

## Marriage and Civil Union: Is It All the Same?

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### Introduction

The *Act instituting civil unions and establishing new rules of filiation* (LQ 2002, c. 6) (the "Act") came into force on June 24, 2002. A new status and a new parenting model are now offered to spouses in Quebec. Couples of the opposite or the same sex may henceforth make a public commitment to live together and to uphold the rights and obligations stemming from such status. Between June 24, 2002, the date of the coming into force of the Act and June 26, 2003, 256 couples (147 masculine and 109 feminine) had their civil union solemnized in Quebec.

As in marriage, such a commitment entails civil consequences on matters such as the contribution towards domestic expenses, the family residence, the family patrimony, the compensatory allowance, the obligation of support and the right to inherit.

For some, the Act renders Quebec a society without boundaries that will inspire values of tolerance. Foreign citizens are henceforth allowed to have their civil union solemnized in Quebec, subject to the recognition of this new regime in their country of origin.

This newsletter aims to provide an overview of the effects and implications of the Act, that, among other things, sets out the conditions that apply to the formation, solemnization and dissolution of civil union, while amending some fifty statutes to formalize recognition of the new status of civil union spouses.

With respect to filiation, the Act issues new assisted procreation rules as well as clarifies adoption rules. Several existing conditions that apply to adoption are also amended. These provisions will be the subject of a forthcoming newsletter.

The fact that the Act extends to both the opposite and same sex *de facto* spouses the applicability of the provisions pertaining to such matters as consenting to the care required by a person's state of health, conflict of interests situations and non-compellability rules will not be discussed in this newsletter.

### Who May Form a Civil Union and How?

Both opposite and same sex couples may form a civil union, which is defined as being a commitment by two persons eighteen years of age or over who express their free and enlightened consent to live together and to uphold the rights and obligations that derive from that status. A civil union may only be contracted between persons who are free from any previous bond of marriage or civil union.

It is not surprising that the age of majority is required to form a civil union. However, it is to be noted that a person can marry from 16 years of age.

The solemnization of a civil union is subject to the same rules, with the necessary modifications, as are applicable to the solemnization of a marriage, until such rules are amended by the Minister of Justice, as provided for by article 241 of the transitional provisions of the Act.



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Both intended spouses must publicly express their free and enlightened consent to enter into a civil union before a legally recognized officiant; henceforth, clerks and deputy clerks of the Superior Court, every notary authorized by law to execute notarized acts and any other person designated by the Minister of Justice, among such officials as mayors, other members of municipal or borough councils and municipal officers are legally recognized officiants. Some ministers of religion, authorized to solemnize marriages by the religious societies to which they belong, are also competent to celebrate a civil union.

The Act sets out that the solemnization of a civil union is subject to the same rules, with the necessary modifications, as are applicable to the solemnization of a marriage, including the rules pertaining to prior publication by means of a posted notice, for twenty days before the date fixed for the solemnization, at the place where the civil union is to be solemnized.

### What Are the Effects of Civil Union?

Civil union spouses are subject to practically the same effects as married spouses: they have the same rights and the same obligations, they owe each other respect, fidelity, succour and assistance. They are bound to live together.

The *Civil Code of Québec* also provides that the effects of the civil union as to the direction of the family, the exercise of parental authority, the contribution towards expenses, the family residence, the family patrimony and the compensatory allowance are, with the necessary modifications, the same as in marriage.

Neither civil union nor married spouses are allowed to derogate from these legal provisions, as such provisions are of public order.

In case of death of a civil spouse, the surviving spouse will be entitled to the same survival benefits as a married spouse in matters such as successions, life insurance, annuities and other benefits that devolve to the surviving spouse.

### Some Differences With Marriage

The Quebec legislator has not seen fit to grant civil union spouses the benefit of the provisions governing married spouses with respect to the tacit mandate and the domestic mandate.

Furthermore, while the provisions of the *Civil Code of Québec* protecting the family residence are applicable to civil union spouses, no reference is made to the protection of the movable property that serves for the use of the family or to the judicial award of the ownership of use of such property. It is uncertain whether spouses joined in a civil union benefit from the protection afforded by law to married spouses with respect to the ownership or use of movable property that serves for the use of the family.

It should also be emphasized that couples joined in a civil union cannot file for judicial separation of bed and board. Such remedy is only available to married spouses.

### Civil Union Regime and Civil Union Contract

Civil union spouses may, by contract, create a civil union regime that would be the equivalent of a matrimonial regime subject to the imperative provisions of law and public order. The civil union contract must be established by notarial act. Spouses who fail to enter into a civil union contract before the solemnization of their civil union are governed by the regime of partnership of acquests.

Civil union regimes and civil union contracts are subject to the same rules as are applicable to matrimonial regimes and marriage contracts, with the necessary modifications. Civil union spouses may thus, by civil union contract, make *inter vivos* or *mortis causa* gifts to each other.

The provisions relating to family patrimony and compensatory allowance apply in their entirety to civil union spouses.

### Nullity and Dissolution of Civil Union

A civil union that is not contracted in accordance with the provisions of the law may be declared null upon the application of any interested person within three years from its solemnization. After three years, the application cannot be entertained except where public order is concerned. These provisions are identical to those applicable to an application for nullity of marriage. The nullity of a civil union entails the same effects as the nullity of a marriage. However, few applications for nullity of marriage have been introduced since the coming into force of the *Divorce Act*.

Either civil union spouse may apply for dissolution of the civil union where the spouses' will to live together is irretrievably undermined.

There are three ways to dissolve a civil union:

- by way of a joint declaration by notarial act:
  - where the spouses have settled all the consequences of the dissolution in a transaction agreement; and
  - in the absence of common children.

The joint declaration of dissolution and the transaction agreement can be executed before a notary.

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- by the death of either spouse; and
- by a court judgment:
  - where the spouses have common children or;
  - in the absence of a joint declaration dissolving the civil union executed before a notary or;
  - failing an agreement between the civil union spouses.

One of the effects of the judgment dissolving a civil union is that it also dissolves the civil union regime. Such dissolution will be effective retroactively to the day of the application to the court, unless the court makes it retroactive to the day on which the spouses ceased living together.

Where dissolution of a civil union occurs, the *inter vivos* or *mortis causa* gifts made in a civil union contract are treated in the same way as in the case of dissolution of a marriage by divorce.

## Civil Union and Private International Law

In Quebec private international law, one must distinguish between the legal provisions pertaining to jurisdiction of the court and those provisions pertaining to the applicable law. Indeed, the court may well be competent to entertain a case while having to decide it on the basis of foreign law.

Civil union is governed by conditions applicable to both process and substance imposed by the law of the place where it was solemnized. Thus, for example, the validity of a civil union will be analysed according to the laws of Quebec to the extent that it was solemnized in Quebec. This differs from the situation applicable to a marriage of which the conditions relating to substance are governed by the law applicable to the country of each of the spouses while the conditions relating to process are governed either by the law of the country where the marriage was solemnized or the laws of the country of domicile or of the nationality of either spouse.

The effects of marriage are governed by the law of the domicile of the spouses, which is the main factor determining a close connection, while the effects of the civil union are governed by the law of the place of solemnization of the union except for the effects that apply to the spouses regardless of their union regime, such effects being governed by the law of their domicile.

Thus, regardless of the place of solemnization of the civil union, it is the domicile of the couple at the time of commencement of the proceedings that will determine whether the spouses are subject to the partition of the family patrimony and to the compensatory allowance (public order effects of the marriage). Consequently, if the spouses solemnize their civil union in Quebec but establish their domicile in the United States during their common life, it is to be expected that the provisions relating to the partition of the family patrimony will not apply.

Furthermore, with respect to the dissolution of the civil union, the legislator does not impose difficult conditions for Quebec courts to have jurisdiction. Indeed, it suffices that either spouse be domiciled in Quebec or be a Quebec resident for the Superior Court to be competent to deal with the matter. In other words, it means that a spouse can initiate his or her proceedings forthwith, upon establishing his or her residence in Quebec, without being required to prove that he or she intends to make Quebec the place of his or her principal establishment. Thus, in the preceding example, if the spouses are domiciled in the United States when the couple breaks up, either spouse who moves to Quebec after the fact will be allowed to introduce civil union dissolution proceedings in Quebec and the Superior Court will have jurisdiction to entertain the matter.

The dissolution of the union will be governed either by the law of the domicile of the spouses or the law of the place where the union was solemnized. The law that will have been applied to the dissolution of the union governs the effects of the dissolution of the union.

The law applicable to the dissolution or nullity of the civil union governs the obligation of support between spouses of whom the civil union is dissolved or has been declared null.

Some confusion may result from the fact that the legislator has decided not to recognize the decisions of foreign courts with respect to dissolution of the civil union, unless the relevant jurisdictions have themselves adopted provisions instituting civil union in their own legislation. Let's emphasize that for a foreign judgment to be executed or recognized as enforceable in Quebec, it must first be recognized by Quebec authorities. One of the recognition criteria provided for in the *Civil Code of Québec* is that a competent authority must have pronounced the judgment. With respect to competence, the legislator now provides that the relevant foreign jurisdiction must itself recognize civil union for foreign judgments relating to civil union to be recognized.

In some cases, a foreign court could qualify a civil union as being a marriage. A judgment dissolving a civil union would then be pronounced in a foreign jurisdiction by a court on the basis of its own institution, in that case, marriage, that the court would have considered as identical to civil union. It will be interesting to see the judgments that might be rendered in the future in such situations where a Quebec court would have to deal with an application for recognition and execution of a foreign judgment ordering the dissolution of a "marriage" that is in fact a civil union, thus creating foreseeable confusion.

According so several authors, civil union would be without effect in countries where marriage between persons of the same sex is prohibited or that do not recognize partnership (for example, Greece, Italy, England).

In short, it is strongly recommended that you obtain prior information about the consequences of a marriage or civil union, particularly in a context where the spouses joined in a civil union will have to successively reside in different countries during their common life. The members of our Family, Personal and Estate Law Group have acquired significant experience in private international law matters. They can help you understand how the law applies in any particular set of circumstances.

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