
LEGISLATIVE ACTION BRIEF

Civil Unions

Q. *I heard that the Legislature passed a bill allowing civil unions this session. Is that true?*

A. Yes. This session, the Legislature passed H.B. 444, H.D. 1, S.D. 1 (HB444), which recognizes civil unions in Hawaii. The intent of HB444 is to grant individuals who enter into a civil union the benefits, protections, and responsibilities as those who are married, without revising the definition or eligibility requirements of marriage.

Q. *Can opposite-sex couples enter into civil unions, too?*

A. Yes. Both same-sex and opposite-sex couples may enter into a civil union if they are eligible.

Q. *Who is eligible to enter into a civil union?*

A. Under HB444, a person may enter into a civil union if the person is not already a partner in a civil union, a spouse in a marriage, or a party to a reciprocal beneficiary relationship. In addition, the person must be at least 18 years old and cannot be related to the other partner. Both same-sex and opposite-sex couples may enter into a civil union if they are eligible.

Q. *What types of rights and benefits are conferred when someone marries?*

A. As an institution, marriage is comprised of several components. It is a legal status with which comes a bundle of rights and responsibilities conferred by the government at both the state and federal levels. It can be a religious sacrament, a contract, a sacred institution, or a covenant, according to the church or religious institution of the individuals involved. It can entail the legal establishment of a nuclear family unit and the legal protection of children of the applicable individuals. And it is generally considered a public declaration of love between the two spouses.

A marriage confers societal recognition of the joining of the two individuals. The act of marriage changes the personal and social status of the individuals who enter into it. Traditionally, marrying is also considered a rite of passage, in which two single individuals transition into their new societal role of responsible adults. The status of being married is "portable", in that society's recognition of the institution of marriage and the public's recognition of what being married traditionally entails crosses state and national boundaries. When a couple says that they are married, the importance of the relationship is immediately recognized and no further explanation is required.

The legal implications of marriage are extensive. When two people marry, their legal status changes for purposes of state and federal law, and legal rights and responsibilities follow. There are hundreds of rights and responsibilities, both large and small, scattered throughout state law that apply to married couples, such as the ability to cover the other spouse for health insurance and the legal requirement that each spouse provide maintenance and support for the other. States also confer rights and responsibilities for any children of the marriage. Under federal law,

there are an estimated 1,138 rights applicable to married couples, including laws governing Social Security benefits, veterans' benefits, health insurance, Medicaid, hospital visitation, estate taxes, retirement savings, pensions, family leave, and immigration law.

When an opposite-sex couple marries, the legal benefits and responsibilities and societal recognition follow the couple if they move from the state where they married, provided that the marriage was legal in the state in which the couple was married.

Q. *I've heard a lot about civil unions in the news lately and am still confused. How is a civil union not "marriage"?*

A. Although the intent of HB444 is to grant individuals who enter into a civil union the benefits, protections, and responsibilities as those who are married, a civil union is not the same as a traditional marriage between opposite-sex spouses. There are several important differences between a civil union and a traditional marriage. First, a civil union is a legal construction that addresses only the legal bundle of rights and responsibilities that come with marriage, and does not address any other aspect of marriage.

Second, a civil union offers some of the same rights and responsibilities as marriage, but only on a state level. Legally, the primary difference between a civil union and a traditional marriage between opposite-sex couples is that the estimated 1,138 rights available to married spouses under federal law are not conferred to civil union partners.

Third, some rights or responsibilities under state law that are tied to federal law may not be included in the bundle of rights and responsibilities granted in HB444.

Fourth, a civil union is generally only recognized within the state where the couple enters into it and, therefore, may not be "portable" and recognized in other states that the couple moves to or visits, as is marriage.

Fifth, the eligibility requirements for traditional marriage and civil union are different. A sixteen year old, or a fifteen year old with the written approval of his or her family, can enter into a traditional marriage in Hawaii, but cannot enter into a civil union under HB444. Moreover, there is no requirement that a person who wishes to enter into a traditional marriage not already be a party to a reciprocal beneficiary relationship, while a person who is a party to a reciprocal beneficiary relationship is ineligible from entering into a civil union. Under the reciprocal beneficiary law, a person who enters into a marriage automatically terminates a reciprocal beneficiary relationship the person might be a party to. Therefore, it appears that, unlike a traditional marriage, civil unions are subject to any existing reciprocal beneficiary relationship of the parties.

The sixth important distinction between traditional marriage and civil unions is the societal recognition accorded to married couples. Marriage is an institution of unique and enduring importance in our society, one that carries with it a special status. Everyone knows what "marriage" means. What is meant by a "civil union" is not likely to be clear to everyone.

Q. *How is a civil union not same-sex marriage?*

A. Civil unions are also not the same as same-sex marriage in the following ways. First, a civil union is a legal construction that addresses only the legal bundle of rights and responsibilities that come with marriage under state law. As a result, some rights or responsibilities under state law that are tied to federal law may not be included in the bundle of rights and responsibilities granted in HB444.

Second, rights conferred by a civil union may be given limited recognition outside the state where the couple resides. For example, Connecticut, Iowa, Rhode Island, Maryland, Massachusetts, and New Hampshire will recognize a validly-issued marriage license issued to a same-sex couple as a valid marriage, but will not recognize other forms of relationship recognition, including civil unions performed in other states. Some states may require couples to re-register with the state regardless of their relationship status elsewhere.

Third, the eligibility requirements for marriage under state law and a civil union in HB444 are different. A sixteen year old, or a fifteen year old with the written approval of his or her family, can enter into a marriage in Hawaii, but cannot enter into a civil union under HB444. Moreover, there is no requirement that a person who wishes to enter into a marriage not already be a party to a reciprocal beneficiary relationship, while a person who is a party to a reciprocal beneficiary relationship is ineligible from entering into a civil union. Under the reciprocal beneficiary law, a person who enters into a marriage automatically terminates a reciprocal beneficiary relationship the person might be a party to. Therefore, it appears that, unlike a marriage, civil unions are subject to any existing reciprocal beneficiary relationship.

The fourth important distinction between same-sex marriage and civil unions is the societal recognition accorded to married couples. Everyone knows what "marriage" means, notwithstanding that the individuals involved are of the same sex. What is meant by a "civil union" is not likely to be clear to everyone.

Q. *Doesn't Hawaii already have a reciprocal beneficiary law?*

A. Yes. In 1997, the Legislature created the status of "reciprocal beneficiaries", which is governed by chapter 572C, Hawaii Revised Statutes. The Legislature established the reciprocal beneficiary status because there were many individuals who have significant personal, emotional, and economic relationships with another individual yet are prohibited by such legal restrictions from marrying. For example, two individuals who are related to one another, such as a widowed mother and her unmarried son, may enter into a reciprocal beneficiary relationship by registering with the Department of Health. By creating a reciprocal beneficiary status, the Legislature made certain rights and benefits that were only available only to married couples available to couples comprised of two individuals who are legally prohibited from marrying one another. Until HB444, this type of relationship was the only method of making these rights available to same-sex couples.

Q. *How is a civil union different than a reciprocal beneficiary relationship?*

A. The reciprocal beneficiary relationship is very different from a civil union. The reciprocal beneficiary relationship does not convey all of the rights and benefits that are available to married couples, as the civil union law attempts to do. Currently, the reciprocal beneficiary law allows reciprocal beneficiaries access to fewer than 60 spousal rights on the state level, far fewer than the rights accorded to married spouses under Hawaii law or that would be available to civil union partners under HB444. Additionally, either party may terminate the relationship by filing a signed, notarized declaration of termination of reciprocal beneficiary relationship with the Department of Health or by entering into a legal marriage. This termination procedure is far more abbreviated than the divorce process, which, although more time-consuming, comprehensively addresses issues that come up when a committed couple with joint finances, child custody, support, and property issues must resolve when divorcing.

Moreover, the reciprocal beneficiary law may apply to any two individuals who are unable by law to marry. While the reciprocal beneficiary law acknowledges a close relationship between the beneficiaries, it does not adequately encompass the rights and responsibilities that two lifetime-committed partners may want to assume. These include next-of-kin rights, parenting duties and responsibilities, and certain property rights, to name a few.

Q. *The civil union law also covers opposite-sex couples. Why would an opposite-sex couple enter into a civil union rather than just getting married?*

A. Because partners in a civil union are not recognized as "married" under federal law, opposite-sex couples who enter into civil unions would not be subject to federal laws applicable to married couples. For example, there could be tax advantages for an opposite-sex couple who are civil union partners to file federal tax returns as "single" or "head of household", rather than as "married". This could be beneficial for those whose income was relatively equal who would consequently be subject to the "marriage penalty." This refers to the higher taxes required from some married couples, where spouses are making approximately the same taxable income, filing one tax return ("married filing jointly") than for the same two people filing two separate tax returns if they were unmarried (i.e. filing as "single", not "married filing separately").

There may also be an incentive for an opposite-sex couple to enter into a civil union rather than a marriage when one of the individuals receives Social Security benefits that would be cut off if the individual remarries.

There also may be religious reasons why a couple may enter into a civil union rather than a marriage, such as if the couples' religion forbid remarriage after one of the individuals' previous divorce from a prior spouse, but the couple still wanted to enter into a legal commitment to each other.

Q. *Will my priest or pastor have to perform a civil union if they do not want to?*

A. No. First, a person who wishes to solemnize a civil union must have a license to do so that is issued by the Department of Health. Any clergyperson who does not wish to perform civil unions has the option of not obtaining this type of license.

Second, the civil union law specifically provides that, even if a clergyperson does obtain a license to solemnize a civil union, nothing in the law regarding solemnization of civil unions "shall be construed to require any person authorized to perform solemnizations of marriages or civil unions to perform a solemnization of a civil union, and no such authorized person who fails or refuses for any reason to join persons in a civil union shall be subject to any fine or other penalty for such failure or refusal." This means that the clergy have a right to refuse to perform a civil union if they do not want to.

Q. *Can't a couple just get a lawyer to set up all the benefits and obligations that the couple gets under a civil union?*

A. No. Although a lawyer can set up some things like a durable power of attorney, a will, and a medical power of attorney, not all marriage-related rights under state law can be created by a lawyer. Additionally, preparing documents that would duplicate some of the rights and obligations

currently granted to married spouses under state law would cost thousands of dollars in legal fees. A civil union license would cover all the same rights and benefits.

Moreover, any of these documents can be challenged in court, leading to lengthy delays and acrimonious litigation that circumvents the civil union partner's express intentions and wishes.

Q. *The effective date of HB444 is "January 1, 2010". Is this a problem?*

A. As the bill was first introduced in the 2009 legislative session, and, at that time, was given an effective date of January 1, 2010, the effective date was not subsequently amended when the bill was carried over into the 2010 legislative session and passed by the House of Representatives in May 2010.

Whether the effective date will be problematic is unclear. First, the effective date does not affect the validity of HB444. The question is whether HB444's application should be retroactive (i.e., be made applicable back to January 1, 2010) or prospective (i.e., be made applicable from the date it becomes law).