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Articles

Family Law

Colorado Civil Union Act

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Family Law articles are sponsored by the CBA Family Law Section to provide information to family law practitioners. Articles focus on practice tips and discussions of current issues within the realm of family law.

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This article discusses the Colorado Civil Union Act, which was signed into law on March 21, 2013, and its effects on the rights of couples, including same-sex couples, who elect to enter into a civil union.

In March 2013, the Colorado Legislature adopted the Colorado Civil Union Act, becoming the fifteenth state in the United States to grant significant legal rights to non-married couples,

including same-sex couples, who wish their relationships to be recognized by the state.² Couples may enter into a civil union effective May 1, 2013. This article provides an overview of the Colorado Civil Union Act and discusses its modifications to domestic relations, trusts and estates, probate, and other areas of law in Colorado.

History

The push to recognize couples in same-sex relationships began in Colorado in the 1990s. The first recognition came in the form of domestic partnership registries in various municipalities, such as Boulder and Denver.³ Although the relationships were recognized, the registries did not afford domestic partners substantive rights or responsibilities. In 2003, Colorado Representative Tom Plant introduced the first comprehensive civil union bill.⁴ In 2006, two ballot measures were presented to Colorado's voters—a proposed constitutional amendment to recognize domestic partnerships and a proposed constitutional amendment to state that marriage was limited to opposite-sex couples. The first failed and the second passed.⁵

In May 2007, the Colorado General Assembly passed the second parent adoption law, allowing same-sex partners to adopt their partners' children when there is only one legal parent.⁶ In 2009, the Colorado General Assembly passed the Designated Beneficiary Agreements Act, allowing couples, including same-sex couples, to register their partnerships and opt into some limited rights enjoyed by married persons.⁷

Senator Pat Steadman and Representative Mark Ferrandino introduced the Colorado Civil Union Act in 2011. It passed in the Senate, but not in the House. The bill was reintroduced in 2012. It again passed in the Senate but not in the House during a special session called by Governor John Hickenlooper to address the bill.

In 2013, the Civil Union Act was one of the first bills introduced. It had fifty-eight sponsors, including Senators Steadman and Lucia Guzman and Representatives Ferrandino and Sue Schafer. On January 23, a Senate Judiciary Committee, Senate Appropriations Committee, and Senate Constitutional Committee approved the legislation on a 3–2 vote. On February 11, the Senate Floor passed the legislation on a 21–14 vote. On March 12, the House Judiciary Committee, House Appropriations Committee, and House Constitutional Committee approved the legislation on a 39–26 vote. Governor Hickenlooper signed the bill into law on March 21. The law took effect on May 1, 2013.

With the adoption of the Colorado Civil Union Act, Colorado is the sixth state to recognize civil unions.⁸ In the United States, civil unions were first recognized in Vermont on July 1, 2000. Vermont subsequently passed a same-sex marriage bill in 2009. Connecticut followed suit by legalizing civil unions in 2005, and same-sex marriages in 2008. In New Hampshire, civil unions went into effect in 2008, followed by same-sex marriages in 2010. In 2007, New Jersey's Civil Union Act took effect. In 2011, civil unions were legally recognized in Illinois, Rhode Island, and Hawaii. Delaware's civil union bill took effect in 2012. Many other states have comprehensive domestic partnership laws, including California, Oregon, and Nevada. Currently, same sex-marriages are recognized in nine states and the District of Columbia.⁹

The Colorado Civil Union Act grants partners who have entered into a civil union most of the same rights and responsibilities as married persons. However, Colorado still has a statute specifying that a marriage is valid in this state only if it is between one man and one woman,¹⁰ and the Colorado Constitution states that, "[o]nly a union of one man and one woman shall be valid or recognized as a marriage in this state."¹¹

The federal Defense of Marriage Act (DOMA)¹² defines marriage as a legal union between one man and one woman. DOMA codifies the non-recognition of same-sex marriage for all federal purposes, including the filing of joint tax returns, Social Security survivors' benefits, and insurance benefits for government employees. It also provides that no state is required to recognize a same-sex marriage entered into in another state. However, the constitutionality of DOMA is currently before the U.S. Supreme Court.¹³ Arguments were heard March 27, 2013, and the Supreme Court's opinion is pending.

The Basics of the Act

Senate Bill (SB) 13-011 creates the Colorado Civil Union Act (Act) at CRS §§ 14-15-101 *et seq.* The Act authorizes any two unmarried adults, regardless of gender, to enter into a civil union.¹⁴ Parties wishing to enter into a civil union obtain a license from the clerk and recorder of their county.¹⁵ The couple has a ceremony, presided over by one of the authorized persons, after which they receive a certificate of civil union.¹⁶ The certificate is filed with the clerk and recorder and then transferred to the Office of Vital Statistics, which will keep records of civil unions.¹⁷

The foremost purpose of the Act is to provide eligible couples the opportunity to obtain the rights, benefits, protections, duties, obligations, and responsibilities granted or imposed under the law to married persons.¹⁸ The second purpose of the Act is to protect individuals

against discrimination based on spousal status in employment, housing, and places of public accommodation.¹⁹ The third purpose is to grant reciprocity by recognizing relationships similar to civil unions legally created in other jurisdictions. Under the principle of comity, a marriage, civil union, domestic partnership, or substantially similar relationship legally created in another jurisdiction shall be deemed a civil union under Colorado law.²⁰

By operation of the law, throughout the Colorado Revised Statutes, a “party to a civil union” or “partner to a civil union” is included in any definition or use of the terms “dependent,” “family,” “heir,” “immediate family,” “next of kin,” “spouse,” and any other term that denotes the familial or spousal relationship.²¹ To date, the individual affected statutes have not been amended.

The Act recognizes the right to free exercise of religion by specifying that a priest, minister, rabbi, or other official of a religious institution or denomination of an Indian nation or tribe is not required to certify a civil union.²²

Effect on Domestic Relations Law

The entire body of domestic relations law now applies to civil unions in the same manner as marriages.²³ This includes property division, maintenance, allocation of parental responsibilities, parenting time, child support, and attorney fees. Same-sex parties who were married or parties who entered into civil unions in other states or countries shall have CRS §§ 14-10-101 *et seq.* applied to the dissolution of their marriages or civil unions in Colorado.²⁴ Parties who enter into civil unions in Colorado consent to Colorado jurisdiction to dissolve the union, or for any action related to the civil union, even if one or both of the parties do not reside in the state when the union is dissolved or other relief is requested.²⁵

Parties to a civil union may create agreements modifying the terms and conditions of a civil union in the manner specified for creating marital agreements.²⁶ If parties already have contracts governing their partnerships, these contracts are not affected by the Act.²⁷

Before the passage of the Act, both partners in a same-sex couple could be parents to a child of the relationship only through second parent adoption. Following passage of the Act, a partner in a civil union may adopt a child of the other partner through the same process outlined in CRS § 19-5-203 for a stepparent adoption and shall be considered a stepparent.²⁸ This will eliminate many of the hurdles (such as a home study) and much of the

expense of adopting a partner's child. If both partners seek to adopt a child, under the Act, they can do so jointly.²⁹

A child conceived during a civil union by one of the parties is treated as though the parents were spouses pursuant to CRS § 19-4-105.³⁰ In other words, even though there is no biological connection between the child and one of the parents, when a child is conceived during the civil union, the non-biological partner is presumed to be a parent under the Uniform Parentage Act.

The Act does not provide an exception for religiously affiliated social services and adoption agencies to opt out of assisting in adoptions to same-sex couples.³¹ SB 13-011 was opposed by Catholic Charities and some other agencies.

Effect on Trusts and Estates and Probate Law

Pursuant to the Act, all laws relating to title and survivorship apply to partners in a civil union the same as they apply to spouses. Thus, for example, all of Title 15, CRS, such as the laws applying to decedents' estates, wills, trusts, intestate succession, non-probate transfers, wards, protected persons, and priority for the appointment as a conservator, guardian, or personal representative, treat partners in a civil union as they do spouses.³²

A person who has entered into a Designated Beneficiary Agreement under Colorado's Designated Beneficiary Agreement Act is precluded from entering into a civil union with a different person.³³ If parties to a Designated Beneficiary Agreement enter into a civil union, the civil union certificate constitutes a superseding legal document that supersedes and revokes the prior Designated Beneficiary Agreement.³⁴

Other Effects

Section 14-15-107 of the Civil Union Act lists several of the additional rights, benefits, protections, duties, obligations, and responsibilities that apply in like manner to parties of a civil union as those granted to or imposed on spouses. These provisions address rights including, but not limited to:

1. the acquisition, ownership, or transfer of real or personal property;
2. standing to sue in causes of action related to or dependent on spousal status, including actions for wrongful death;

3. prohibitions against discrimination based on spousal status;³⁵
4. workers' compensation benefits;
5. unemployment and family medical leave benefits;³⁶
6. healthcare coverage;³⁷
7. survivor benefits for partners of public employees;
8. hospital visitation and notification;
9. rights under the Colorado Medical Treatment Decision Act;
10. jailhouse visitation;
11. testimonial privilege;³⁸
12. public assistance benefits;
13. homestead and exempt property rights; and
14. insurance coverage.

What is Not Affected

The Act does not impact federal laws, including DOMA. Current federal laws do not allow for the filing of a joint income tax return by parties who are not considered legally married under federal law. Because Colorado income tax filings are tied to the federal income tax form, parties to a civil union may not file a joint state income tax return.³⁹ Similarly, Social Security laws, military benefits,⁴⁰ ERISA laws, and other federal laws that impose burdens or provide benefits to married persons do not apply to partners of civil unions.

The Act states in a number of places that it preserves Colorado's previously codified public policy. This policy provides that only the union of one man and one woman constitutes a marriage.⁴¹

Practice Pointers

When advising same-sex couples, practitioners should first determine what the status of the couple is, and what has been done to legally protect the relationship thus far. Relevant questions include:

- Are they married in another state or country?
- Have they entered into a civil union in another state? If so, they are deemed to be in a civil union for purposes of applying Colorado law.

- Are they the designated beneficiary of some person? If so, they should terminate the designation if it refers to a person other than the person who will become a civil union partner.
- Do they have any domestic partnership agreements? If so, those agreements should be reviewed and revised, revoked, or reaffirmed.
- Have any estate planning documents been prepared? If so, they might need to be revised.

Domestic Relations Issues

The Act provides same-sex couples who enter into a civil union a body of law to apply to the status of the relationship. Attorneys should very carefully advise couples making a decision as to whether to enter into a civil union. Same-sex couples may want to give state *imprimatur* to their relationships, but it is important that they understand the extensiveness of the rights and responsibilities of this status. For example, should the pending bill regarding spousal maintenance⁴² pass in 2013, same-sex couples should know the implications of the new law (and current law) as it pertains to a maintenance claim made by the lesser-earning partner on dissolution of the civil union. Because there has never been law in Colorado entitling or even allowing maintenance to be paid from one non-married partner to another, this could be a major shift in thinking for same-sex couples.

Same-sex couples will be able to enter into agreements to govern their relationships and dissolution of those relationships by application of the Colorado Marital Agreement Act.⁴³ Practitioners should be aware that a bill that would supersede this statute is before the Colorado General Assembly in 2013.⁴⁴

Federal and state income tax issues must be addressed differently for couples in a civil union than for married couples. Maintenance is not a tax deduction for the payor partner to a civil union. Transfers of property between partners incident to civil union dissolution will not be governed by IRC 1041, and therefore may be taxed.

Other federal laws do not apply to these couples. For example, ERISA (governing certain retirement accounts), Social Security laws, COBRA (governing health insurance coverage), and laws relating to military benefits do not apply to civil union couples. Issues around the treatment of retirement assets, Social Security benefits, continuing health insurance coverage, and military benefits thus might be dealt with differently than would be the case with a dissolution of marriage. Even if the U.S. Supreme Court overturns DOMA, civil unions

are not marriages, and therefore partners in civil unions will not be treated as married persons under federal law.

It is unclear whether same-sex couples will be able to raise a claim of common law civil union. However, the legislative history suggests that this claim will not be available to same-sex partners.⁴⁵

With civil unions, second parent adoptions likely will become much more limited in use. The process is employed primarily by same-sex couples, although it is not limited to those families. The process for a second parent adoption is more time consuming and expensive than a stepparent adoption. Further, children born during a civil union will now be presumed to be the child of the parties to the union.

Many same-sex couples will choose not to enter into a civil union. Just like non-married opposite-sex couples, if a couple does not formalize their relationship and the relationship ends, their remedies are limited to a patchwork application of laws. This is problematic for the resolution of financial issues, but it is extremely problematic for children's issues. Entering into a civil union will provide significant protections for the non-biological parent of a child created during a civil union. For those parents who create families outside these unions, a non-biological parent will not be on equal footing with the biological parent if there is a dispute about the children after a break up.⁴⁶

Trusts and Estates Issues

Trusts and estates lawyers have been addressing the special needs of same-sex couples for a long time. Same-sex couples have for years wanted to ensure that their partners can make medical decisions for them and inherit from them on death. Under the Act, same-sex couples in civil unions enjoy all of the statutory default planning protections that married persons enjoy. Like many married couples, they simply may rely on the statutes for their estate planning.

Again, federal tax law does not apply to these couples. When a partner to a civil union dies, gifts to a surviving partner do not pass tax free if above the federal estate tax exemption amount. Further, civil union partners cannot take advantage of the portability of this exemption as can spouses. Therefore, one of the main estate planning tax protection tools at the disposal of married persons is not available to partners in a civil union. Trusts and estates

attorneys will need to be creative about tax planning for same-sex couples, equalization of estates, and planning for the death of the wealthier partner.

The Designated Beneficiary Act likely will be used very rarely, given the Civil Union Act. This is because a civil union certificate would supersede and revoke a prior Designated Beneficiary Agreement.

Constitutionality

The Colorado Constitution and Colorado statutory law forbid same-sex marriage in Colorado. The Act clearly states that it is not granting same-sex couples the right to marry.⁴⁷ However, the statute gives partners to civil unions the same state rights and responsibilities given to married persons, except the ability to file joint state personal income tax returns.

Colorado's Constitution and the Act might be subject to constitutional challenges. There are a couple of potential outcomes. First, the Colorado statute and Constitution defining marriage could be determined to be unconstitutional under the U.S. Constitution. If that were to happen, same-sex couples likely would be able to marry in Colorado. Another possible outcome is that the Colorado Civil Union Act could be determined to be unconstitutional by a Colorado court. That might lead to a U.S. Supreme Court case, or a ballot initiative. Either way, the Act might not be the last word on the rights of same-sex couples.

Conclusion

Couples in a civil union now will be treated under Colorado law as married persons are treated. However, there are significant differences between how the law treats opposite-sex married couples and same-sex partners to a civil union. This is particularly the case as it relates to federal laws. DOMA may very well be found unconstitutional. Even if that occurs, however, persons in a civil union still are not married for purposes of federal law.

It is likely that there will be issues to address in the application of the Act. One approach to the implementation of the bill would have been to change all Colorado statutes where the word "spouse" or other family relationship is found to include partners in a civil union. Because every statute was not changed, there may be some instances where judicial interpretation is needed to determine the Act's effect on existing statutes. There also might be judges or other authorities who refuse to apply the law under the theory that it is contrary

to the Colorado Constitution. In any event, Colorado is now a state where same-sex couples, for the most part, have the same rights and responsibilities as married couples under the law.

Notes

1. SB 13-011 (Colo. 2013); CRS §§ 14-15-101 *et seq.*
2. National Conference of State Legislatures (NCSL), “Civil Unions and Domestic Partnership Statutes” (April 5, 2013) (NCSL 1), available at www.ncsl.org/issues-research/human-services/civil-unions-and-domestic-partnership-statutes.aspx. *See also* NCSL, “Same Sex Marriage Laws” (Feb. 14, 2013) (NCSL 2), available at www.ncsl.org/issues-research/human-services/same-sex-marriage-laws.aspx.
3. Boulder County Revised Code § 12-4 (2013); Denver County Revised Municipal Code § 28-200 (2013).
4. HB 1141 (Colo. 2003).
5. Colo. Const. art. II, § 31 (Amendment 43, 2006).
6. CRS § 19-5-203(d.5).
7. CRS §§ 15-22-101 *et seq.*
8. States with civil unions are New Jersey (2007), Illinois (2011), Rhode Island (2011), Hawaii (2011), and Delaware (2012). *See* NCSL 1, *supra* note 2.
9. States with same-sex marriages are Massachusetts (2004), Vermont (2009), Connecticut (2008), Iowa (2009), District of Columbia (2010), New Hampshire (2010), New York (2011), Washington (2012), Maine (2012), and Maryland (2012). *See* NCSL 2, *supra* note 2.
10. CRS § 14-2-104(1)(b).
11. Colo. Const. art. II, § 31 (Amendment 43, 2006).
12. Defense of Marriage Act, 1 USC § 7 and 28 USC § 1738C.
13. *U.S. v. Windsor*, No.12-307.

14. The Colorado Civil Union Act defines “civil union” as a “relationship established by two eligible persons pursuant to this article that entitles them to receive the benefits and protections and be subject to the responsibilities of spouses.”

15. CRS § 14-15-109.

16. CRS § 14-15-112.

17. CRS § 14-15-110.

18. CRS § 14-15-102.

19. *Id.*

20. *Id.*

21. CRS § 14-15-107.

22. CRS § 14-15-112(4).

23. CRS § 14-10-106.5.

24. CRS § 14-15-116.

25. CRS § 14-15-115.

26. CRS § 14-15-108(1). *See also* CRS § 14-2-307.5.

27. CRS § 14-15-108(2).

28. CRS § 19-5-202(5).

29. CRS § 19-5-202(4).

30. CRS § 14-15-107(6).

31. SB 12-002 (Colo. 2012) (stating that the bill “shall not be interpreted to require a child placement agency to place a child for adoption” with a couple in a civil union).

32. CRS § 14-15-107(5)(a) to (d).

33. CRS § 15-22-104(1)(a)(III.5).

34. CRS § 15-22-103(3)(I).

35. CRS § 24-34-301 defines “marital status” as:

a relationship or a spousal status of a person, including but not limited to being single, cohabitating, engaged, widowed, married, in a civil union, or legally separated, or a relationship or a spousal status of a person who has had or is in the process of having a marriage or civil union dissolved or declared invalid.

36. “Immediate family member” means the worker’s spouse, partner in civil union, parent, or minor child under 18 years of age.

37. “Dependent” means a spouse, a partner in a civil union, an unmarried child under 19 years of age, an unmarried child who is a full-time student under 24 years of age and who is financially dependent on the parent, or an unmarried child of any age who is medically certified as disabled and dependent on the parent.

38. *See* CRS § 13-90-107(a.5)(I), which states:

a partner in a civil union shall not be examined for or against the other partner in the civil union without the other partner’s consent, nor during the civil union or afterward shall either be examined without the consent of the other as to any communications made by one to the other during the civil union. . . .

39. CRS § 14-15-117.

40. However, on February 11, 2013, U.S. Defense Secretary Leon Panetta announced that twenty military benefits would be extended to families headed by same-sex couples. *See* English, “For same-sex military couples, a battle on the home front,” *The Boston Globe* (March 5, 2013), available at bostonglobe.com/lifestyle/2013/03/04/military/hFaMoNgiovrEg3KrwMAJL/story.html.

41. CRS §§ 14-15-102 and -118.

42. HB 13-1256 (Colo. 2013).

43. CRS §§ 14-2-301 *et seq.*

44. HB 13-1204 (Colo. 2013).

45. Based on conversations with Colorado Senator Patrick Steadman, sponsor.

46. There is very little law that specifically applies to the rights of non-biological parents to children of same-sex parents. The closest is *In re E.L.M.C.*, 100 P.3d 546 (Colo.App. 2004), but *In re Reese*, 227 P.3d 900 (Colo.App. Div. 2 2010), has put the fundamental holding of that case for the non-biological parent into question. As of this writing, case law holds that the non-biological parent is a non-parent and *Troxel v. Granville*, 530 U.S. 57 (2000), giving the biological parent a “trump card” over the non-biological parent, applies. This is very disadvantageous to families headed by same-sex parents.

47. CRS §§ 14-15-102 and -118.

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