**Pre-Divorce Planning in Illinois**

**Estate Planning Documents**

An important, but usually overlooked, aspect of pre-divorce planning is modifying (or perhaps creating) your estate planning documents to correspond with your current situation.

**Picture this.**

You are in the middle of a nasty, hard-fought divorce. You are on your way home from the store; singing along with a song on the radio. Out of the blue, some bozo runs a red light and smashes into you, sending your car flying across the intersection, into a light pole.

You end up in the hospital, unconscious, perhaps in a coma. There are many medical issues about your care that need to be quickly addressed and resolved. But . . . you're unconscious and can't speak with the doctors. So what happens?

If you haven't updated your estate planning, most likely your spouse will be in charge of directing your medical care! What!! That loser (that I'm trying desperately to get rid of) will be making decisions about whether I live or die? Really??

Unfortunately, the answer is "probably." If you have a Power of Attorney for Health Care, it probably appoints your spouse as agent to make medical decisions for you, including decisions about life-sustaining treatments. Even if the Power of Attorney is 10 years old, and even if you're in the middle of a divorce, the old Power of Attorney is effective. If you don't have a Power of Attorney, your spouse probably has the priority to make decisions for you under the Illinois Health Care Surrogate Act.

**So how do you avoid this terrible result?**

It's easy. As part of your **pre-divorce planning**, you should collect and review your existing estate planning documents. Then, you need to **get a new** estate planning attorney, and modify the documents, as appropriate. You need to replace the fiduciaries (your spouse and his relatives) with people who you trust and who will be part of your post-divorce life. In addition, you need to modify the beneficiaries under your Will or Trust to make sure that your family is protected.

Why do you need a **new** estate planning lawyer? Why can't you just call the current lawyer (who you like), and have him or her modify your documents "on the sly"?

Why? Because it will cause a huge problem for your initial lawyer. A lawyer has an ethical duty, which may be described as a "full disclosure obligation," when representing two people who have (or possibly have) conflicting interests. The lawyer can't keep one client's secret if it might have a negative impact on the other client.

Once you call the lawyer who prepared the estate planning for you and your spouse, and tell him or her that you're thinking about a divorce and you want to remove your spouse, the lawyer will have no ethical choice but to call your spouse and tell him about the upcoming divorce. That would be a terrible divorce strategy, and your documents would never get changed!

When you find and retain a new estate planning lawyer, his primary obligation will be to **protect your interests** and to make the necessary changes without fanfare and without notifying your spouse.

If you don't have any existing estate planning documents, it's still easy. Just find yourself an independent (not related in any way to your spouse) estate planner, and discuss why you need it, and what you want to accomplish. It's a great first step in taking control of the rest of your life.

It is recommended that you consider the suggestions in this article **before you file** for divorce. Once you are before the divorce court, the court may place limitations and restrictions on the changes you can make, especially with respect to your properties. These suggestions should be discussed with your estate planning attorney and your divorce attorney, once you have made the decision to proceed with your divorce.

*WARNING*. You may be tempted to try to take some of the suggestions in this article by yourself. Please be advised that estate planning is a specialized legal field. It is strongly advised that you do not try to modify or create your estate planning as a "do-it-yourself" project. It is well worth your time and money to hire an experienced estate planning attorney.

As a second piece of advice, don't hire an estate planning lawyer to do your divorce, and don't hire a divorce attorney to do your estate planning. You need them both.

**What's in a basic Estate Plan?**

In Illinois, the basic estate plan includes four documents: a Will, a Revocable Trust, a Power of Attorney for Health Care, and a Power of Attorney for Property.

1. A Will is the traditional form of estate planning. With a Will, you arrange for someone, upon your death, to wrap up your affairs and distribute your remaining property based on your directions. You can also designate guardians for your minor or disabled children. A Will is only effective after your death.

2. A Revocable Trust is simply a written set of instructions for the management and distribution of your property. The major difference between a Will and a Revocable Trust is that the Revocable Trust is immediately effective. Since it is effective when it's created and funded, it is instrumental in planning for the possibility of your incapacity from an illness or accident. It also contains directions for the distribution of your property after your death, and for any trusts that are to be created for your children.

If you have a Revocable Trust, the terms of your Will are modified to direct than any property in your individual name should be transferred to your Trust at your death, and be distributed as set forth in the Trust.

3. A Power of Attorney for Health Care allows your designated agent to make decisions regarding your medical care, if you cannot communicate with your doctors. Although the powers of your agent are initially very broad, you can limit your agent's ability to make certain decisions. For example, if certain types of procedures violate your religious beliefs, you can limit your agent's ability to approve those procedures.

The Power of Attorney for Health Care addresses the issue of life-sustaining treatments and end-of-life issues. Based on the level of authority you have chosen, your agent may withhold or remove life-sustaining treatments when appropriate. Your agent is also authorized to control making anatomical gifts, your funeral arrangements, and the disposition of your remains.

4. A Power of Attorney for Property allows your designated agent to make financial decisions and take financial actions for you. These actions can be as simple as paying your bills, or as complicated as managing your investments or selling your home.

A Power for Attorney for Property can also be used in conjunction with a Revocable Trust. If you become disabled, but you haven't had a chance to transfer your properties into your Trust, your agent can transfer your assets to your Trust for you. Thereafter, your property will be managed according to your wishes by your successor trustee.

**Revocable Trusts and Divorce**

In addition to the traditional uses and benefits, a revocable trust is a great tool for protecting your family, and for maintaining control over your future, as you move forward with your decision to get a divorce and start a new life.

Estate planning and an on-going divorce intersect in two specific situations. First, if you become incapacitated, due to illness and injury, during your divorce; and second, if you die before your divorce is finalized.

Presumably, your goal is the same in both situations, you want to protect yourself and your family. You want protection from your spouse interjecting himself into your problems and from taking control of your property.

**A revocable trust is uniquely able to keep your spouse out of your affairs, if tragedy occurs before your divorce is final.**

In order to get the benefits of a revocable trust, all or most of your individually-owned assets must be transferred to your trust, and titled in the name of the trustee. This can be an easy process of changing title from "you" to "you, as trustee of Your Revocable Trust."

The transfer of your assets to your revocable trust is called "funding" your trust. This process also acts a great organizational tool by putting all your individually owned property under the single umbrella of your trust.

*CLASSIFICATION OF PROPERTY*

As your divorce proceeds, you will become need to become familiar with the concepts of "marital property" and "nonmarital property."

Generally speaking, your "nonmarital" property is comprised of property that you owned at the time of your marriage and gifts or inheritances that you have received, provided that you have maintained your separate ownership of those assets and have not given your spouse an interest in those properties.

Your "marital" property is basically everything else, all the property that was earned or obtained as a result of the marriage.

If you do not come to a property settlement with your spouse, the court will classify all the properties and assets owned by you and your spouse as either "marital" property or "nonmarital" property. The assets classified as your marital property will be "equitably" divided between you and your spouse by the judge in your divorce case. Your nonmarital property typically remains your sole property throughout the marriage and after the divorce.

For example, if you married your high school sweetheart, almost all the property that you and your spouse have accumulated will be marital property (except for separately-owned gifts and inheritances). If you were married later in life, or if this marriage is a second marriage, you may own a significant amount of nonmarital property. The characterization of your property may also be affected by a pre-nuptial agreement.

You must discuss these concepts with your divorce attorney and become very familiar with the distinctions between "nonmarital" and "marital" property.

It is recommended that you only put "nonmarital" property into your revocable trust. If you also have individual ownership of "marital" property, it is suggested that you create a separate trust to hold such property. There is no reason to commingle such different types of property in a single trust, and run the risk that your "nonmarital" property may be transmuted into "marital" property.

*INCAPACITY*

If you become incapacitated, your revocable trust has a built-in mechanism for your selected successor to take over and manage your financial affairs. The transfer of control to your successor trustee, while you're incapacitated, is a time-honored transition. Generally, it is more accepted than someone trying to manage your affairs through the use of a power of attorney for property.

*DEATH*

If you die in the middle of your divorce, the court will terminate your divorce proceedings. In that case, your spouse will be considered to be your "surviving spouse" under the law. However, that doesn't mean that everything you own must go to your spouse when you die.

You have a right to direct where your "nonmarital" property goes after your death. To the extent that your nonmarital property is held in your revocable trust, in Illinois, there are very few limitations on who you leave your property to. Your trust can direct that your property is distributed:

(a) to your adult children, if you believe that they can handle the property;

(b) to a trust for the benefit of your minor (or adult) children, until they reach a certain age or level of maturity;

(c) to other family and friends; or

(d) to your favorite charities.

Subject to the discussion below, there is no requirement that you leave any of your nonmarital property in your trust to your spouse.

If your revocable trust is named as beneficiary of your life insurance, your "payable on death" accounts, your IRAs, or your bank and brokerage accounts, those assets will be transferred to your trust beneficiaries after your death, not to your spouse.

**NOTE:** The divorce court has the jurisdiction and authority to distribute all properties owned by you and your spouse, as it determines is equitable. The transfer of your assets into a revocable trust does not affect the court's ability to allocate and distribute those assets. The transfers to your revocable cannot be used to hide your assets from your spouse or the divorce court. However, such transfers should protect you if you become incapacitated, and should be effective to distribute your properties, if you die before your divorce is final.

**Illinois is one of the few states that allows a transfer to a revocable trust to defeat a surviving spouse's rights to certain statutory benefits attributed to marriage.**

Under the Illinois Probate Act, a surviving spouse has two "statutory" benefits which result strictly from the fact that your spouse was married to you when you died.

First, your spouse is entitled to a "Spouse's Award" from your estate, which can be used to support your spouse (755 ILCS 5/15-1). The Spouse's Award is the amount necessary to support your spouse for nine months after your death. The minimum Spouse's Award is $20,000. In addition your spouse may be entitled to collect an additional amount of not less than $10,000 for each minor child.

Second, your spouse is entitled to "renounce" your Will and take a defined share of your estate, notwithstanding what your Will says. If you have descendants, your spouse can renounce your Will and receive one-third of your estate. If you don't have any descendants, your spouse can receive one-half of your estate. (755 ILCS 5/2-8.)

Your spouse will also receive complete ownership of any jointly-owned assets upon your death.

**This is terrible! How does a revocable trust reduce my spouse's statutory benefits?**

As mentioned above, the statutory benefits for your spouse arise from the Probate Act. In Illinois, the Probate Act only applies to property that is held in one's individual name when one dies. These assets are called one's "probate estate." As a general rule, your probate estate does not include jointly-owned property and it does not include property that is subject to a contract-based beneficiary designation.

Most important to one in the middle of a divorce, your probate estate does not include any property that was validly transferred to your revocable trust. If you transfer your nonmarital property to your revocable trust, your spouse will not have a statutory claim to those assets. By reducing the properties that would comprise your probate estate as low as possible, you can limit the statutory benefits your spouse will receive on your untimely death.

**Is it really that easy to defeat a surviving spouse's statutory benefits?**

This is an unusual result. The statutory benefits were put into place to protect a surviving spouse, by giving the survivor a share of deceased spouse's assets. What legal authority is there for this approach?

There are several cases that support the conclusion that a revocable trust can be used to limit a surviving spouse's benefits in Illinois.

*XXXX* is an Illinois Supreme Court case that holds that assets that have been transferred to a revocable trust are not included in one's probate estate. Since the assets are not in one's probate estate, they cannot be used to pay for the statutory benefits under the Probate Act.

This conclusion is confirmed by *Johnson v. LaGrange State Bank*. This case specifically addressed the question whether a spouse can defeat a surviving spouse's rights by making certain types of transfers, including a transfer to revocable trust. The Illinois Supreme Court held that a lifetime transfer (specifically referring to a transfer to a trust of which the surviving spouse was not a beneficiary) was valid as against the marital rights of the surviving spouse, if the transfer was based on the donative intent to convey an interest in the property. In other words, unless the transfer was a sham, it was valid to remove the property from one's probate estate.

To drive the point home, the Supreme Court stated that "a valid gift for the express purpose of defeating the rights of a surviving spouse does not make the transfer vulnerable to attack" by such spouse.

**Note:** This result can be changed by legislation that modifies the definition of "probate estate" or that changes the basis for determination of a surviving spouse's benefits. Such a change may bring Illinois in line with other states that have expanded the pool of assets that are subject to the statutory benefits. However, no such legislation is currently pending in Springfield (as of February 2015).

**Okay, I agree that one of the first things I should do is to update my estate planning. What should I change?**

What needs to be changed depends on your existing estate plan.

**1. Decision makers.**

If you've already done estate planning with your spouse, you have probably appointed your spouse in all the decision-making roles. These are called "fiduciary" positions and include the executor under your will, the successor trustee under your revocable trust (if you have one), guardians for your minor children, and agent under your powers of attorney for health care decisions and financial decisions. In other words, if anything happens to you or you are even temporarily incapacitated, your spouse will be in charge of everything. Your spouse will be in charge of making decisions regarding your medical care; your spouse will be in control of your finances and investments, and paying your bills; your spouse will be charge of raising and providing for your children. **This is probably not what you want in the middle of your divorce.**

If you haven't done any prior estate planning, the results will be very similar. Illinois law presumes that, if you haven't made a different choice, your spouse is the reasonable choice to make decisions for you. Your spouse will have a priority for making medical decisions for you; your spouse, as joint owner of any financial accounts, will be able to withdraw those funds; your spouse will have a priority if you need to have a guardian appointed for your medical or financial matters; if you die, your spouse will have a priority to manage and wrap-up your affairs. **This is probably not what you want in the middle of your divorce.**

**2. Beneficiaries.**

If you already have an estate plan, your primary beneficiary (the person who receives your property) is almost certainly your spouse. A typical estate plan will give everything to the spouse, with the children of the marriage as the contingent beneficiaries. The children will take only if the spouse doesn't survive, or perhaps they may take after the death of the spouse, if the property is held in trust. **This is probably not what you want in the middle of your divorce.**

If you don't have an estate plan, the State of Illinois has created a default estate plan for you. This plan is based on the statutory rules for "intestacy."

If you have no children, everything you own will go to your spouse (755 ILCS 5/2-1(c)).

If you have children, one-half of your property will go to your spouse, and one-half will go to your children (755 ILCS 5/2-1(a)). If your children are minors, a guardianship will need to be set up for each of them, and your spouse will probably be in charge of managing the children's property.

**This is probably not what you want in the middle of your divorce.**

**3. Property Ownership.**

Typically, an existing estate plan and your "default" intestacy estate plan only control the distribution of the property held in your **individual** name or payable to your estate.

Property can be owned in many other ways, which ways will affect what happens to the property on your death, including:

a. Joint Ownership. Certain types of joint ownership include a survivorship concept, such as joint bank accounts, joint tenancy of real estate or other property, and homes held as "tenants by the entirety." These types of assets will automatically pass to the surviving joint owner upon the death of the other owner. For example, if you own your home in joint tenancy with your spouse, and you pass away before your divorce is finalized, your home will automatically go to your spouse, even if that's contrary to your wishes.

b.Beneficiary Designations and Payable-on-Death Accounts. Many types of property are subject to an agreement that the property will be transferred to a specified person (or persons) at your death. These agreements are typically in the form of a "beneficiary designation" which is made when the account is opened or when the property is purchased.

These assets include life insurance policies, brokerage accounts, money market accounts, annuity contracts, certain custodian accounts, land trusts, pension plan benefits, individual retirement accounts (IRAs), Roth IRAs, and 401(k) accounts.

The terms of the beneficiary designation will control the distribution of the asset in almost every situation. These types of assets will all go to the named beneficiary after your death, even if you indicate otherwise in your Will.

If you fail to name a valid beneficiary, the contract may set up a default taker, probably your spouse. In some cases, if there is no named beneficiary, then the property will be distributed to your estate.

In most cases, the designated beneficiary will be your spouse, and the joint owner will be your spouse. If you die before your divorce is completed, most of these assets will go your spouse, instead of your children or the other people you care about. **This is probably not what you want in the middle of your divorce.**

**I really, really don't want my spouse to have any control over me, especially during our divorce. Tell me, exactly what should I change?**

Let's assume that you're thinking about getting a divorce. It's clear to you that you don't want your soon-to-be-ex-spouse to be in charge of making any financial and health-related decisions about you. It's clear that your soon-to-be-ex must be removed as a fiduciary and decision maker; but, how do you do that? It's simple. You need to **immediately revoke and revise your current estate planning documents**.

If you haven't previously created a Will or Powers of Attorney, **now is the time to make your estate plan.**

**These are the choices you must make:**

***Agent under Power of Attorney for Health Care***. This person will make all health-related decisions for you, if your doctors don't think you can make them for yourself. Your agent needs to know your views on a variety of subjects relating to your medical care and end-of-life considerations. These topics include: your objections, if any, to certain types of medical treatment; when it's appropriate to withdraw life-sustaining treatments; if you wish to make an organ donation; and your wishes regarding cremation or burial. Many people choose a parent (if not too old), or a brother or sister, as their agent. If none of them are a good choice, then a trusted friend or an adult child may be appropriate.

***Agent under Power of Attorney for Property***. This person will have the authority to make **all** financial decisions for you. Your agent can pay your bills, write checks for you, move money around in your bank accounts, manage your investments, sell your property, and purchase assets in your name. In most cases, your power of attorney for property will be effective immediately upon signing. Your agent must be financially astute, and must be able to understand your finances. Most of all, your agent must **be absolutely honest**, so you can trust them with your financial life.

Many people choose a parent (if not too old), or a brother or sister to act as their agent. If none of them are a good choice, then a trusted friend or an adult child with a financial background may be appropriate.

***Guardian of your Minor Children***. If both you and your spouse both pass away, you will need to designate your choice for guardian(s) for your minor children. There are two types of guardians: guardians of the person, who will raise your children; and guardians of the estate, who will manage any funds belonging to your children. The two roles may be held by the same person, but having different persons acting as guardians may create a helpful system of "checks and balances." The probate court will review your designations and will appoint the guardians based on its determination of your children's best interests.

The designation of guardians for your minor children can be made in your Will or in a separate instrument.

Some people have very strong reservations about their spouse's suitability to raise the children alone. If you are concerned about the welfare of your children after your death, you must prepare a designation of guardian, which states that your spouse is not an appropriate person to raise your children, and which designates your choice for guardian. Generally, it's a good idea to detail your spouse's shortcomings in a separate letter, rather than including the details in your designation of guardian.

***Executor of your Will***. The executor under your Will is the person who is responsible for collecting your assets, paying your debts, and distributing your remaining assets as directed, after you die.

If you have a Revocable Trust and a "pour-over" Will, your Executor will transfer your property to your Trust, for final distribution under the Trust.

***Successor Trustee of your Revocable Trust***. When you create a Revocable Trust, you will be the initial trustee of your Trust. If you are unable to act as the trustee, your successor trustee will take over the duties. There are three primary times when your successor trustee will act in your place: upon your incapacity, upon your death, and for continuing trusts for your children.

While you are incapacitated, your successor trustee will manage your financial affairs for the properties and accounts that are titled in the name of your Trust. The duties are similar to those of your agent under your Power of Attorney for Property. Many people choose the same person to be the trustee to their Trust, and the agent under their Power of Attorney.

After your death, your successor trustee will have the same duties as your Executor under Will, i.e., collecting your assets, paying your debts, and distributing your remaining assets as directed in your Trust.

If your Revocable Trust creates on-going trusts for your children, you will need to appoint a person to be the trustee of each Child's Trust. The person may be, but need not be, the same person who is the successor trustee of your Revocable Trust.

***Beneficiaries***. In addition to changing the decision-makers under your estate planning documents, you must change the beneficiaries who will receive your assets if you die. If you die during your divorce, and you have not created or modified your estate estate plan, your assets will probably be transferred to your spouse.

Presumably, this is not what you want. Your revised estate planning can direct that your property is distributed:

(a) to your adult children, if you believe that they can handle the property;

(b) to a trust for the benefit of your minor (or adult) children, until they reach a certain age or level of maturity;

(c) to other family and friends; or

(d) to your favorite charities.

As previously discussed, there is no requirement in Illinois that you leave any of your individual property in your revocable trust to your spouse.

***Protection of your property interests.*** As repeatedly mentioned, it is recommended that you transfer title to your individually-owned nonmarital property to your revocable trust. These properties may include:

1. Bank accounts.

2. Brokerage accounts.

3. Real estate.

4. Business interests, such as stock, partnership interests and membership interests in limited liability companies.

5. Gifts and inheritances.

6. Car or boat.

7. Antiques, artwork or collectibles.

***Beneficiary designations*.** For any asset transferred to our revocable trust, you must make sure that any previous beneficiary designation is voided, or changed to be payable to your revocable trust. For other assets that have beneficiary designations, you must make sure that your spouse is removed as beneficiary and replaced with a beneficiary of your choice. It is a good idea to name your revocable trust as beneficiary, because that will help assure that your assets will be distributed in accordance with the allocations and limitations set forth in your trust.

If you fail to update any beneficiary designations, those assets may be paid outright to your spouse, or to your probate estate (where it will be subject to your spouse's statutory rights).

It is recommended that you review and revise the beneficiary designations on all your assets that have them, including:

a. Life insurance policies, including any related to your health insurance.

b. Bank accounts, money market accounts.

c. Brokerage accounts, such as those at Schwab, Fidelity, etc.

d. IRA, Roth IRAs and similar retirement accounts.

***Jointly Owned Property****.* If you own property with your spouse as joint tenants with rights of survivorship, you are each deemed to own an *undivided* 50% of the property. When one joint tenant dies, the property automatically is owned by the survivor.

Another form of joint ownership is known as tenants in common. In this form, each owner owns a separate 50% of the property, as their individual property. If one owner dies, his or her share of the property can be given to anyone the owner wants. There is no right of survivorship. The property doesn't automatically become the survivor's property on the death of one owner.

For some types of held as joint tenants with rights of survivorship, the joint tenancy can be modified so that it becomes held as tenants in common. For example, if your home is held as joint tenants with your spouse, you may wish to covert the ownership to tenants in common. You can do this unilaterally, without telling your spouse and with your spouse's consent. Then, if you die before your divorce is final, your beneficiaries will inherit your one-half of the property. This is called "severing" the joint tenancy. You may also be able to convert joint tenancies in other types of property to a tenancy in common with your spouse.

However, you must be very careful when using this technique, as it may backfire against you. When you convert your joint tenant interest to a tenant in common interest, you also convert your spouse's interest to a tenant in common. If it's your spouse who dies during the divorce, you will not automatically get your spouse's share. Your spouse's share of your home may be inherited by someone totally unrelated to you, and that person would have a right to live in your home.

Your home may be held with your spouse as "tenants by the entirety." This type of ownership has certain asset protection advantages, and includes rights of survivorship. However, the tenancy by tthe entirety cannot be severed or modified by the unilateral act of only one owner.

***Retirement Accounts*.** Individual Retirement Accounts (IRAs) and similar accounts (such as Roth IRAs, 403(b) plans, and SEPS) may be transferred at your death based on a beneficiary designation form that you completed.

If you opened the IRA during your marriage, it is likely that your spouse is named as your beneficiary. If you do not change the beneficiary, and you die during your divorce, these retirement accounts will go to your spouse, rather than your children or other beneficiaries. You can change this result by naming new beneficiaries as part of your pre-divorce planning, such as a separate IRA trust for your children.

Currently, federal law has special rules for defined benefit plans and defined contribution plans that are governed by ERISA, such as a 401(k) plan. Under an ERISA plan, you need your spouse's consent to change the beneficiary to someone other than your spouse. As a result, an attempted change of beneficiary of an ERISA plan, without your spouse's consent, should be ineffective.

Please note that retirement accounts may be deemed to be marital property and may be subject to equitable division by the divorce court. In that case, you may be required to change the beneficiary of your retirement accounts at the end of your divorce.

**DISCLAIMER:** This article is a general discussion of certain estate planning principles and techniques and is provided solely for informational purposes. The content of this article is not intended to provide legal advice or tax advice in any situation.

Estate planning and divorce involve complex questions of law and can be very fact-dependent. This article cannot replace the advice of a licensed professional in your jurisdiction regarding your specific legal or tax situation. You should not act in response to the information contained on this website without first obtaining the opinion of a licensed professional. **John M. Varde, P.C. and Schofield & Varde, LLP disclaim any liability for any act taken by you based on the information provided in this article.**

The publication and reading of this article does not create an attorney-client relationship between you and John M. Varde, P.C. or Schofield & Varde, LLP. An attorney-client relationship will not be established until you have entered into a written engagement agreement with John M. Varde, P.C. or Schofield & Varde, LLP, and complied with the terms thereof.

John M. Varde, P.C. is licensed to practice law only in the state of Illinois, and practices primarily in Cook County, Illinois. The laws regarding estate planning and divorce vary from state to state. The information contained on this article is not applicable to any state other than Illinois. You must consult with an attorney licensed in your jurisdiction regarding your situation.