

## **Estate Planning For Clients During Dissolution**

Fredric Bryan Lesser  
Bollman, Lesser & McGlynn, LLP  
582 N. Oakwood  
Lake Forest, IL 60045  
(847) 295-8800

The concepts of common law property ownership, which dominate estate planning, and the concept of marital property rights, which dominate divorce, are like ships passing in the night. Neither area of law provides significant acknowledgement of the other. See, e.g., *Marriage of Ignatius* 338 Ill.App.3d 652, 660-661, 788 N.E.2d 794 (2003). Parties to a dissolution should understand the precarious position they are in if they are thrust by death or disability from one ship to the other.

Common law property is the usual and customary law governing the ownership of assets. When I open a bank account in my own name alone, I have the complete ownership of the account. No one else has any rights in that account. I can dispose of that account, and transfer any rights to it, in any manner I see fit, even though the purpose of the transfer is to minimize or defeat my wife's interests in the account. *Johnson v. LaGrange State Bank*, 73 Ill.2d 342, 357, 383 N.E.2d 185 (1978); *Blankenship v. Hall*, 233 Ill. 116, 84 N.E. 192 (1908).

If I die, the account is then owned by my estate. I have complete control over my estate, I can leave money to anyone I choose: to my wife or to my children or to a charity or to a significant other. If the account passes through my estate, my wife has the right to renounce my Will and take a 1/3<sup>rd</sup> share of the account. This is a right granted to her by statute. 755 ILCS 5/2-8.

But if I declare myself to be trustee of the account, then upon my death, a successor trustee owns the account and I may provide in the trust for the account to be distributed to persons other than my wife, and she has no equivalent right to renounce my trust.

But I'm married and this account was opened during the marriage with money earned during the marriage. So if my wife sues for a divorce, even though she is not named on that account, the account is marital property and the court, in the divorce, can award her all or some part of that account as part of an equitable division of the marital assets. This is again, a right created by statute.

If I live through the divorce, her marital rights will probably prevail and she will receive an equitable division of my money. If I die before or while the divorce is still pending, the divorce will abate and her marital rights will be gone; my common law property rights will determine how the account is owned. This is the disconnect which lies at the heart of estate planning during a divorce.

Estate planning generally means arranging the client's assets so that (I) If the client becomes mentally disabled, those assets will be available for the client's care and benefit, and (II) When the client dies, the assets will pass as the client desires.

## **I. Disability Planning**

Let's start with the easy part: Disability planning primarily involves using powers of attorney. The Illinois Statutory Short Form Powers of Attorney for Healthcare and Property are cheap, simple and uncontroversial. Your client can obtain the forms from you or through many other sources. The forms are enacted as part of the Illinois Power of Attorney Act. 755 ILCS 45/1-1 *et seq.* Powers of attorney are only valid during the client's lifetime and will not serve as a substitute for a Will or a Living Trust. The powers can serve as a gangplank allowing your client to cross over a period of disability.

### **A. Healthcare Powers**

In the absence of a Healthcare Power of attorney, the estranged spouse has the authority to make medical decisions for the client if the client's physician certifies that the client cannot make decisions. Illinois Healthcare Surrogate Act, 755 ILCS 40/1 *et seq.*; *Collins v. Lake Forest Hospital*, 213 Ill.2d 234, \_\_\_ N.E.2d \_\_\_ (2004). As soon as the client feels that their spouse no longer has their best interests in mind, the client should sign a Healthcare Power, granting a more trusted person the right to make personal and healthcare decisions for the client. These decisions include the termination of life support, but also include a myriad of other circumstances while the client may be temporarily disabled by a stroke, car accident or other trauma.

Most importantly, the Healthcare Power also includes a nomination of the named agent to serve as the guardian of the client's person should the client become permanently disabled. Without the signed power, if the client becomes disabled, it is quite possible, even likely, that the estranged spouse will be appointed as guardian.

### **B. Property Powers**

The same concerns apply to creating a Property Power of attorney, although I do suggest that, unless the client has great trust and confidence in the agent, that the property power not include any current powers, but just the nomination. Property Powers are more problematic than Healthcare Powers; I'm more worried about someone stealing from the client than I am about someone killing them. A Property Power is also known as a "License to Steal".

The client may also consider granting a Property Power to the agent, but making the power a "springing" power, that is, one which is not effective when the client signs the power, but only springs into existence on a later occurrence, such as a physician certifying in writing that the client is not able to give prompt and intelligent consideration to financial matters.

At least in theory, Property Powers can also include the power to direct an attorney in the conduct of the dissolution action and to direct the transfer of property divided in the divorce if

the client becomes mentally disabled. I was not able to find any case precedent for that theory, but on its face, the Illinois Power of Attorney Act appears to grant that authority:

(j) Claims and litigation. The agent is authorized to: institute, prosecute, defend, abandon, compromise, arbitrate, settle and dispose of any claim in favor of or against the principal or any property interests of the principal; collect and receipt for any claim or settlement proceeds and waive or release all rights of the principal; employ attorneys and others and enter into contingency agreements and other contracts as necessary in connection with litigation; and, in general, exercise all powers with respect to claims and litigation which the principal could if present and under no disability. 755 ILCS 45/3-4(j).

If the intention is to include the power to direct the progress of the dissolution case, I suggest that this power be expressly granted in par. 3 of the Property Power form and that the client not rely upon the general grant of power to the agent.

## **II. Dispositions On Death**

There are three primary vehicles for estate planning on death: (1) Joint Tenancy; (2) Will; and (3) Living Trust. There are also other techniques, such as beneficiary designations for IRAs, 401ks and life insurance, and Totten Trusts and POD accounts, but these are typically subsidiary to the primary vehicle. Which vehicle to choose depends in large measure on: (A) Who Does the Client Want to Benefit; (B) How the Client Changes the Estate Plan; and (C) What Happens If Client Dies During the Divorce?

### **A. Who Does the Client Want To Benefit?**

*1. Spouse.* I start from the assumption that the client does not want to benefit their spouse, since my topic assumes that they are getting divorced, but as you all know, there are many different circumstances and some people are more anxious to get divorced than others. There may be circumstances, particularly where the client does not feel great animosity towards their spouse despite the divorce and they have minor children together, where the client may simply want to leave their assets to the surviving spouse after the divorce is final.

In this circumstance, the client does not need to act until the dissolution is final. A Will, rather than a Living Trust or a Joint Tenancy account, should suit their needs. The client will need to make a new Will affirmatively stating their desire to benefit the ex-spouse. Under the Probate Code, if the client had a Will naming their spouse, and then they divorce, the prior spouse will be presumed to have predeceased the client. 755 ILCS 5/4-7(b).

(b) No will or any part thereof is revoked by any change in the circumstances, condition or marital status of the testator, except that 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.

The rule of construction that divorce revokes the benefit is not true for trusts or beneficiary designations. See, e.g., *Allan v. Allan*, 226 Ill.App.3d 576, 589 N.E.2d 1133 (1992). Pending or after the divorce, if the client no longer wants to benefit the soon-to-be ex-spouse, the client needs to act to change the trust or beneficiary designation.

2. Minor Children of the Parties. If the parties have minor children, most clients will want to benefit them to the exclusion of their estranged spouse. This will normally require a change in the client's current estate plan. If the client has no Will at all, Illinois law provides that their estate will pass ½ to their children (at age 18) and ½ to their estranged spouse. 755 ILCS 5/2-1(a). The other party to the divorce, being also the parent of those same minor children, may have no objection to a change which excludes the estranged spouse but benefits their mutual children.

In this circumstance, the client should create a Living Trust naming a third-party trustee to hold the assets until the minor children reach some greater age. Under the law, if no trustee is appointed, then the money will be held for the children in a guardianship, the surviving parent will most likely be appointed as guardian, and the children will receive the money at age 18. This is not good planning. The client can and should, probably with the acquiescence or agreement of the estranged spouse, create a Living Trust and provide that upon the client's death, the money will be held by a bank trust company for the benefit of the children and distributed to them when they reach age 30 (or maybe 50).

3. Someone Else. The client may not have minor children, or children in common with the estranged spouse, or the client may simply want to benefit their own parents or siblings, or they may want to benefit a new significant other. Needless to say, this may not sit well with the estranged spouse. This is where estate planning during a dissolution becomes difficult.

The choice of vehicle is the easy part: the Living Trust is certainly the optimum vehicle. The Living Trust will protect your client if the client becomes disabled and keep the client out of the guardianship court. The client will be able to change the trust at will and to change the residuary beneficiaries without interference. The Living Trust is a private document and during the client's lifetime, only the custodians of the assets (e.g., a bank or stock broker) are entitled to a copy. After the client dies, the Living Trust is not filed with the Probate Court and only the named beneficiaries, not an estranged spouse, are entitled to see the Living Trust. The Living Trust does not pass through Probate and so the estranged spouse will not be able to renounce the Living Trust. If the client dies during the dissolution process, unlike Joint Tenancy, the estranged spouse will only receive what your client wants them to receive.

The problem is how to get the assets into the Living Trust. Obviously, the earlier in the dissolution proceeding the client starts, the easier the transfer will be. The optimal time would seem to be on the eve of filing for divorce.

Anyone, even a party in a divorce, has the right to transfer their assets. *Payne v. River Forest State Bank & Trust Company*, 81 Ill.App.3d 1128, 1131, 401 N.E.2d 1229 (1980). "He may do so even though the transfer is for the precise purpose of minimizing or defeating the statutory marital interest of his spouse in the property transferred or conveyed." *Payne, supra*; *Johnson v. LaGrange State Bank*, 73 Ill.2d 342, 357, 383 N.E.2d 185, 192 (1978); and *Hoeffner v. Hoeffner*, 389 Ill. 253, 59 N.E.2d 684 (1945). The transfer or conveyance is not subject to attack by his surviving spouse unless the transaction is a sham and colorable or illusory and tantamount to a fraud on his marital rights. *Payne, supra*; *Johnson, supra*; *Holmes v. Mims*, 1 Ill.2d 274, 115 N.E.2d 790 (1953).

This right to transfer is codified in the Lifetime Transfer of Property Act, 755 ILCS 25/1 *et seq.*, which provides:

1. An otherwise valid transfer of property, in trust or otherwise, by a decedent during his or her lifetime, shall not, **in the absence of an intent to defraud**, be invalid, in whole or in part, on the ground that it is illusory because the decedent retained any power or right with respect to the property. (Emphasis added.)
2. This act takes effect upon becoming a law and applies to savings account trusts established on or after its effective date, and as to all other transfers this Act is declaratory of existing law."

Any change in the estate plan, such as a transfer into a living trust or joint tenancy, which deprives the spouse of any benefit may be attacked as a "fraud on the marital right". The marital right is a very thin life-preserver which may not keep the client afloat.

The marital right derives from Sections 2-1(a) and 2-8 of the Probate Code. Section 2-1 provides for intestate succession, and 2-8 provides the spouse's right to renounce a will and take a share of a deceased spouse's probate estate. *In re Estate of Mocny*, 257 Ill.App.3d 291, 294, 630 N.E.2d 87 (1993). The marital right exists only after a spouse is dead; until that time, the spouse has only an expectancy and not an enforceable property right. *Toman v. Svoboda*, 39 Ill.App.3d 394, 398, 349 N.E.2d 668 (1976); *Centioli, supra*, 335 Ill.App.3d at 656.

The modern "marital right" is a statutory successor to the much stronger medieval concept of dower. As the Court explained in the seminal case of *Toman v. Svoboda*, 39 Ill.App.3d at 397-98:

Unlike the common law dower right (now abolished in Illinois; Ill.Rev.Stat.1973, ch. 3 par. 18) which, under given circumstances, attached to all real property owned in fee by the deceased spouse at any time during the continuation of a valid marriage and which, during the lifetime of both spouses, constituted the marital right of

inchoate dower, the statutory marital right has no inchoate stage, since it applies only to property which the deceased spouse owns in fee at the date of his or her death. *Petta v. Host* (1954), 1 Ill.2d 293, 115 N.E.2d 881. Prior to that date of death, the statutory marital right is a pure expectancy which, however, cannot be defeated unilaterally by any testamentary transfer of the deceased spouse. Hence, the statutory marital right does not enjoy the same protection as was afforded to the common law inchoate dower, namely, that, once the inchoate dower attached, it could not thereafter be defeated by any unilateral inter vivos act of the owner spouse.

It follows that, with the exception of certain so-called 'illusory' inter vivos transfers of his or her own property by the now deceased spouse, ... the owner and now deceased spouse may completely defeat the statutory marital right of the surviving spouse simply by arranging not to be the owner of any property at the date of his or her death by reason of having made real (as opposed to sham or merely colorable) inter vivos donative transfers of all of his or her own property to persons other than the surviving spouse. Nor does the statutory marital right (unlike certain contractual rights of a surviving spouse) impose any duty on the owner spouse to deal with his or her property during the lifetime of both spouses in what might be regarded as a normal or reasonable course of dealing with one's own property, either as to all or as to a disproportionate share of that property. ... This principle is sometimes expressed by saying that, insofar as the statutory marital right is concerned, the owner and now deceased spouse, in the lifetime of both spouses, has the absolute right actually and really to dispose of his or her own property in any manner he or she sees fit without the concurrence or even the knowledge of the now surviving spouse. And, moreover, he or she may do so even though he or she does so for the precise purpose of thereby minimizing or completely defeating the interest which the now surviving spouse would otherwise have obtained by reason of the statutory marital right. (Citations omitted).

The phrase "fraud on the marital right" is very misleading, since the traditional concept of fraud is not an element of an action to enforce the right. *Johnson*, 73 Ill.2d at 359; *Payne*, 81 Ill.App.3d at 1131. Instead, the challenging spouse must show that the change was made "with the intent to defraud", which means that the change was "illusory" or "colorable". *Johnson*. The Illinois Supreme Court has defined the terms: "[A]n illusory transfer is one which takes back all that it gives, while a colorable transfer is one which appears absolute on its face but due to some secret or tacit understanding between the transferor and the transferee the transfer is, in fact, not a transfer because the parties intended that ownership be retained by the transferor." *Johnson*, 73 Ill.2d at 359. The Supreme Court stated in *Johnson*, 73 Ill.2d at 359:

The intent to defraud is found in the nature of the transfer, whether it be illusory or colorable. In either event the transfer is a fraud on the marital rights because the transferor in reality had no intent to convey any present interest in the property but, in fact, intended to retain complete ownership. Although the spouse's marital rights can be defeated by an actual transfer, a purported transfer whereby the owner does not intend to convey a present interest, but intends to retain ownership, is evidence of an intent to defraud. (Citation omitted).

The Courts have repeatedly ruled, beginning with *Johnson*, that even if the client retains control over the assets, including being trustee and reserving the right to amend or revoke a trust into which the assets are placed, the transfer is valid and does not constitute a “fraud on the marital right”. This is so even if the expressed, deliberate intention of the client was to deprive their spouse of the asset. It is hard to imagine any type of transfer that would actually constitute a “fraud on the marital right”.

The last reported decision that I could discover finding a fraud on the marital right was *Montgomery v. Michaels*, 54 Ill.2d 532, 301 N.E.2d 465 (1973). *Montgomery* involved the creation of Totten Trust benefiting someone other than a spouse. *Montgomery* was expressly limited to its facts by the Supreme Court in *Johnson*, 73 Ill.2d at 356, and probably has been overruled by the General Assembly through the adoption of the Lifetime Transfer of Property Act. 73 Ill.2d at 359-360. Nonetheless, Totten Trusts and their modern cousin Pay On Death Accounts should be avoided in estate planning during dissolution.

Therefore, a party to a divorce is free to make pretty much any estate plan they chose, without being limited by the “marital right” of the estranged spouse. The trick is that they need to plot a course for common law control over the asset when they make the plan, either as the sole owner or as the Joint Tenancy of the asset, so that they can transfer the asset into a Living Trust with the client as the trustee.

## **B. Changing the Estate Plan**

If the client is still early in the process, and no case has yet been filed, the client may create and fund a living trust which provides that, upon the client's death, the assets will go to whomever the client wishes to benefit. *Johnson*. The client can remove funds from joint accounts and transfer those funds to new accounts in the name of the client's new living trust. The Living Trust will be a grantor trust for income tax purposes and continue to use the client's social security number as its taxpayer id number. The Living Trust will be the client's lifeboat to preserve the assets.

Even if an order has already been entered which precludes either party from transferring assets, they may still change their wills or, if they already have living trust, terms of the trust. Parties to a divorce are allowed to change their estate plans, even if that change might defeat the marital rights of the spouse.

The Appellate Court recently made that abundantly clear in *Marriage of Centioli*, 335 Ill.App.3d 650, 781 N.E.2d 611 (2002). In *Centioli*, Gerard had already created a living trust, naming himself as the trustee of his own assets and reserving to himself the right to revoke or amend the trust. Debora sought a preliminary injunction to prevent her husband from changing the terms of his living trust pending the divorce and the equitable division of their assets. The First District would have none of it:

Here, Gerard has a revocable trust in the nature of a will substitute which provides that his estate will pour over into his trust upon his death. Thus, Debora's right to a beneficial interest in Gerard's trust was but a mere expectancy. While Gerard's change in beneficiary may be a relevant factor in determining an equitable distribution of property (citation omitted), it cannot be characterized as a vested property interest within the ambit of the [Dissolution] Act. Consequently, her beneficial interest is not a clearly ascertainable right to be protected.

Furthermore, while Debora argues that she only seeks to maintain the status quo, the effect of requiring Gerard to replace her as the beneficiary during the pendency of the dissolution proceedings would result in her obtaining his entire estate if he were to die during the pendency of the divorce. This amount would be certainly more than she would acquire under an equitable distribution of the marital estate and would result in an overcompensation to Debora. Rather, the right Debora seeks to protect in the instant case is essentially the continued right to an equitable distribution of the marital assets in the event of Gerard's death.

However, it is well settled in Illinois that the death of either party to a divorce action prior to final judgment deprives the circuit court of jurisdiction over all aspects of the marriage relationship. (Citation omitted). Thus, if Gerard were to die during the pendency of the divorce proceedings, the assets in his trust would no longer be within the divorce court's jurisdiction and would instead be subject to probate law which is concerned not with equitable distribution of property, but only with property rights. In Illinois, if Gerard dies intestate, Debora would be entitled to one half of his estate if Gerard has surviving descendants or all of the estate if he has no surviving descendants. 755 ILCS 5/2-1(a), (c) (West 2000). If Gerard dies testate, Debora has the right to renounce Gerard's will and claim her elective share of one third of the estate if Gerard leaves descendants or one half of the estate if he leaves no descendants. 755 ILCS 5/ 2-8(a) (West 2000).

We are cognizant, however, of the possible inconsistencies between Debora's rights in divorce and her spousal rights. If Gerard were to transfer all of his assets into the trust prior to his death such that none of the assets were to pass through probate, Debora could be undercompensated. *Johnson v. La Grange State Bank*, 73 Ill.2d 342, 358, 383 N.E.2d 185, 192 (1978) (property transferred to a revocable trust prior to death not subject to surviving spouse's renunciation unless transfer was "'colorable' or 'illusory' and tantamount to fraud"). We agree that this outcome would not reflect the partnership-based theory of marriage. *Centioli*, 335 Ill.App.3d at 656-57.

The Court then went on to contrast Illinois law with North Carolina. In North Carolina, the legislature has provided that a pending action for equitable distribution of marital assets does not abate upon the death of a party. N.C. Gen.Stat. § 50-20(l) (2001). Additionally, under the North Carolina intestacy and surviving spouse statutes, the court must consider property passing to a surviving spouse through equitable distribution in formulating a surviving spouse's elective share or intestate succession share. See N.C. Gen Stat. §§ 30-3.2(d), 30-3.3(a) (West 2001). That will not, however, help your clients.

Thus, if the parties' assets are in Joint Tenancy or your client controls the asset, such as with an IRA or a 401k, the answer is easy. Create a Living Trust and transfer any asset you can transfer to your client as trustee of the Living Trust. The client should consider changing the designated beneficiary of the life insurance policy, IRA or 401k to his Living Trust. Sometimes, depending upon the nature of the residuary beneficiaries of the Living Trust, there can be unintended income tax ramifications and so care should be exercised in this regard.

### **C. What Happens If Your Client Dies During The Dissolution**

If the assets are held in Joint Tenancy, or the other spouse controls the assets, and the client is suffering from a terminal condition and may not live until the divorce is final, the client needs to act. On the other hand, if your client controls the assets and is the healthy spouse, it is in the client's best interests to maintain the status quo.

If your client does not control the assets and is ill, your client is in a floundering boat with a iceberg dead ahead. The difficulty is well illustrated and explained by two recent cases: (1) *Copeland v. McLean*, 327 Ill.App.3d 855, 763 N.E.2d 941 (2002), and (2) *Marriage of Ingatius*, 338 Ill.App.3d 652 (2003).

1. Copeland. In *Copeland*, both parties had children from prior marriages. The wife suffered from cancer and wanted to benefit her children rather than her spouse. She sued for divorce, and an order was entered which restrained the parties from transferring any assets, which were primarily held in joint tenancy. The wife also asked that the court enter an order terminating the marriage so that she could "dispose of her just portion of the assets." The wife also made a new Will which benefited children from prior to the marriage. This Will would be of limited or no benefit, however, unless the marriage was terminated. If the marriage was not

terminated, the divorce action would immediately abate on her death and the husband would take the assets as the surviving joint tenant. He could also renounce her Will and take 1/3<sup>rd</sup> of her estate. The trial court found that the wife's terminal condition was "appropriate circumstances" to justify bifurcating the dissolution action and entered a final written order of dissolution, reserving all issues other than grounds. The wife died 15 days later.

The Appellate Court, relying on *Marriage of Blount*, 197 Ill.App.3d 816, 555 N.E.2d 114 (1990), affirmed the trial court's finding that the wife's terminal condition constituted appropriate circumstances for bifurcation. The Appellate Court particularly relied upon Section 401(b) of the Dissolution Act, which provides in part: "The death of a party subsequent to entry of a judgment for dissolution but before judgment on reserved issues shall not abate the proceedings."

The *Copeland* Court observed:

While this statute does not give a spouse's estate the right to pursue a divorce action, it does provide where a judgment of dissolution has been entered prior to death, the action will not instantly become a probate matter. See *In re Marriage of Davies*, 95 Ill.2d 474, 479-80, 448 N.E.2d 882, 884-85 (1983). Clearly, our legislature contemplated just the situation presented in the instant case, and it intended the desire of a party seeking a divorce not be frustrated by the simple fact of the party's death after the entry of the judgment of dissolution. *Copeland*, 327 Ill.App.3d at 867.

The trial court in *Copeland* could then go on to adjudicate a division of the marital property and the wife's Will could benefit her children.

2. Ignatius. The scene played out very differently in *Ignatius*. In *Ignatius*, the wife filed for divorce and the court entered a restraining order preventing any transfers of marital assets. The majority of the assets were held in Joint Tenancy between the parties. The wife suffered from bone cancer, and brought a motion asking that the restraining order be modified to allow her to sever the Joint Tenancies and make the ownership tenancy in common, so that a deceased spouse's estate, rather than the estranged spouse, would not receive the decedent's half of the asset.

So far as the record shows, the wife did not request bifurcation. The trial court entered an order that "all assets jointly held by the parties shall be transferred into tenancy in common interests as soon as practicable."

Two months later, the wife died. The husband moved to dismiss the dissolution proceeding. No judgment for dissolution had been entered.

The executor of the wife's estate sought leave to intervene in the dissolution. The trial court allowed the intervention. The wife had died before completing the transfer of joint assets

to tenancy in common. The executor asked the trial court to perform an accounting of the Joint Tenancy assets and divide them into tenancy in common. The trial court ruled that the restraining order survived the death of the wife and ordered the accounting.

The husband sought and the Second District allowed an interlocutory appeal. The Appellate Court ruled that the trial court's jurisdiction in dissolution proceedings is granted only by statute and that the trial court could not rely upon its general equity powers. 338 Ill.App.3d at 657; *In re Marriage of Burkhardt*, 267 Ill.App.3d 761, 765, 643 N.E.2d 268 (1994). The Appellate Court then ruled that the trial court's judgment of dissolution was essential to preclude the abatement of the proceeding.

Since the judgment was never entered, the entire action abated. Any assets remaining in Joint Tenancy were the husband's by operation of law. Any assets which were in tenancy in common passed through the wife's estate, where the husband could renounce her Will and take his share. The wife's estate plan plunged into the sea.

The Second District Appellate Court in *Ignatius* contrasted the status of the case with the decision in *Copeland*. In *Ignatius*, the executor was asking the trial court to carry on with the wife's wishes as if she were still alive. This, the Second District found, the court could not do. "Marital property cannot be divided in a proceeding that no longer exists". The Appellate Court then went on to reason that the restraining order terminated when the wife died and the dissolution action should have been dismissed.

These two cases demonstrate the critical need to seek bifurcation when a client is suffering from a terminal condition. The client's medical prognosis is often unclear. One client may be very ill but live long past the divorce, while another client who appears healthier may pass suddenly. The client needs to rely, to the best they can, on their physician's opinion. While the random possibility of sudden death from a random car accident should not justify bifurcation, any serious, terminal disease should qualify.

When faced with a terminal condition, the client should consider asking the court to enter an order terminating the marriage but reserving all other issues. I realize that the court is probably not going to like this idea, and that bifurcation may increase the amount of work, but bifurcation is a just way to avoid having your client fall into the sea between the two ships of common law and marital property rights.