for a review, just as they should upon experiencing other major life changes such as divorce, marriage, or death.

Koenig said the new law will also im-

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## Berry and discovery depositions: hard cases make new rules

The Illinois Supreme Court amends Rule 212 by expanding the permissible uses of discovery depositions to cases where the deponent is a party and has died before trial.

As ISBA's Christopher Bonjean reported in July in *Illinois Lawyer Now*, ISBA's continually updated blog, the Committee on Discovery Procedures of the Illinois Judicial Conference examined Rule 212, which governs the use of depositions, after the Illinois appellate court issued *Berry v American Standard, Inc.*, 382 Ill App 3d 895, 888 NE2d 740 (5th D 2008).

In that case, the plaintiff, Howard Berry, a mesothelioma victim who had been exposed to asbestos on various job sites, died before trial. Though his counsel moved to take his evidence deposition the month after filing suit, on the defendants' objections, it was postponed until after his discovery deposition.

That deposition was completed five months later, by which time Berry's illness had rapidly and substantially weakened him, affecting his ability to testify. He was hospitalized and died less than a month later, without his evidence deposition having been taken.

### "The justice system failed"

At that time, SCR 212(a)(5) permitted the use of discovery depositions as evidence at trial where the deponent is unavailable because of infirmity or death *except* where the deponent is a party or an expert witness. Based on the rule's clear language, the trial court barred Berry's discovery deposition from use at trial. Without his testimony, Berry's estate could not prove his case, and the court accordingly granted summary judgment to the defendants.

Upholding the trial court's decision, the appellate court contrasted the purposes and procedures of discovery and evidence depositions. During discovery depositions, counsel ordinarily do not object as they would at evidence depositions, the court said, because they know that the purpose of a discovery deposition is to explore a case's facts and that the de-

position's admissibility at trial is limited.

Were it to have allowed Berry's estate to use his discovery deposition at trial, the court said, it would have effectively abrogated the rule's language. "A different construction would turn every discovery deposition of a party into an evidence deposition because the parties would know that, in the event of the party/deponent's death, the deposition might be admissible as evidence at the trial." *Id* at 901, 888 NE2d at 747.

Two members of the appellate court panel filed a concurring opinion. Though they agreed that it would have been legally incorrect for the court to have permitted the use of Berry's discovery deposition at trial, they also said "the justice system failed....Through a series of motion-related delays and rulings of the trial court, Mr. Berry was denied his 'day in court.'" *Id* at 906, 888 NE2d at 751.

### "[R]are, but compelling, circumstances"

As amended, the rule gives broad discretion to the trial court to permit the use of any discovery deposition, unless the deponent is a controlled expert witness, as evidence at trial or a hearing against a party who appeared at the deposition or was given proper notice of it, as long as two conditions are met:

the deponent is unable to attend or testify at the trial or hearing because of death or infirmity, and the deponent's evidence deposition has not been taken. The rule requires the trial court to find only that permitting the use of the discovery deposition as evidence will do substantial justice between or among the parties.

The committee acknowledged *Berry's* impact on the rule in its explanatory note, published with the amended rule.

The Committee believes that a trial court should have the discretion under subparagraph (a)(5) to permit the use of a party's discovery deposition at trial. It appears that there may be rare, but compelling, circumstances under which a party's discovery deposition should be permitted to be used. In the Committee's view, *Berry* presents such circumstances. Given that in most cases counsel will have the opportunity to preserve a party's testimony via an evidence deposition, it is expected that the circumstances that would justify use of a discovery deposition would be extremely limited.

The amendment applies to all cases filed on or after January 1, 2011, its effective date. For the latest news you can use in your law practice, point your browsers to [illinoislawyernow.com](http://illinoislawyernow.com). ■

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pact the spousal privilege for testimony. He added that it will neither affect nor be affected by 750 ILCS 5/213.1, which provides that "[a] marriage between 2 individuals of the same sex is contrary to the public policy of this State."

Harris and other gay rights advocates made no bones about their hopes for repeal of section 213.1. Distinguish between the sacrament of marriage,

which religious institutions perform based upon their faith and traditions and which is not governed or affected by governmental action, and civil marriage, the legal provision for rights, benefits, and protections, Harris said, "This is a monumental step for Illinois. I hope that it will mark a turning point in the national discussion of marriage equality." ■