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Attorney at Law

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Estate Planning | Wills & Trusts

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## **Estate Planning, Marriage and Divorce**

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When considering marriage or a divorce, your estate planning is likely low on the list of priorities. However, these are significant changes in a family situation that should trigger an immediate review of your existing estate planning documents or preparation of documents if you do not already have an estate plan.

Marriage will not invalidate estate planning documents, but a spouse has certain rights that may conflict with existing documents or the individual's wishes. In addition to having existing estate planning documents updated or new documents prepared, it is important that the wishes reflected in the documents also reflect any requirements imposed by a prenuptial or postnuptial agreement.

The effect of a divorce on existing estate planning documents is determined by state law. In Illinois, an ex-spouse is deemed to have predeceased the creator of a Will or Revocable Living Trust.<sup>1, 2</sup> However, the Illinois laws do not affect the documents until the divorce is final. Since a divorce can take many months to finalize and a lot can happen between the decision to divorce and when it is final, the state's laws should not be relied upon and estate planning issues should be addressed immediately when a divorce is being considered.

There are many issues regarding marriage, divorce and their effect on estate planning documents that are not addressed by the laws but can be resolved through proper planning. Several of these issues are discussed below.

### ***Existing Estate Planning Documents***

Since the spouse is typically named as the primary beneficiary, executor, trustee and health care and property agent during marriage, existing estate planning documents should be amended immediately when the decision to marry or divorce has been made. If documents are not amended and one of the spouses is incapacitated or passes away, the outdated documents will likely lead to unintended consequences and a conflict in court.

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For example, assume that Mike and Kate have an estate plan which names the spouse as the beneficiary of the estate and the agent for property and health care purposes. Kate files for divorce, but fails to update her estate planning before she dies in a car accident. Despite having filed for divorce, Mike will inherit Kate's estate under the estate planning documents since they were still legally married at the time of Kate's death.

Now assume the same circumstances, but instead of passing away, Kate survives but is in a coma. Under her Property and Health Care Powers of Attorney, Mike would have access to Kate's accounts and would also have the authority to make health care decisions for Kate during her incapacity. In most cases of divorce, one spouse would not want the other to continue to have such authority.

### ***No Estate Planning***

A spouse who does not have existing estate planning documents should have similar concerns regarding unintended results. For example, assume that Mike passes away without any estate planning documents in place. He is survived by Kate and their son, Steve. Under Illinois law, Kate would only receive half of Mike's estate, with the other half passing to Steve. If Steve is over age 18, he will receive his inheritance outright. It is unlikely that either the division or distribution of assets is in accordance with the wishes of Mike or any other parent.

Similarly, if Mike and Kate were considering or had filed for divorce, such filing would not preclude Kate from inheriting her share of Mike's estate. Additionally, a health care provider will look to the spouse first to make health care decisions in the absence of a Health Care Power of Attorney, regardless of whether a divorce has been filed for—another result that likely contradicts a divorcing spouse's wishes.

### ***Elective Share***

In most states, a surviving spouse may renounce the Will of the deceased spouse and instead take an "elective share." The elective share is a fraction, percentage or amount of the deceased spouse's estate, as legislated by state law, to which the surviving spouse is entitled in order to prevent an individual from completely disinheriting the surviving spouse. In Illinois, the fraction to which the surviving spouse is entitled is one-half of the probate estate if the decedent left no surviving descendants and one-third of the probate estate if the decedent did leave surviving descendants.

In other words, assume that upon making the decision to divorce, Kate revised her Will to leave everything to her brother, Billy. If Kate dies before the divorce is final, Mike could take the elective share and still receive a significant portion of Kate's estate, despite her best efforts to disinherit Mike.

A proper estate plan can help avoid such turmoil. Since trust assets are not included in an individual's probate estate, proper planning can ensure that the deceased spouse's assets pass in accordance with his or her wishes.

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## ***Life Insurance and Accounts***

A review of beneficiary designations should be a part of every estate plan, but it is especially important in situations where marriage or divorce is being considered. The designation of a beneficiary of a life insurance policy or retirement account supersedes the provisions of a Will or Trust. Therefore, beneficiary designations on all policies and accounts must be reviewed when the decision to marry or divorce has been made. Upon preparing an estate plan, your estate planning attorney should provide you with the specific language necessary to correctly designate your primary and secondary beneficiaries for your assets.

## ***Gifts and Inheritances***

Assets acquired during marriage are considered marital assets in Illinois, which are subject to equitable division upon divorce. However, there are exceptions to this rule. Gifts and inheritances to one spouse are considered non-marital assets unless they are commingled with marital assets. Examples of commingling include adding the assets to a joint account or using the assets to purchase jointly owned property, such as a home. Proper advice must be obtained before any deposits or purchases are made. Once assets are deposited into a joint account or used to purchase a jointly owned asset, it is too late. Through proper planning, it is not only possible to protect gifts or inheritances that you receive, but also to protect your children's gifts or inheritances when they receive them from you or other loved ones.

## ***Planning for Your Marriage or Divorce***

Estate planning affects, and is affected by, many circumstances beyond taxes and the transfer of property. One of the primary goals of estate planning is to ensure that your estate is administered in accordance with your wishes rather than the laws of the state. When a change in marital status is involved, this goal becomes even more important. For comprehensive advice that takes all of your family and financial situations into consideration, it is important to work with an experienced estate planning attorney as soon as the decision to marry or divorce has been made.

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1. 755 ILCS 5/4-7(b) – Dissolution of marriage or declaration of invalidity of the marriage of the testator revokes every legacy or interest or power of appointment given to or nomination to fiduciary office of the testator's former spouse in a will executed before the entry of the judgment of dissolution of marriage or declaration of invalidity of marriage and the will takes effect in the same manner as if the former spouse had died before the testator.
  2. 760 ILCS 35/1(a) – Judicial termination of the marriage of the settlor of a trust revokes every provision which is revocable by the settlor pertaining to the settlor's former spouse in a trust instrument or amendment thereto executed by the settlor before the entry of the judgment of judicial termination of the settlor's marriage, and any such trust shall be administered and construed as if the settlor's former spouse had died upon entry of the judgment of judicial termination of the settlor's marriage.



Manish C. Bhatia is an Illinois attorney focusing his practice in the area of Estate Planning. Manish has focused his education and practice on Tax Planning, Estate Planning and Business Succession Planning since the first year of law school. He has also added Asset Protection, Trust and Estate Administration and Nonprofit Organizations/Charitable Giving to his fields of practice. Manish has served as Vice President of Professional Development for the Indian American Bar Association and board member of the Young Professionals of Evanston.

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