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'TIL DEATH DO US PART . . . AFTER THAT, MY DEAR, YOU'RE ON YOUR OWN: A PRACTITIONER'S GUIDE TO DISINHERITING A SPOUSE IN ILLINOIS

Ronald Z. Domsky*

1. INTRODUCTION

To some, only a cold-hearted and uncaring person would even consider disinheriting a spouse. And, perhaps that would be an accurate portrayal of the individual wishing to do so if this article was written in the 1950s.

But, this article is written in the new millennium. Over the last fifty years, there has been unprecedented change, an evolution if you will, in the American family. As a result, the estate planning practitioner can no longer expect to counsel clients who are part of that ancient relic known as the "traditional" American family.

Instead, clients are a part of a family unit as unique as the individuals comprising it. For this reason, with each passing year, the estate planning practitioner can expect to counsel an increasing number of clients wishing to disinherit their spouses. Of course, there will always be the elderly client who, after losing a spouse of many years decides to "tie the knot" again, but who wants a lifetime accumulation of wealth to go to children and/or grandchildren from a previous marriage rather than their new spouse. However, as the population continues to grow older,¹ the practitioner can expect to see an increasing number of younger married clients who, in the event of their untimely death, want their wealth to be used to care, not for their career focused and equally successful spouse, but for their aging parents. In short, there are legitimate reasons for wanting to disinherit one's spouse that do not reflect adversely on the relationship between the spouses.

The good news for the practitioner is that, in Illinois, it is relatively simple to create a plan that will effectively assist the client in disinheriting a

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1. In 1900, the life expectancy of the average American citizen was just 47 years, where, in 2001 it was 77 years. Source: <http://www.cdc.gov/nchs/data/hus/tables/2003/03hus027.pdf> (last visited Oct. 28, 2004).

spouse. While there are numerous devices the practitioner can utilize to help achieve the client's goal, this article will discuss just two; the marital agreement and the *inter vivos* trust. Included within the discussion will be some problems associated with using these devices to disinherit a spouse. Finally, this article will address some of the problems the practitioner may encounter.

Since this article is written with the estate planning practitioner in mind, there will be no mention of policy considerations as to whether a person should be able to disinherit a spouse, for such discussion is of little value to the practitioner who has a fee paying client who wants to prepare an estate plan.

II. MARITAL AGREEMENTS

The first device the estate planning practitioner should consider employing to assist a client in disinheriting a spouse is the marital agreement. There are two types of marital agreements: the premarital agreement also known as an antenuptial agreement or prenuptial agreement and the postmarital agreement also known as a postnuptial agreement.

A. The Premarital Agreement

A premarital agreement is “[a]n agreement between a man and a woman entered into before marriage, but in contemplation and in consideration thereof, whereby the rights and obligations of one or both of the prospective spouses are determined.”² Given the staggering rate of divorce in the United States, it may be surprising to learn that just five percent of couples contemplating marriage enter into these types of agreements.³ There are, of course, legitimate reasons why clients choose not to enter into a premarital agreement.⁴ However, for the client seeking to disinherit their prospective spouse, the premarital agreement becomes an essential and invaluable tool. In fact, the most common reason for entering into a premarital agreement is

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2. BERNARD B. RINELLA & RICHARD A. RINELLA, ILLINOIS DOMESTIC RELATIONS FORMS § 11.1.1 (Lexis Law Publishing 1999).
 3. Allison A. Marston, Comment, *Planning for Love: The Politics of Prenuptial Agreements*, 49 STAN. L. REV. 887, 891 (1997).
 4. *Id.* at 893-94.

to allow the contracting parties to define their rights in each other's property upon death.⁵

For the most part, a premarital agreement is just like any other contract.⁶ However, unlike most parties to an ordinary contract, the parties to a premarital agreement are usually engaged to one another at the time of contracting.⁷ It is for this reason that Illinois courts review premarital agreements with heightened scrutiny.⁸ Accordingly, it is imperative that the premarital agreement be properly drafted.

1. Basic Formality Requirements

When drafting a premarital agreement, the practitioner must be aware of some basic formality agreements. First and foremost, the agreement must be in writing.⁹ This has been a long-standing requirement in Illinois even prior to enactment of the Illinois Uniform Premarital Agreement Act (ILUPAA), when the Illinois Frauds Act required these agreements to be in writing.¹⁰

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5. Katharine B. Silbaugh, *Marriage Contracts and the Family Economy* 93 NW. U. L. REV. 65 (1998). In fact, until 1972, defining rights in property at death was the only reason for Illinois couples to enter into a premarital agreement for, until then, Illinois courts refused to enforce provisions in premarital agreements that contemplated divorce. See *Valid v. Valid*, 286 N.E.2d 42 (Ill. App. Ct. 1972).
 6. In fact, Illinois courts generally apply ordinary contract construction and interpretation rules to premarital agreements when litigation over such agreements arises. See e.g. *In Re Estate of Hopkins*, 520 N.E.2d 415, 418 (Ill. App. Ct. 1988). Accordingly, the parties to a premarital agreement must have contractual capacity. See P. Andre Katz, *When Your Elderly Clients Marry: Prenuptial Agreements and Other Considerations*, 16 J. AM. ACAD. MATRIM. LAW. 445, 447 (2000).
 7. Of course, the parties to a premarital agreement need not necessarily be engaged at the time of entering into the agreement for such agreement to be valid. However, the parties do, at least, need to be contemplating marriage at the time of the agreement's execution. See 750 ILL. COMP. STAT. 10/2 (2003) wherein a premarital agreement is defined as "an agreement between prospective spouses made in contemplation of marriage...." (emphasis added). See also the official comment to the definitional section of the Uniform Premarital Agreement Act, which has been adopted in Illinois without modification, which provides, in relevant part, that "[a]greements between persons living together but not contemplating marriage...are outside the scope of this Act." UNIF. PREMARITAL AGREEMENT ACT § 1 (2003). To ensure that a premarital agreement falls within the purview of the Illinois Act, the practitioner should include in the agreement a recital confirming that, at the time of the agreement's execution, the parties are either contemplating marriage or are, in fact, engaged to be married.
 8. See *In re Marriage of Sokolowski*, 597 N.E.2d 675 (Ill. App. Ct. 1992).
 9. 750 ILL. COMP. STAT. 10/3 (2003).
 10. See 740 ILL. COMP. STAT. 80/1 (2003). See also *Richardson v. Richardson*, 36 N.E. 608 (Ill. 1893) (oral premarital agreement declared void). But see, *Lee v. Central Nat'l Bank & Trust Co.*, 308 N.E.2d 605 (Ill. 1974) (court upheld oral premarital agreement where parties executed a document evidencing agreement after marriage).

Second, any such agreement executed after January 1, 1990, must be signed by both parties.¹¹ Prior to the enactment of the ILUPAA, Illinois law only required the agreement to contain the signature of the party sought to be held to the agreement.¹² Finally, while not expressly required by the ILUPAA, the contracting parties' signatures should be notarized by a notary public.¹³

2. *Procedural Fairness*

In addition to the basic formality requirements, when the parties to the agreement are engaged to be married at the time of the agreement's execution, the practitioner must not only pay particular attention to the substantive provisions contained in the agreement but also to the procedures leading up to the agreement's execution because Illinois courts have historically required the procedures leading up to the agreement's execution be conducted in a fair manner. While Illinois courts have scrutinized various processes to determine whether the circumstances surrounding the execution of a premarital agreement are fair, two processes are reviewed with particular veracity: whether the parties made the appropriate financial disclosure and whether the parties were separately represented by counsel at the time of executing the agreement.

i. Financial Disclosure

As a prerequisite to a premarital agreement's enforceability, Illinois courts require each party to provide full financial disclosure prior to execution.¹⁴ When analyzing whether the requisite disclosure has been made, the primary concern is whether the spouse seeking to set aside the premarital

11. 750 ILL. COMP. STAT. 10/3 (2003).

12. 740 ILL. COMP. STAT. 80/1 (2003).

13. See *infra* Section II (A)(3)(i)(b) for an explanation as to why agreement should be notarized.

14. It has been asserted that the Uniform Premarital Agreement Act (UPAA) abolished the long-standing common law requirement of full financial disclosure. See, e.g., Martson, Comment, 49 STAN. L. REV. at 899 ("[N]either unconscionability nor disclosure alone is sufficient to void a premarital agreement.") In reaching this conclusion, the aforementioned author relies on the language of section 7(a) of the Uniform Premarital Agreement Act. 750 ILL. COMP. STAT. 10/7(a) (2003). While it is true that section 7(a) of the UPAA does require a complaining spouse to show both that the agreement is unconscionable and the requisite disclosure was not made to successfully assert a claim to have the agreement set aside on grounds of unconscionability, at common law, the Illinois courts have often considered lack of financial disclosure as one element to show the agreement was unconscionable. See, e.g., *Bergheger v. Boyle*, 629 N.E.2d 1168, 1172 (Ill. App. Ct. 1994). Given this interrelationship, the practitioner would be remiss to counsel a client against providing full financial disclosure at the time of a premarital agreement's execution.

agreement received enough information to make a knowing and intelligent decision whether to enter the agreement.¹⁵ Of course, the right to receive the requisite disclosure can be waived by the complaining spouse. Absent waiver, full financial disclosure will be considered made where a party has been provided with information concerning the nature, character and amount of property in the disclosing party's estate.¹⁶ While such a requirement may conjure images of having to provide the client's prospective spouse with detailed accountings consisting of balance sheets, income statements and the like, Illinois courts have never required such detail. In fact, the information provided in the disclosure can be fairly general.¹⁷ However, notwithstanding the court's tolerance for general disclosure, under no circumstances will the court find adequate disclosure has been made where the complaining spouse only knows of the client's reputation in the community as a wealthy person.¹⁸

Where the right to disclosure has not been waived and a party has alleged such disclosure was not made, the alleging party has the burden to prove that the required disclosure was not made.¹⁹ Accordingly, the practitioner representing the client attempting to disinherit a spouse should make certain the premarital agreement incorporates both the financial disclosure actually made

15. See *Landes v. Landes*, 108 N.E. 691, 695 (Ill. 1915) (disclosure made by complaining spouse's father); *Fleming v. Fleming*, 406 N.E.2d 879 (Ill. App. Ct. 1980) (disclosure made by future in-laws).
16. *Petru v. Petru*, 123 N.E.2d 352, 357-58 (Ill. App. Ct. 1954).
17. See *Warren v. Warren*, 523 N.E.2d 680 (Ill. App. Ct. 1988) (court upheld agreement where husband only disclosed an estimate of his net worth and provided a general recital of the source of that wealth.); *But see*, *Watson v. Watson*, 126 N.E.2d 220 (Ill. 1955) (Illinois Supreme Court refused to enforce premarital agreement where spouse seeking to set aside agreement did not have specific knowledge of other spouse's assets at the time of the agreement's execution); *But see also*, *Fleming*, 406 N.E.2d at 881 (where court upheld premarital agreement after applying *Watson* standard and concluded that adequate financial disclosure was made where spouse seeking to set aside agreement learned both the value of the disclosing spouse's estate as well as the assets that comprised the estate.).
18. See *Watson*, 126 N.E.2d at 223 (where the court declared that evidence showing that complaining spouse knew that disclosing spouse was a "wealthy person" or a "big property owner" was insufficient to discharge disclosing spouse's duty of disclosure).
19. At common law, where the death-related provisions afforded to the complaining spouse were disproportionate to the value of the non-complaining spouse's estate, the burden to prove financial disclosure was made shifted to the non-complaining spouse (or rather the representative of the non-complaining spouse's estate) since the issue of the affect of death-related provisions of a premarital agreement is not ripe for review until after the non-complaining spouse's death. *Fleming*, 406 N.E.2d at 883-884. However, under the ILUPAA, the burden to prove non-disclosure remains with the complaining spouse regardless of whether the death-related provisions are disproportionate to the value of the non-complaining spouse's estate. See 755 ILL. COMP. STAT. 10/7(a) (2003) (which provides, in relevant part, that "[a] premarital agreement is not enforceable if the party against whom enforcement is sought proves that: . . . the agreement was unconscionable when it was executed and, before execution of that agreement, that party: was not provided a fair and reasonable disclosure of the property or financial obligations of the other party..." (emphasis added)).

by the practitioner's client²⁰ and a waiver of the right to financial disclosure beyond what has been provided.²¹ In cases where the client's prospective spouse has waived the right to disclosure, the practitioner should be sure to include a provision in the agreement memorializing such a decision.

ii. *Separate Counsel Representation*

In addition to requiring full financial disclosure, Illinois courts also deemed counsel representation at the time of a premarital agreement's execution a crucial factor in determining whether the agreement's execution was procedurally fair. This does not mean that the courts, or the legislature for that matter, have gone so far as to require both parties to a premarital agreement to actually be represented by counsel at the time the contract is executed.²² Instead, Illinois courts only require an unrepresented party be advised to seek advice from independent counsel and given sufficient opportunity to do so.²³ It is not clear what constitutes sufficient opportunity, because the Illinois courts have upheld agreements both presented and executed just one day prior to the marriage ceremony.²⁴ However, as a matter of practice, the practitioner representing the client seeking to disinherit a prospective spouse should provide the unrepresented prospective spouse with as much time as possible to seek advice from counsel.²⁵ Regardless of whether the client's prospective spouse decides to employ independent counsel, when drafting the agreement, the practitioner should include a provision wherein the client's prospective spouse acknowledges being given advice to seek independent counsel and their decision regarding advice.

iii. A Brief Note on Substantive Fairness Review

In addition to reviewing the premarital agreement to ensure the circumstances surrounding its execution are fair, Illinois courts also review

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20. Other practitioners are in accord with this recommendation. See *PREMARITAL & MARITAL CONTRACTS: A LAWYER'S GUIDE TO DRAFTING & NEGOTIATING ENFORCEABLE MARITAL & COHABITATION AGREEMENTS* (Edward L. Winer & Lewis Becker eds., 1993).
 21. Other practitioners are also in accord with this recommendation. See Randall J. Gingiss, *Second Marriage Considerations for the Elderly*, 45 S.D. L. REV. 469, 476 (2000). See *In re Marriage of Sokolowski*, 597 N.E.2d 675, 681 (Ill. App. Ct. 1992).
 22. *Warren*, 523 N.E.2d at 683.
 23. *In re Estate of Hopkins*, 520 N.E.2d 415, 419 (Ill. App. Ct. 1988).
 25. A week seems to be an adequate amount of time. See, e.g., *In re Marriage of Osborn*, 564 N.E.2d 1325 (Ill. App. Ct. 1990) (five days) and *In re Marriage of Byrne*, 535 N.E.2d 14 (Ill. App. Ct. 1989) (five days).

the actual terms of the agreement to determine whether they are fair to the complaining party. Typically this type of review is reserved for those situations where a spouse attacks the divorce-related provisions of the agreement.²⁶

However, at common law, under certain circumstances, the courts look to the death-related provisions contained in a premarital agreement. Specifically, if the death-related provisions afforded the complaining spouse were disproportionate to the value of the deceased spouse's estate, a presumption arose that the deceased spouse concealed the true value of their estate at the time the premarital agreement was executed.²⁷ Once the presumption attached, the non-complaining spouse (or rather the representative of the estate) bore the burden to prove that the requisite disclosure was made. However, this presumption has been eliminated under the ILUPAA.²⁸ Even if, for some reason, the courts were to construe the ILUPAA in such a way as to continue invoking this presumption under the aforementioned circumstances, the courts' past concerns have not been with the provisions actually afforded the surviving spouse under the agreement upon the death of the client but rather with whether the surviving spouse had the requisite information to knowingly accept such provisions.²⁹ In other words, as long as the deceased spouse provided the necessary disclosure, the agreement would be upheld even if, as a result of the waiver(s) made in the premarital agreement, the surviving spouse is entitled to nothing from the deceased spouse's estate.

3. *Substantive Provisions to be Included in the Agreement*

Once the practitioner has taken the necessary steps to ensure that the premarital agreement will be in compliance with both the statutory formality requirements as well as the judicially imposed procedural requirements, the practitioner must then turn to the substantive provisions of the agreement. When drafting the substantive provisions with an eye toward assisting a client in disinheriting a spouse, the practitioner must be aware of certain statutory rights afforded to the client's spouse under Illinois law. Such rights include:

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26. This article is limited to a discussion of the death-related provisions of a premarital agreement. Accordingly, a detailed discussion of the effectiveness of divorce-related provisions will not be made. For more information regarding the inquiries made by courts when dealing with divorce-related provisions, *See generally supra* note 20.
27. *Fleming v. Fleming*, 406 N.E.2d 879, 884–85 (Ill. App. Ct. 1980).
28. *See Marston, supra*, note 3 at 899.
29. *Id.*

the right to renounce the client's will,³⁰ the right to share in the client's intestate estate,³¹ the right to a spouse's award,³² and the right to share in the client's qualified retirement plan(s).³³ While these rights do not vest until after the parties have married, the client's spouse is still generally able to waive these rights prior to their vesting.³⁴ However, some waivers may be more effective than others.

i. Waivers of Statutory Rights that are Usually Upheld

Illinois courts have allowed spouses to waive certain statutory rights when entering into a prenuptial agreement. The spouse can waive their right to renounce the client's will, and instead, accept their share in the intestate estate of the client.

(a) Right to Renounce Will

In Illinois, a client's prospective spouse can waive the statutory right to renounce the client's will.³⁵ The statutory right to renounce essentially provides the client's spouse with a choice; the spouse can either accept the provision set forth under the client's will or take a statutorily prescribed share of the client's estate. As a result of the statutory right to renounce, the provision in the will of a client became in legal effect an offer on the part of such client "to purchase the statutory interest of [his or her spouse] in the estate of the [client] for [client's estate's] benefit."³⁶ When the client's spouse exercises the right to renounce, the spouse rejects that offer.³⁷ The right to renounce must be affirmatively elected by the client's spouse by filing appropriate documentation with the probate court having jurisdiction over the client's probate estate within a statutorily prescribed period of time.³⁸ If the client's spouse fails to file the appropriate documentation, such failure is

30. 755 ILL. COMP. STAT. 5/2-8 (2003).

31. 755 ILL. COMP. STAT. 5/2-1 (2003).

32. 755 ILL. COMP. STAT. 5/15-1 (2003).

33. 29 U.S.C. § 1055(a) (2003).

34. See 750 ILL. COMP. STAT. 10/4(a)(2003). See *In re Estate of Hopkins*, 574 N.E.2d 230, 232 (Ill. App. Ct. 1991).

35. *Golden v. Golden*, 66 N.E.2d 662, 663 (Ill. 1946).

36. *First Nat'l Bank of Danville v. McMillan*, 145 N.E.2d 60, 64 (Ill. 1957).

37. *Id.*

38. Generally within seven months after the client's will has been admitted to probate appropriate documentation must be filed. 755 ILL. COMP. STAT. 5/2-8(b) (2003).

considered the equivalent of an election to take whatever benefits are afforded under the client's will.³⁹

However, when the client's spouse exercises the statutory right to renounce the client's will, the spouse automatically becomes entitled to a statutory share of the client's net estate.⁴⁰ The actual portion to which the client's spouse is entitled depends upon the client's family circumstances at the client's death. If the client dies leaving a descendant, the client's spouse is entitled to one-third of the client's net estate.⁴¹ Where the client dies leaving no descendants, the statutory share increases to one-half of the client's net estate.⁴² The net estate upon which shares are determined is equal to the value of the client's probate estate remaining after payment of all just claims against the client's estate, including, but not necessarily limited to, taxes (both estate and income), spouse's award, funeral expenses and estate administration costs.⁴³ However, for purposes of calculating the spouse's share upon renunciation, the net probate estate will not include the value of any of the client's real estate located outside Illinois even if the realty is subject to ancillary probate proceedings in the jurisdiction where it is located.⁴⁴

The spouse has the right to demand the statutory share upon renunciation be satisfied from any assets bequeathed under the client's will with any deficiency being satisfied from the residue of the client's net probate estate.⁴⁵ However, if such share cannot be satisfied from the residue of the client's estate, the normal abatement rules are applied to make up any deficiency.⁴⁶

The portion of the client's net probate estate remaining after satisfying the client's spouse's share is then distributed in accordance with the terms of the client's will.⁴⁷ However, the client's spouse is deemed to have predeceased the client for purposes of carrying out the dispositive provisions of the client's

39. *Remillard v. Remillard*, 129 N.E.2d 744, 746 (Ill. 1955).

40. If competent, the client's spouse has an absolute right to renounce the client's will. *See, First Nat'l Bank*, 145 N.E.2d at 64. However, if the surviving spouse is incompetent, the right to renounce is no longer absolute. Instead, the court must grant the spouse's guardian approval to file the election, as the court wants to ensure that such election is, in fact, being made for the benefit of the surviving spouse. *Id.*; *See also, In Re Estate of Klekunas*, 205 N.E.2d 497 (Ill. App. Ct. 1965).

41. 755 ILL. COMP. STAT. 5/2-8(a) (2003).

42. *Id.*

43. *In re Estate of Grant*, 415 N.E.2d 416, 418 (Ill. 1980).

44. *In re Estate of Pericles*, 641 N.E.2d 10, 13 (Ill. App. Ct. 1994).

45. *See generally, In re Estate of Brinkman*, 326 N.E.2d 167 (Ill. App. Ct. 1975).

46. *Id.* For the order of abatement in Illinois, *See* 755 ILL. COMP. STAT. 5/24-3 (2003).

47. *Brinkman*, 326 N.E.2d at 170.

will⁴⁸ unless the client directs otherwise by will, in which case the remaining net probate estate will be distributed in accordance with the client's express directions.⁴⁹

(b) Right to Share in Intestate Estate

If a client dies intestate,⁵⁰ the client's probate estate becomes known as the client's intestate estate and is distributed in accordance with the Illinois intestate succession laws, which are known as the Rules of Descent and Distribution.⁵¹ In such situations, absent effective waiver,⁵² the client's spouse is entitled to either the client's entire intestate estate if the client dies leaving no descendant or one-half of the client's intestate estate if the client dies leaving one or more descendants.⁵³ Akin to the calculation of the amount to which the client's spouse is entitled after renouncing the client's will, the amount the client's spouse will receive pursuant to the intestate succession statute is also based upon the value of the client's net probate estate.⁵⁴ The client's spouse is entitled to the intestate share as long as the parties were

48. 755 ILL. COMP. STAT. 5/2-8(b) (2003) ("The filing of the instrument is a complete bar to any claim of the surviving spouse under the will"). See also *In re Estate of Donovan*, 98 N.E.2d 757 (Ill. 1951).

49. 755 ILL. COMP. STAT. 5/2-8(c) (2003).

50. Of course, if a client is seeking the advice of counsel to disinherit a spouse, it is unlikely that the client will die without having executed a will. In fact, the practitioner would be remiss if they did not insist on the client executing a new will, or at least a codicil to an existing will, for a provision should be included in the client's will referencing the marital agreement to put the probate court on notice of its existence. However, failure to execute a will is not the only situation where a person is considered to have died intestate. Instead, the will executed by the client could be set aside by the probate court as a result of a successful will contest or simply because it fails to adhere to the statutory formality requirements for executing a will. And, even if the will is otherwise effective, the client could still die partially intestate should the client fail to dispose of the entire probate estate under the will.

51. See 755 ILL. COMP. STAT. 5/2-1 (2003). For those unfamiliar with this area of the law, descent refers to the transmission of real property where distribution refers to the transmission of personal property.

52. *Collins v. Phillips*, 102 NE 796, 798 (Ill. 1913).

53. 755 ILL. COMP. STAT. 5/2-1 (2003); As an aside, where there are assets subject to probate and the surviving spouse has been disinherited by a client, the surviving spouse has an incentive to contest the client's will. If the client's will is declared invalid and such declaration does not revive a previously executed will, which it ordinarily would not, the client's probate estate will be distributed in accordance with Illinois' intestate succession laws. Pursuant to the right to renounce, the surviving spouse is only entitled to a maximum of one-half of the decedent spouse's probate estate, whereas, in situations where the client is deemed to have died intestate, the surviving spouse may be entitled to the client's entire probate estate.

54. *In re Estate of Fenton*, 440 N.E.2d 222, 225 (Ill. App. Ct. 1982) (where the court interpreted the Illinois Supreme Court's holding in *In re Estate of Grant*, 415 N.E.2d 416 (Ill. 1980)).

legally married at the time of the client's death.⁵⁵ Even if parties are in the process of divorce when the client dies, the client's spouse will still be entitled to a share of the deceased spouse's intestate estate unless a premarital or post-marital agreement, such as a separation agreement, precludes such a right.

ii. Waivers of Statutory Rights that May or May Not be Upheld

Illinois courts occasionally uphold the spouse's waiver of their award and the right to survivor benefits in Employee Retirement Income Security Act of 1974 (ERISA) retirement plans.

(a) Right to Spouse's Award

Regardless of whether the client dies testate or intestate, if the client was a resident of Illinois at the time of death and left assets subject to Illinois probate proceedings, the client's surviving spouse is entitled to a spouse's award, which is a statutorily prescribed sum of money to support for a period of nine months after the death both the spouse and any dependent children living with the spouse at the time of the client's death.⁵⁶ When determining the amount of the award, courts often consider other resources available to the client's spouse,⁵⁷ including assets and income passed outside of probate to the client's spouse as a result of the client's death.⁵⁸ In appropriate circumstances, the amount awarded can be substantial for the court need not limit the amount of the award to the bare necessities of life, but may take into account the surviving spouse's accustomed standard of living.⁵⁹ However, under no circumstances may the court award less than the statutory minimum, which is \$10,000 for the spouse plus \$5,000 for each of the client's dependent children living with the client's spouse.⁶⁰ The spouse's award is not an inheritable right or interest, but rather a debt owed to the client's estate.⁶¹ Accordingly, where the client's spouse is entitled to a portion of the client's

55. See *In re Estate of Morrissey*, 349 N.E.2d 642, 644 (Ill. App. Ct. 1976) (where the court defines surviving spouse as "one of a married pair who outlives the other"). See also *Estate of Biewald*, 468 N.E.2d 1321 (Ill. App. Ct. 1984) (where court declares that a decree of divorce terminated a spouse's property rights and interests in deceased ex-spouse's property even though parties continued to live together after divorce was finalized).

56. 755 ILL. COMP. STAT. 5/15-1(a) (2003).

57. *In re Estate of Parkhill*, 548 N.E.2d 821, 823 (Ill. App. Ct. 1989).

58. *In re Estate of Caffrey*, 458 N.E.2d 1147, 1150 (Ill. App. Ct. 1983).

59. *In re Estate of Meyers*, 446 N.E.2d 892, 895 (Ill. App. Ct. 1983).

60. *Id.* For the amount of the statutory minimum, See 755 ILL. COMP. STAT. 5/15-1(a) (2003).

61. *In re Estate of Caffrey*, 458 N.E.2d at 1147.

estate pursuant to either an affirmative election of the right to renounce or by application of the rules of descent and distribution, the amount of the spouse's award is deducted from the value of the client's probate estate before calculating the spouse's statutory share.⁶²

While the purpose of the spouse's award is to provide support to both the client's spouse and dependent children living with the surviving spouse, the client's dependent children do not have a vested interest in the award.⁶³ However, where the client leaves dependent children living with the client's spouse, the court will not enforce an otherwise effective waiver of the right to a spouse's award.⁶⁴ While a waiver will not be enforced in such circumstances, the client can still deny the spouse the right to their award by invoking a statutory right to include a provision by will wherein the client indicates any benefit conferred to the spouse under will is in lieu of the spouse's award.⁶⁵ But, where the client confers either no benefits or limited benefits to a spouse by will, which would be the case for clients wishing to disinherit a spouse, inclusion of such a provision in the will would be of little value because the client's spouse only needs to renounce the client's will to render such a provision ineffective.⁶⁶

(b) Waiver of Right to Survivor Benefits in ERISA Governed Retirement Plan(s)

In 1984, Congress enacted the Retirement Equity Act (REA), which amended various provisions of ERISA. One of the major reasons for passing the REA was to better protect spouses' pension plan survivor benefits.⁶⁷ REA provides such protection by requiring ERISA governed retirement plans to

62. 755 ILL. COMP. STAT. 5/18-10 (2003).

63. See *Kroell v. Kroell*, 76 N.E. 63, 66 (Ill. 1905).

64. *Pavlicek v. Roessler*, 78 NE 11, 12 (Ill. 1906) (wherein the Illinois Supreme Court notes that "[t]he [surviving spouse's] award is a statutory allowance made for the benefit of the [surviving spouse] and other members of the family of the decedent, and especially his [or her] children of tender years, that they may not be left wholly without support in the days of desolation following the death of the [spouse], and before time or opportunity has been afforded for readjustment to changed conditions. Hence it has been held that the [surviving spouse] cannot release the award by antenuptial contract where there are children entitled to share in the benefit of its protection"). See also *In re Estate of Nakaerts*, 435 N.E.2d 791, 793 (Ill. App. Ct. 1982) (where court relies on holding in *Pavlicek* in rendering waiver of spousal award in postnuptial agreement invalid even though child born to couple after execution of agreement).

65. 755 ILL. COMP. STAT. 5/15-1(b) (2003).

66. *Id.*

67. *Boggs v. Boggs*, 520 U.S. 833, 843 (1997).

automatically provide spouses of plan participants certain survivor benefits upon the death of the plan participant.⁶⁸

However, the automatic survivor benefits required by the REA are merely default provisions and may be waived by the plan participant's spouse.⁶⁹ It is imperative the practitioner properly draft the waiver for, with each passing year, pension plans occupy a larger percentage of the typical client's financial portfolio.⁷⁰ Similar to the basic formality requirements necessary for an enforceable premarital agreement, a waiver of survivor benefits in an ERISA governed qualified pension plan must be in writing, signed by the waiving spouse with the waiving spouse's signature either notarized or witnessed by the pension plan representative.⁷¹ In addition to these formality requirements, the substance of the waiver must:

- 1) Designate the beneficiary(ies) entitled to survivor benefits in place of the spouse (or, if the plan participant is electing a form of benefit from a defined benefit-type plan that will not provide survivor benefits (such as a single-life annuity without a guaranteed payment period), the waiver need not name a beneficiary, but need only set forth the form of benefit that the plan participant has elected); 2) Indicate whether the aforementioned beneficiary designation (or form of benefit) may be changed by the participant spouse without the waiving spouse's further consent; and, 3) acknowledge the effects of the waiver.⁷²

So, if ERISA, as amended by REA, specifically allows spouses to waive their rights to survivor benefits in pension plans, it may seem contradictory to assert the proposition that such a waiver may be ineffective.

However, there are two reasons for such a proposition. First, it is likely only spouses can waive rights to survivor benefits and, at the time of executing a premarital agreement, the waiving party is only a prospective spouse. Second, even if a prospective spouse can waive rights to survivor benefits in ERISA governed pension plans, only such rights in pension plans that are in existence at the time the premarital agreement is executed may be waived.

68. See 29 U.S.C. § 1055(a) (2003) for defined benefit-type arrangements—Surviving spouse is automatically entitled to a QJSA if plan participant was vested and survived past retirement or a QPSA if vested plan participant dies prior to annuity starting date; 29 U.S.C. § 1055 (b)(1)(C)(i) (2003) for defined contribution type-arrangements—Surviving spouse is automatically entitled to participant's vested account balance upon participant's death.

69. 29 U.S.C. § 1055 (c)(2) (2003).

70. In fact, in 1998, pension plans represented nearly 50% of the average American investor's portfolio. See www.ebri.org/testimony/t135.pdf (last visited on Oct. 23, 2004).

71. 29 U.S.C. § 1055 (c)(2)(A) (2003).

72. 29 U.S.C. § 1055 (c)(2)(A) (2003).

An assertion that a waiver by a prospective spouse of the right to survivor benefits in a client's ERISA governed pension plan is probably ineffective will likely seem contradictory to the Illinois Appellate Court's holding in *Hopkins v. Hopkins*,⁷³ where the court held a prospective spouse can waive their right to survivor benefits under an ERISA governed pension plan without adhering to the specific waiver requirements set out in section 1055(c) of ERISA.⁷⁴ However, *Hopkins* acknowledged, compliance with the ERISA waiver provisions is a matter of federal law and the court incorrectly applied federal law dealing with this issue in arriving at its decision.⁷⁵

The federal circuit courts, including the Seventh Circuit, employ two doctrines to determine whether there has been compliance with federal statutes like ERISA: the strict compliance doctrine and the substantial compliance doctrine. The strict compliance doctrine requires a court to use a term or provision's ordinary meaning when interpreting the statute in which that term or provision appears. In contrast, the substantial compliance doctrine allows a court to construe the meaning of the term or provision under review in a way that fulfills the statute's purpose. The federal circuit courts have consistently held that the strict compliance doctrine must be applied when dealing with unambiguous terms or provisions contained within ERISA.⁷⁶ The only exception to this requirement is when a term or provision's ordinary meaning would lead to an absurd result.⁷⁷

Even though *Hopkins* did not expressly declare it was applying the substantial compliance doctrine in arriving at its decision, one could reasonably conclude it did because it provided "a surviving spouse can waive her interests in a plan under REA *without following its specific waiver requirements*."⁷⁸ Furthermore, the court disregarded the fact that the waiver under review neither named the beneficiary to take the place of the waiving prospective spouse nor acknowledged the effects of such waiver, which, are two of the explicit requirements dictated by section 1055(c) of ERISA. In fact, in reaching its decision, the Illinois Appellate Court relied on the Seventh Circuit's holding in *Fox Valley & Vicinity Construction Workers Pension Fund v. Brown*, where the court applied the substantial compliance doctrine in dealing with an ERISA waiver.⁷⁹

73. 574 N.E.2d 230 (Ill. App. Ct. 1991).

74. *Id.* at 235.

75. *Id.*

76. *See, e.g.,* *Butler v. Encyclopedia Britannica, Inc.*, 41 F.3d 285, 294 (7th Cir. 1994); *Lasche v. George W. Lasche Basic Profit Sharing Plan*, 111 F.3d 863 (11th Cir. 1997).

77. *Commissioner of IRS v. Brown*, 380 U.S. 563, 571 (1965).

78. *Hopkins*, 574 N.E.2d at 235 (emphasis added).

79. 897 F.2d 275 (7th Cir. 1990).

However, reliance on *Fox Valley* is misplaced because the Seventh Circuit dealt with a waiver made in a postnuptial agreement executed by a person already a spouse in contemplation of divorce, not a waiver made in a premarital agreement by a prospective spouse in contemplation of marriage.⁸⁰ As a matter of fact, the Seventh Circuit declared the otherwise deficient waiver valid because the person seeking to have the waiver set aside was no longer a spouse and, as a result, could no longer seek the protections afforded under the REA, as the REA was enacted to protect spouses not former spouses.⁸¹ Accordingly, since the *Hopkins* court failed to properly apply either the strict compliance doctrine or federal case precedent, it would be unwise for the practitioner to rely on *Hopkins* when drafting the pension plan waiver in the client's premarital agreement.

Though the Seventh Circuit has yet to rule on whether the substantial compliance doctrine can be used to interpret the term "spouse" as used in section 1055(c) to include prospective spouses, if given the opportunity it is unlikely that it would do so, as it has already required strict compliance with other unambiguous ERISA waiver provisions, including some of the very provisions that were lacking in the *Hopkins* waiver.⁸²

Furthermore, in rendering its decision, the Seventh Circuit would most likely consult other federal circuit precedent. Unfortunately, most federal courts have found it unnecessary to decide whether the strict compliance doctrine should be applied to the term "spouse" in the ERISA waiver provisions. Most waivers reviewed for compliance to date have failed to adhere to the basic formality requirements discussed above thereby allowing the court to avoid the issue and declare the waiver ineffective on other grounds.⁸³ Only the Fourth Circuit has directly addressed the issue and, in so doing, applied the strict compliance doctrine to declare that waivers in premarital agreements are ineffective because a prospective spouse does not fit within the ordinary definition of a spouse.⁸⁴ Therefore, if a spouse seeking to set aside a premarital waiver to survivor benefits in an ERISA governed pension plan were to file in an Illinois federal district court, it is likely that the

80. *Id.* at 278.

81. *Id.* at 281.

82. *Butler*, 41 F.3d at 285 (The court applied strict compliance doctrine to set aside the waiver in premarital agreement where waiver neither named an alternative beneficiary nor acknowledged the effect of the waiver).

83. *See, e.g., Hurwitz v. Sher*, 982 F.2d 778 (2d Cir. 1992); *Lasche v. George W. Lasche Basic Profit Sharing Plan*, 111 F.3d 863 (11th Cir. 1997).

84. *Hagwood v. Newton*, 282 F.3d 285, 290-91 (4th Cir. 2002); *See also Natl Auto. Dealers & Assocs. Ret. Trust v. Arbeitman*, 89 F.3d 496 (8th Cir. 1996) (where, though not necessary to decide the case, the court emphasized that ERISA waiver can only be made by a spouse).

district court would follow federal court precedent, rather than the Illinois appellate court decision in *Hopkins* to render the waiver ineffective.

Fortunately, all is not lost for the practitioner seeking to disinherit a client's spouse. The practitioner can likely avoid the issue entirely by including a provision in the premarital agreement wherein the client's prospective spouse promises to execute the necessary documentation to waive any right to survivor benefits in the client's ERISA governed pension plan after the marriage ceremony.⁸⁵ Such a provision should be in addition to a standard waiver of rights to survivor benefits in the client's ERISA governed pension plan that complies with the requirements set forth above.

Even though the practitioner has taken the appropriate steps to ensure that the waiver is executed at the appropriate time, i.e., after the marriage, there is still a possibility the waiver will be ineffective. According to section 1055(c)(2)(A)(iii), for a waiver to be effective, it must acknowledge the effects of such waiver. In *Pedro Enterprises, Inc. v. Perdue*,⁸⁶ the Seventh Circuit held the waiving party cannot acknowledge the effects of such waiver for a pension plan not yet in existence. The court noted it "is self-evident that a waiver [of survivor benefits in an ERISA governed pension plan] cannot be knowing and considered if the thing to be relinquished has not yet been conceived of by the employer."⁸⁷ Accordingly, in a premarital agreement, a client's prospective spouse can generally waive acquired rights in property not yet acquired by the client.⁸⁸ However, a prospective spouse cannot waive such right to survivor benefits in pension plans afforded under ERISA. But, just as with the issue of timing, the practitioner may be able to circumvent the holding in *Pedro Enterprises* through careful drafting. The practitioner can include a provision in the premarital agreement where the client's spouse promises to execute the necessary documentation to waive any rights to survivor benefits in any ERISA governed pension plan(s) in which the client may, in the future, become a participant.

85. In *Lasche*, 111 F.3d at 863, the spouses executed a premarital agreement wherein they both waived any right to each other's pension plans and agreed to execute any documentation to effectuate such waivers. After the wedding, in accordance with the premarital agreement, the wife executed the pension plan's form waiver, but the court set it aside because it was not witnessed or notarized. The court spent little time discussing the fact that the waiver was executed pursuant to a contractual obligation set forth in a premarital agreement. Accordingly, it is reasonable to conclude the federal courts will uphold a properly drafted waiver executed after the marriage even though such waiver was executed pursuant to a contractual obligation assumed by the waiving party prior to the marriage.

86. 998 F.2d 491 (7th Cir. 1993)

87. *Id.* at 494.

88. 750 ILL. COMP. STAT. 10/4(a)(1) (2003).

B. Postmarital Agreements

While the above discussion indicated it would be ideal for the practitioner to use a premarital agreement to assist the client in disinheriting a spouse, the reality is, few clients approach the practitioner for estate planning advice prior to marriage. However, all is not lost as the practitioner can still use a postmarital agreement in lieu of the premarital agreement. A postmarital agreement is an agreement executed by a husband and wife after they are married.⁸⁹ However, it is uncommon for spouses to enter into a postmarital agreement to define their rights in each other's estates at death unless there is contemplated divorce or separation. This does not mean such an agreement is not a viable alternative to assist a client in disinheriting a spouse.

In Illinois, postmarital agreements between spouses not contemplating separation or divorce are a matter of common law.⁹⁰ Even though postmarital agreements are governed by common law, they are subject to most of the same rules as premarital contracts. Accordingly, the drafting of premarital contracts equally applies to postmarital contracts.⁹¹

However, there are some important differences between the two agreements. First, while premarital agreements need not be supported by consideration to be binding,⁹² the same is not true for postmarital agreements.⁹³ However, lack of consideration should not be a major issue in most postmarital agreements since reciprocal waivers made by either spouse to any right and/or claim against one another's estate at death are deemed sufficient consideration to support a postmarital agreement.⁹⁴ Second, unlike premarital agreements, postmarital agreements do not generally need to be in

89. BLACK'S LAW DICTIONARY 1187 (7th ed. 2001).

90. 750 ILL. COMP. STAT. 5/502 (2003) (authorizes spouses to enter postmarital agreements in contemplation of divorce); 750 ILL. COMP. STAT. 5/503(a)(4) (2003) (allows spouses to enter into postmarital agreements when not contemplating separation or divorce to define respective rights in marital property (a concept only applicable to dissolution proceedings). Furthermore, Illinois did not extend the reach of the ILUPAA to cover postmarital agreements. Instead, the Illinois legislature adopted section 1 of the Uniform Act without modification and the official comment to that section specifically providing "postnuptial...agreements are outside the scope of this Act."

91. See e.g., *In re Estate of Brosseau*, 531 N.E.2d 158 (Ill. App. Ct. 1988); *In re Marriage of Richardson*, 606 N.E.2d 56 (Ill. App. Ct. 1992) (requiring adequate consideration without any duress or undue influence which may render the agreement unenforceable or unconscionable).

92. 750 ILL. COMP. STAT. 10/3 (2003).

93. *In re Estate of Brosseau*, 531 N.E.2d 158, 160 (Ill. App. Ct. 1988).

94. *Id.*

writing to be enforceable.⁹⁵ Of course, for the client wishing to disinherit a spouse, the practitioner would be remiss to rely on such a rule because certain waivers must be in writing to be effective.

Postmarital agreements are a great alternative to premarital agreements where the client is already married when seeking advice on disinheritance, but some of the problems associated with premarital agreements plague the postmarital agreement as well. Specifically, waivers of both survivor benefits in ERISA governed pension plans not yet in existence and the spouse's award where the client dies leaving dependent children living with the waiving spouse will be ineffective if included in an otherwise properly drafted postmarital agreement. While the waiver problem to survivor benefits in the ERISA governed pension plan can be cured by including a provision where the client's spouse promises to execute the necessary documentation to properly waive such rights when the plan comes into existence, nothing can be done to prevent the waiver of the spouse's award from being rendered ineffective. Practitioners must educate the client about the court's unwillingness to allow the client's spouse to waive the right to their award when the spouse has a legal obligation to support the client's dependent children.

C. Drafting Waiver Provisions in Premarital or Postmarital Agreements

Generally, the practitioner does not need to use specific language when drafting the waiver provisions for such waivers to be enforceable.⁹⁶ However, Illinois courts have consistently refused to enforce waiver provisions unless an intention to relinquish the rights waived is clearly apparent from the language used.⁹⁷ Furthermore, waivers must be drafted in a particular manner to ensure compliance with the statute conferring the rights waived.⁹⁸ The practitioner's goal in drafting these agreements should be to deter litigation or at the very least increase the likelihood of success if litigation arises over the terms of the agreement. This is especially true in situations where the

95. *See* *Miethe v. Miethe*, 101 N.E.2d 571 (Ill. 1951) (where the Illinois Supreme Court enforced an oral understanding between husband and wife where the wife agreed to hold title to the couple's realty to ensure the husband did not improvidently dispose of it while drunk).

96. *See* *Genung v. Hagemann*, 242 N.E.2d 790, 793 (Ill. App. Ct. 1968) (no precise words required); *See also In re Estate of Anderson*, 552 N.E.2d 429 (Ill. App. Ct. 1990).

97. *See* *Van Cura v. Drangelis*, 193 N.E.2d 201 (Ill. App. Ct. 1963) (property rights acquired through marriage cannot be taken away by premarital agreement unless intention to relinquish these rights is clearly apparent); *See also* *Heaney v. Nagel*, 153 N.E.2d 75 (Ill. 1958).

98. *See supra* Section II (A)(3)(ii)(b).

practitioner is drafting an agreement to assist the client in disinheriting a spouse. Accordingly, in addition to including an all encompassing waiver of rights and claims against the client's estate at death, the practitioner should also include a provision addressing each of the above discussed statutory rights and/or claims wherein the client's spouse specifically waives the right to assert such rights and/or claims.⁹⁹

III. THE *INTER VIVOS* TRUST

If a client is attempting to disinherit a spouse, it is unlikely that the client would provide for the spouse under his/her will. Under Illinois law, a client does not need to worry about the possibility of a spouse being considered a pretermitted heir; since Illinois law does not grant an unmentioned spouse pretermitted heir status.¹⁰⁰ Thus, failing to expressly provide for a surviving spouse in a will alone is insufficient to successfully disinherit a spouse. Further, a client's spouse has certain statutory rights the client's estate, including the right to an elective share¹⁰¹ and the right to an intestate share.¹⁰² The client's spouse is entitled to these statutorily prescribed shares of the client's estate regardless of whether the client wanted the spouse to share in the client's estate.

However, the estate upon which both the statutory elective share and statutory intestate share is calculated is generally limited to the deceased spouse's net probate estate.¹⁰³ Accordingly, if during the client's lifetime the client were to re-title all assets, or, in the case of acquisition of an asset, take title to that asset into an *inter vivos* trust, the client will have essentially eliminated a spouse's statutory rights, as those assets re-titled into the client's *inter vivos* trust do not become a part of the client's probate estate at death. In other words, those assets will not be a part of the client's net probate estate which is the very estate upon which the client's spouse's statutory share is determined.

99. Others are in accord with this recommendation. See *PREMARITAL & MARITAL CONTRACTS: A LAWYER'S GUIDE TO DRAFTING & NEGOTIATING ENFORCEABLE MARITAL & COHABITATION AGREEMENTS* (Edward L. Winer & Lewis Becker eds., 1993).

100. In Illinois, pretermitted heir status is limited to the testator's children. See 755 ILL. COMP. STAT. 5/4-10 (2003).

101. See *supra* Section II (A)(3)(i)(a).

102. See *supra* Section II (A)(3)(i)(b).

103. *In re Estate of Grant*, 415 N.E.2d 416, 418 (Ill. 1980).

Of course, the manner in which the client's assets are handled once placed into an *inter vivos* trust is important because there is a possibility the value of the re-titled assets could be deemed a part of the client's net probate estate for purposes of calculating the spouse's statutorily prescribed share of the client's probate estate. In Illinois, as in other common law property states, the client's spouse has the ability to assert a claim, in equity, alleging the process of re-titling the assets constituted a fraud on the marital right.¹⁰⁴ The marital right is the right to share in the client's estate either by exercising the right to elect against the client's will, thereby being entitled to an elective share of the client's probate estate, or by taking automatically a share of the client's intestate estate.¹⁰⁵ In essence, by asserting such a claim, the client's spouse is alleging that had the client not re-titled the assets in question into an *inter vivos* trust, such assets would have become a part of client's probate estate thereby allowing the client's spouse to take a share of those assets via either an elective share or a share of the intestate estate.

When assessing the sufficiency of the client's spouse's claim, Illinois courts apply a statutory "intent to defraud" test.¹⁰⁶ To begin, the Illinois test should not be confused with the common law test used in other jurisdictions that goes by the same name.¹⁰⁷ To successfully assert fraud on the marital right claim under the common law form of the intent to defraud test, the client's spouse must prove the client re-titled the assets under review for the primary purpose of denying the client's spouse the right to share in the re-titled assets.¹⁰⁸ In other words, the client's spouse must prove the client re-titled the assets for the very purpose of disinheritance. Unlike the common law test, under the Illinois statutory intent to defraud test,¹⁰⁹ the courts are not concerned with the reason the decedent spouse re-titled the assets being reviewed. In fact, in Illinois, a person may "dispose of his property during his lifetime in any manner he sees fit . . . even though the transfer is for the precise purpose of minimizing or defeating the statutory marital interests of the spouse in the property conveyed."¹¹⁰ Instead, under the Illinois test, as

104. See *Johnson v. LaGrange State Bank*, 383 N.E.2d 185, 195-97 (Ill. 1978).

105. *Id.*

106. 755 ILL. COMP. STAT. 25/0.01-2 (2003).

107. Van Foreman McClellan, *Inter vivos Transfers: Will They Stand Up Against the Surviving Spouse's Elective Share?*, 14 OKLA. CITY U. L. REV. 605, 618 (1989).

108. *Id.* For an example where a court applied the common law intent to defraud test, see *Rose v. St. Louis Union Trust Co.*, 253 N.E.2d 417 (Ill. 1969) (where the Illinois Supreme Court directed the trial court to apply the common law intent to defraud test in accordance with Missouri law to determine whether the decedent spouse established an irrevocable *inter vivos* trust solely to disinherit his widow).

109. To avoid confusion with the common law test, the Illinois test is oftentimes referred to as the Present Donative Intent test.

110. *Johnson*, 383 N.E.2d at 192.

declared by the General Assembly when enacting the Lifetime Transfer of Property Act,¹¹¹ and later explained by the Illinois Supreme Court in *Johnson v. LaGrange State Bank*,¹¹² in order to successfully assert a fraud on the marital right claim, the client's spouse must prove the client lacked present donative intent to transfer some present or future interest in the re-titled asset(s) to a third party when re-titling the asset(s) in question.¹¹³ Present donative intent is lacking only when the client's spouse proves the client's act of re-titling was "a sham or merely a colorable or illusory transfer of legal title."¹¹⁴

The good news for clients wishing to disinherit a spouse is, since the Illinois Supreme Court handed down its decision in *Johnson*, there is no reported case where a disinherited or disenfranchised spouse has successfully asserted a fraud on the marital right claim.¹¹⁵ The bad news is all re-titled assets that would have become a part of the client's probate estate had the assets not been re-titled are vulnerable to attack by the disinherited spouse.¹¹⁶ In situations where the client retains a life estate in the asset re-titled (which is exactly the case where the client employs the typical revocable *inter vivos* trust), the court will review the client's spouse's claim with special scrutiny.¹¹⁷ While in such circumstances the determination of whether there has been fraud on the marital right will turn on the facts of each case,¹¹⁸ the courts have customarily looked to a handful of factors in rendering its decision.¹¹⁹ While these factors have played a role in the court decisions, to date, the courts have placed a great deal of importance on just two of the factors when handing down their decisions; the amount of control the client retained and exercised

111. 755 ILL. COMP. STAT. 25/0.01-2 (2003).

112. 383 N.E.2d 185 (Ill. 1978).

113. *Id.* at 194.

114. *Id.*

115. However, there have been two cases where the appellate court has reversed the trial court's grant of pre-trial motions in favor of the disinheriting spouse. See *Lucchetti v. Lucchetti*, 402 N.E.2d 854 (Ill. App. Ct. 1980) (where the court reversed trial court's grant of motion to dismiss in favor of deceased husband's children who were surviving tenants on several joint bank accounts because surviving spouse did allege sufficient facts to establish fraud on the marital right cause of action). See also *In re Estate of Puetz*, 521 N.E.2d 1277 (Ill. App. Ct. 1988) (where court reversed trial court's grant of summary judgment for remainder beneficiaries of a land trust established by plaintiff wife's deceased husband).

116. See *In re Estate of Goldstein*, 688 N.E.2d 684 (Ill. App. Ct. 1997) (where court affirmed dismissal of surviving spouse's fraud on the marital right claim because surviving spouse had no expectancy interest in the assets transferred prior to the assets being transferred since assets were held in joint tenancy with siblings prior to being transferred).

117. See e.g. *Toman v. Svoboda*, 349 N.E.2d 668, 674 (Ill. App. Ct. 1976).

118. *Johnson*, 383 N.E.2d at 191.

119. See e.g., *In re Estate of Puetz*, 521 N.E.2d at 1280.

over the assets re-titled and the secretive manner in which the client re-titled the assets.

The fact that the Illinois courts look to control as a factor in determining fraud on the marital right claim may seem as if the courts are really just applying the illusory transfer test, which is yet another common law test employed by other jurisdictions in assessing the sufficiency of the surviving spouse's fraud on the marital right claims.¹²⁰ However, when applying the illusory transfer test, courts focus on the incidents of control and ownership a grantor spouse retained in the property transferred during his or her lifetime to determine whether a valid transfer was made.¹²¹ If the grantor spouse retained too much control over the re-titled assets in question, courts would be required to include the value of the re-titled assets in the grantor spouse's probate estate in calculating the surviving spouse's statutory elective share.¹²² However, under Illinois law, the courts cannot conclude the client lacked present donative intent when re-titling assets into an *inter vivos* trust simply because the client retained certain powers or rights over the assets re-titled.¹²³ Nonetheless, Illinois courts have considered the amount of control retained to be a relevant factor in rendering its decision.¹²⁴ In fact, a client may retain a significant degree of control over the trust estate without being concerned the trust estate will be pulled back into the probate estate for purposes of calculating a spouse's statutory share.¹²⁵ Instead, Illinois courts focus on how much control the client exercised during their lifetime.¹²⁶ Of particular interest to the courts is whether the client exercised the right to withdraw principal from the trust estate after the assets being reviewed were transferred into the client's trust.¹²⁷ However, even though principal invasion is relevant

120. Richard Lee Dees, Note, *A Response to Johnson v. LaGrange State Bank: Restoring Forced Share Protection for the Surviving Spouse*, 1980 U. ILL. L.F. 277 (1980).

121. *Id.*

122. *Id.*

123. 755 ILL. COMP. STAT. 25/0.02 (2003).

124. *Lesnik v. Estate of Lesnik*, 403 N.E.2d 683, 686 (Ill. App. Ct. 1980).

125. *See Johnson*, 383 N.E.2d 185 (where the court upheld a transfer of assets into an *inter vivos* trust in which the grantor spouse, who was also acting as trustee, retained the power to invade principal, amend the trust agreement, and revoke the trust in its entirety.). *See also Payne v. Riverforest Bank and Trust Co.*, 401 N.E.2d 1229, 1233 (Ill. App. 1980) (In dealing with a fraud on the marital right claim where re-titling spouse retained a life estate as well as the power to amend or revoke a land trust, the court provided, "[w]hile the reserved powers indicate that the settlor retained a significant degree of control over the trust res, the *form* of control which the settlor retains over the trust does not make it invalid as against the surviving spouse" (emphasis added)). *Id.* at 1233.

126. *In re Estate of Puetz*, 521 N.E.2d at 1280 (citing to *Toman*, 349 N.E.2d at 668).

127. *See Johnson*, 383 N.E.2d at 195 ("There is no evidence that Mrs. Johnson made any withdrawals from the principal [of the trust estate]"); *See also Payne*, 401 N.E.2d at 1234 ("if [the grantor] exercised any of her reserved powers to deplete the res of the land trust, that act would indicate that

to the court's determination, the client may receive income from the trust estate without being concerned the trust assets will be considered part of the probate estate for purposes of calculating the spouse's statutory share. Given the court's concern with principal invasion, it may be appropriate for the client to re-title only those assets the client will not need for ordinary or anticipated expenses.¹²⁸

When assessing the sufficiency of the client's spouse's claim, the courts also look to whether the client transferred the assets in a secretive manner. However, the client need not necessarily tell a spouse exactly what is being done. Instead, courts require the client's spouse be aware the client is preparing an estate plan and the client's spouse is given opportunity to participate in the activities leading up to the preparation of that plan.¹²⁹

Of course, the *inter vivos* trust is not the only vehicle the client can use to disinherit a spouse. In fact, the client could avoid the possibility of having the act of re-titling assets subject to special scrutiny simply by re-titling assets into a joint tenancy bank account with someone other than the spouse. In *Havey v. Patton*,¹³⁰ the companion case to *Johnson v. LaGrange State Bank*, the Illinois Supreme Court declared present donative intent is presumed when dealing with bank accounts re-titled into joint tenancy.¹³¹ To overcome this presumption, the client's spouse has to prove by clear and convincing evidence, the client re-titled the assets into joint tenancy bank accounts for convenience purposes only.¹³² "A convenience account is an apparent joint account which the creator of the account established to enable another tenant to write checks from the account at the direction and for the benefit of the creator."¹³³ The mere fact the tenant either did not have the authority to withdraw funds from the account or had the authority but did not withdraw funds was not enough to prove the account was established for the

she did not intend to make a valid and effective transfer at the time of conveyance"); *In re Estate of Puetz*, 521 N.E.2d at 1281 (where court justified reversing trial court's dismissal of surviving spouse's fraud on the marital right claim because the grantor spouse had withdrawn principal from the trust estate during his lifetime).

128. Please note that the client may be able to withdraw principal from the trust estate to cover unusual medical expenses without subjecting the entire trust estate to a surviving spouse's claim. See *Johnson*, 383 N.E.2d at 197 (the mere fact that grantor spouse would need access to re-titled funds to cover expenses during a terminal illness not sufficient to render transfer testamentary).

129. *Johnson*, 383 N.E.2d at 197-98.

130. 368 N.E.2d 728 (Ill. App. Ct. 1977).

131. *Id.* at 731.

132. *In re Estate of Mocny*, 630 N.E.2d 87, 92 (Ill. App. Ct. 1993).

133. *Id.* at 92. See also *In re Estate of Harms*, 603 N.E.2d 37 (Ill. App. Ct. 1992); *In re Estate of Kaplan* 579 N.E.2d 963 (Ill. App. Ct. 1991).

convenience of the creator.¹³⁴ Finally, even if a spouse successfully asserts a claim for fraud on their marital right, regardless of the vehicle used by the client, the transfer deemed fraudulent is not set aside in its entirety. Instead, the court will use the entire value of the asset transferred for purposes of calculating the spouse's elective share, but only place a constructive trust on that portion of the asset necessary to satisfy the spouse's elective share.¹³⁵

IV. SOME PROBLEMS WITH DISINHERITANCE

Special problems exist when the client decides to move to another state upon retirement and when the client co-titles certain assets or property with a spouse.

A. Client Takes Up Domicile in Another State

Some states infringe more than others on client's retirement plans. For instance, clients choosing to move to Arizona are much less likely to have to alter their plans of disinheriting a spouse than if they moved to Florida.

1. Arizona

If the choice were limited to Arizona and Florida, Arizona is the hands down winner in this regard. While a detailed discussion of Arizona law is beyond the scope of this article, the practitioner assisting the client in disinheriting a spouse should be aware that, while Arizona is a community property state,¹³⁶ it does not apply quasi-community property concepts at death.¹³⁷ Under a community property system, each spouse automatically acquires a one-half interest in any asset falling within the definition of community property when the asset is acquired.¹³⁸ Accordingly, at the client's

134. See *In re Estate of Harms*, 603 N.E.2d at 41-42.

135. See generally *Johnson v. LaGrange State Bank*, 383 N.E.2d 185 (Ill. 1978), *In re Estate of Puetz*, 210 N.E.2d 1277 (Ill. App. Ct. 1988); *Payne v. Riverforest State Bank & Trust Co.*, 401 N.E.2d 1229 (Ill. App. Ct. 1980).

136. ARIZ. REV. STAT. § 25-211- 218 (2003).

137. Jeffrey N. Pennell, *Minimizing the Surviving Spouse's Elective Share*, in 32-9 PHILLIP E. HECKERLING INSTITUTE OF ESTATE PLANNING § 904.3(C) (1999). Under a quasi-community property system, property acquired by spouses while domiciled in a common law property state is deemed to be community property once the spouses become domiciled in the community property state.

138. ARIZ. REV. STAT. § 25-211 (2003). Arizona defines community property as "all property acquired by either husband or wife during the marriage . . . except for property that is: 1. Acquired by gift, devise or descent or 2. Acquired after service of a petition for dissolution of marriage, legal

death, the client has to devise or bequeath a one-half interest in any asset deemed a community property asset. However, in Arizona, the only assets that could possibly fall within the definition of community property are those that are acquired by the spouses while domiciled in Arizona.¹³⁹ In other words, all property acquired by either spouse while domiciled in a common law property state, like Illinois, retains its character as separate property upon taking up domicile in Arizona regardless of whether that asset would be deemed community property if acquired while domiciled in Arizona. Therefore, the assets acquired by the client while domiciled in Illinois will be distributed upon the client's death according to either the way the asset is titled or the client's will,¹⁴⁰ unless the client transmutes the assets into community property. A client can transmute separate property into community property in one of three ways: 1) where the client enters into an agreement with his or her spouse to consider the asset community property (e.g. postmarital agreement); 2) where the client makes a gift of the asset or a portion thereof to his or her spouse (e.g. places realty into joint tenancy with spouse); or 3) where the client commingles the assets with other assets already considered community property.¹⁴¹

Arizona law still provides the client's spouse some rights in the client's estate. First, regardless of whether the client dies testate or intestate, the spouse is entitled to a homestead allowance, equivalent to Illinois' spousal award of \$18,000.¹⁴² In addition, the spouse is entitled to receive up to \$7,000 worth of the deceased spouse's personality such as household furnishings, automobiles, appliances, etc.¹⁴³ Furthermore, under certain circumstances, the client's spouse may be entitled to a share of the client's probate estate beyond the homestead and personality allowances where the client executed a will being probated prior to marrying the surviving spouse.¹⁴⁴ While the statute conveying this right is convoluted, the basic idea is the surviving spouse will be entitled to a portion of the estate not going to descendants of the testator equal to what the surviving spouse would be entitled to if the testator died intestate.¹⁴⁵ When the client dies intestate, the spouse will be entitled to all of the client's separate property and one-half of community property if the client

separation or annulment if the petition results in a decree of dissolution of marriage, legal separation or annulment."

139. *Stephen v. Stephen*, 284 P. 158 (Ariz. 1930).

140. ARIZ. REV. STAT. § 14-3101 (2003).

141. *Nationwide Res. Corp. v. Massabni*, 694 P.2d 290, 295 (Ariz. Ct. App. 1984).

142. ARIZ. REV. STAT. § 14-2402 (2003).

143. ARIZ. REV. STAT. § 14-2403 (2003).

144. ARIZ. REV. STAT. § 14-2301 (2003).

145. ARIZ. REV. STAT. § 14-2301(a) (2003).

died either leaving no issue or leaving issue who are also issue of the client's spouse.¹⁴⁶ If the client's issue are not also the client's spouse's issue, the client's spouse's share is reduced to one-half of the client's separate property.¹⁴⁷ Of course, this assumes the client either died without a will or with a will wherein the client did not expressly limit the surviving spouse's right to share in the deceased spouse's intestate estate.¹⁴⁸

2. Florida

For the client choosing to take up domicile in Florida, the picture becomes grave. While Florida, like Illinois, is a common law property state, unlike Illinois, it has adopted a version of the Uniform Probate Code, which is much more protective of surviving spouses than Illinois probate law. Initially, when calculating the value of an elective share, Florida's statutory scheme utilizes an augmented estate approach.¹⁴⁹ Under this approach, the value of many assets transferred *inter vivos* by the client, such as assets transferred into a revocable *inter vivos* trust, are added to the value of the client's probate estate for purposes of calculating the client's spouse's statutory elective share.¹⁵⁰ So, the percentage of the client's estate to which the client's spouse is entitled after renouncing the client's will is fixed at 30 percent,¹⁵¹ the amount actually awarded will likely be significantly more since the calculation includes non-probate assets.¹⁵² However, the protection afforded to surviving spouses does not end there. If the client dies domiciled in Florida, the client's spouse is automatically entitled to a life estate in the client's homestead.¹⁵³ Further, the client's spouse is also entitled to a family allowance equivalent of Illinois' spouse's award of \$18,000.¹⁵⁴ Given the radical difference in protection afforded surviving spouses between Arizona and Florida, the best advice a

146. ARIZ. REV. STAT. § 14-2102(1) (2003).

147. ARIZ. REV. STAT. § 14-2102(2) (2003).

148. ARIZ. REV. STAT. § 14-2101 (2003).

149. FLA. STAT. ch. 732.201-32.30 (2003).

150. FLA. STAT. ch. 732.2035 (2003).

151. FLA. STAT. ch. 732.2065 (2003); where, as the reader may recall, in Illinois, the client's spouse would be entitled to either 1/3 or 1/2 of the client's probate estate.

152. Please note that, for the client who created an *inter vivos* trust while domiciled in Illinois, there may be a conflict of laws issue. If the Florida court determines that the client's spouse is entitled to a portion of the client's trust estate to satisfy the spouse's elective share, the question arises as to whether the trustee would have to comply with a Florida court order to that effect where both the trust situs and trustee are located in Illinois. Such a discussion is beyond the scope of this article.

153. FLA. STAT. ch. 732.401 (2003). However, this right can be waived in a premarital agreement. *See James v. James*, 843 So.2d 304, 307 (Fla. Dist. Ct. App. 2003).

154. FLA. STAT. ch. 732.403 (2003).

practitioner could give a client who is contemplating changing domicile is to maintain domicile in Illinois. If that is not an option, then the next best advice is to recommend that the client take up domicile in Arizona.

B. Titling Assets with a Spouse in Some Form of Co-tenancy

For whatever reason, clients have a propensity to title some, or even all, of their assets in some form of co-ownership with their spouse. When the client does so, a presumption attaches that the client intended to make a gift of the property placed into co-ownership to the joint tenant.¹⁵⁵ This presumption can only be overcome by clear and convincing evidence.¹⁵⁶ If the client titled an asset into some form of co-tenancy with his or her spouse, it would be difficult to reclaim that entire asset without the spouse's cooperation or, at least, without protracted litigation.

However, if the client's spouse does not cooperate, depending upon what form of co-tenancy was employed, the client may be able to reclaim a portion of the asset and title that portion into an *inter vivos* trust preventing the spouse from possibly obtaining the entire asset upon the client's death. In Illinois, there are three different forms of co-tenancy: tenants in common, joint tenancy with right of survivorship and tenancy by the entirety.

Absent express declaration to the contrary, Illinois law presumes that property taken jointly is intended to be held as tenants in common.¹⁵⁷ When an asset is held by two or more individuals as tenants in common, each individual owns an undivided fractional interest in that property. Upon each co-tenant's death, that co-tenant's share of the asset becomes a part of their probate estate and is distributed either in accordance with the co-tenant's will or in accordance with the rules of descent and distribution. For the co-tenant who does not want their share of the asset to become a part of their probate estate, like the client wishing to disinherit a spouse, that co-tenant may, during their lifetime, re-title their undivided share of the asset in any way they see fit. Accordingly, the client can freely re-title a fractional share into the name of an *inter vivos* trust.

The second form of joint ownership recognized in Illinois is joint tenancy with right of survivorship.¹⁵⁸ Unlike property held as tenants in common,

155. See *Murgic v. Granite City Trust & Sav. Bank*, 202 N.E.2d 470 (Ill. 1964).

156. For an example where a presumption was overcome, see *Dixon Nat'l Bank v. Morris*, 210 N.E.2d 505, 506 (Ill. 1965).

157. 765 ILL. COMP. STAT. 1005/1 (2003). This presumption also attached at common law. See *In re Estate of Smith*, 232 N.E.2d 310, 312 (Ill App. Ct. 1967).

158. 765 ILL. COMP. STAT. 1005/1b (2003).

upon the death of a co-tenant, property held as joint tenants with right of survivorship automatically passes to the surviving tenants by operation of law.¹⁵⁹ In order for the benefits of joint tenancy with right of survivorship to attach, an express declaration is required by the tenants that the property is being held not as tenants in common, but as joint tenants.¹⁶⁰ For the client wishing to disinherit a spouse, it is important to note that a joint tenant can sever a joint tenancy.¹⁶¹ Once severed, the joint tenancy automatically converts to tenancy in common.¹⁶² Accordingly, if the client happened to have titled assets in joint tenancy with his or her spouse, one spouse may sever the tenancy by transferring his or her interest in the asset to an *inter vivos* trust.

The third form of co-ownership recognized in Illinois proves to be a little more troublesome for the client wishing to disinherit a spouse. This form of co-tenancy is known as tenancy by the entirety.¹⁶³ Tenancy by the entirety is a statutorily created form of joint ownership that can only exist between husband and wife.¹⁶⁴ This form of ownership shares many of the same attributes as joint tenancy with right of survivorship with some important distinguishing features. To begin, the only type of property that can be held under this form of ownership is the couples' homestead.¹⁶⁵ While the statute creating this form of ownership does not define what qualifies as a homestead, based upon a fair reading of the entire statute as well as a common definition of the term and other Illinois statutes, it is reasonable to conclude the homestead is synonymous with the parties' domicile.¹⁶⁶ More importantly, however, is unlike joint tenancy with rights of survivorship, neither tenant can unilaterally sever the tenancy.¹⁶⁷ This is why tenancy by the entirety may prove troublesome to the client. If the client attempted to re-title his or her interest in the residence held as tenancy by the entireties without the client's spouse's consent, the attempted transfer would be ineffective and, upon the

159. Harms v. Sprague, 473 N.E.2d 930, 934 (Ill. 1984).

160. 765 ILL. COMP. STAT. 1005/1 (2003); 765 ILL. COMP. STAT. 1005/2.1 (2003).

161. Olney Trust Bank v. Pitts, 558 N.E.2d 398, 400 (Ill. App. Ct. 1990).

162. Klouda v. Pechousek, 110 N.E.2d 258 (Ill. 1953).

163. 765 ILL. COMP. STAT. 1005/1c (2003).

164. See Douds v. Freseñ, 64 N.E.2d 729 (Ill. 1946) (Tenancy by the entirety not recognized under common law in Illinois after passage of the Married Women's Act of 1891).

165. 765 ILL. COMP. STAT. 1005/1c (2003).

166. BLACK'S LAW DICTIONARY 737 (7th ed. 2001) (defines homestead as "any house, out-building, and surrounding land that is owned and used as a dwelling by the head of a family"). See also 765 ILL. COMP. STAT. 1005/1(c) (2003) (providing that property held by husband and wife as tenants by the entirety automatically converts to joint tenancy if the husband and wife *create and maintain another property as a homestead*). Finally, other Illinois statutes define the term homestead to mean domicile. See e.g. 205 ILL. COMP. STAT. 5/5(a) (2003).

167. 765 Ill. Comp. Stat. § 1005/1c (2003).

client's death, the residence would pass to the client's surviving spouse by operation of law.

V. CONCLUSION

There are many legitimate reasons for a client to disinherit a spouse. As practitioners, we cannot judge the client's goals, but merely fulfill them within the bounds of the law. Fortunately, for practitioners practicing in Illinois, it is relatively easy to assist a client in disinheriting a spouse. This article addressed the marital agreement and *inter vivos* trust simply because these are the devices with which most practitioners are most comfortable and familiar. There are many devices that can be employed that would be just as, if not more, effective than the ones discussed in this article. However, hopefully this article has explained why employing more elaborate and expensive devices, such as the offshore trust, when representing a client in Illinois, is truly unnecessary.

