Legally Speaking

FALL NEWSLETTER 2010

Schiller DuCanto & Fleck LLP

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Divorce among professional women

A recent study found that professional women are three times as likely to get divorced than their stay-at-home counterparts. Why this phenomenon exists is a mystery. One possibility is that because of their status in their workplace, career women are less likely to remain in an untenable situation at home. Another possibility is that a financially independent woman is in a better position to leave if she is unhappy. Of course, there is also the inherent tension relating to division of labor in dual income families that may lead to dissatisfaction in the marriage.

Not only are professional women more likely to get divorced, but the number of women paying alimony has almost doubled since the late 90's. This is due to the fact one third of all married women are the primary breadwinners. Their status as the primary breadwinner exposes them to having to support a financially dependent spouse after the marriage is dissolved through the use of alimony, known in Illinois as maintenance.

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Moreover, working women are particularly vulnerable to claims that they are not the primary caretaker of the children (and should not be awarded custody of the children), while in many of the cases, they are, indeed, the ones who are taking care of the kids and managing the household. *How does a professional woman protect herself from such claims in the event of divorce?*

Ask for a premarital agreement. In recent years, there has been a marked increase in the number of woman seeking premarital agrements, and with good reason. Illinois law permits a party to waive maintenance in a properly formalized premarital agreement. A court can only invalidate such a waiver at the time of divorce if its enforcement would create an undue hardship and if the circumstances that created the hardship were unforeseeable at the time the agreement was executed. A good premarital agreement will expressly set forth a litany of circumstances that would be deemed foreseeable, such as cessation of employment, birth of children, sickness or disability.

> "IF IT IS CLEAR THAT THE MARRIAGE IS IRRETIEVABLY BROKEN, IT MAY BE BETTER TO GET OUT QUICKLY."

Further, while a premarital agreement cannot bind a court with respect to child related issues, there is no reason it cannot be used to demonstrate the parties' intent. An agreement which states that the parties intend that the woman will continue to work, but will also serve as the primary caretaker of the children, may be used as evidence in the event her primary caretaker status is later questioned.

Cut your losses. The longer the marriage, the greater the maintenance exposure. Typically, maintenance is not awarded in very short term marriages, but, depending on the circumstances, can be awarded permanently in marriages of long duration. Every additional year of marriage may result in a longer maintenance award. While there may be many good reasons to try to repair a marriage, if it is clear that the marriage is irretrievably broken, it may be better to get out quickly if you are vulnerable to a maintenance claim.

Encourage your spouse to find a job. Illinois divorce law favors the status quo.

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In this issue

Congratulations Honorable Celia G. Gamrath

Schiller DuCanto & Fleck LLP congratulates former partner Celia G. Gamrath on her Appointment as Judge of the Circuit Court of Cook County.

Carlton Marcyan Running for Lake County Board

Carlton R. Marcyan is running for the Lake County Board in District 23 encompassing Highland Park, Highwood, Ft. Sheridan and southeast Lake Forest.

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Imputed income for support awards

When a child support obligor is unemployed or underemployed, the courts may use the imputation of income as an effective method of determining the appropriate support obligation. Before the court can impute income to the unemployed obligor, however, it must find that at least one of the requisite conditions exist specifically: (1) the obligor is voluntarily unemployed; (2) he/she is attempting to evade a support obligation; or (3) he/she has unreasonably failed to take advantage of employment opportunity. The critical consideration in determining if an employment change was made in good faith is whether the change was prompted by a desire to evade support responsibilities.

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A non-custodial parent has a duty to contribute to the support of their child and therefore cannot become voluntarily unemployed. In *In re Marriage of Adams*, 348 Ill.App.3d 340, 809 N.E.2d 246 (3rd Dist. 2004), a support obligor quit his job and moved to Germany without first obtaining employment. The court imputed income to the obligor based on findings that he was voluntarily unemployed and his prior income reflected his earning potential.

The court will also require that an obligor take advantage of any reasonable employment opportunities. In *In re Marriage of Hubbs* 363 Ill.App.3d 696, 843 N.E.2d 478 (5th Dist. 2006), the appellate court upheld a support award based on imputed income because of the obligor's rejection of a job opportunity which would have paid him a salary commensurate with that earned during the marriage.

When imputing income, the court may consider averaging past earnings for purposes of making a support award. In *In re Marriage of Nelson* 297 Ill.App.3d 651, 698 N.E.2d 1084 (3rd Dist. 1998), the court used an average income of the obligor's prior three years of employment to determine net income.

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The use of income information dating back too many years, however, may be an abuse of discretion. In *In re Marriage of Schroeder* 215 Ill. App.3d 156, 574 N.E.2d 834 (4th Dist. 1991), the court held that data six years old did not reflect the current circumstances of the parties which would enable the court to comport with (or deviate from) the child support guidelines.

Divorce among professional women *(continued from cover)*

If one spouse was not working during the marriage, it is unlikely the court would require them to seek employment upon a filing for divorce. Similarly, if a party is working during the marriage, the court will not condone voluntary underemployment once a case has been filed. Even in those situations where one's spouse is unemployed, it may be a good idea to have full time child care to help mitigate against later claims that one's spouse is the primary caretaker.

Protect Non-Marital Assets. Many professional women have accumulated assets prior to marriage. Property acquired before a marriage is considered non-marital property and will be awarded solely to the owner in the event of a divorce. It is critical, however, to keep premarital property segregated and to refrain from making additions during the marriage in order to avoid a later claim that the property has evolved into marital property. Also, maintenance can be paid from marital or non-marital property so segregation is not a total protection against potential claims in the event of a divorce.

Hire a matrimonial lawyer with experience representing professional women. The custody and financial issues confronting a professional woman are unique and complex. It is important to seek an attorney with experience in this arena so that your case is presented in the best light leading to the most successful possible outcome.

Invalidating a Prenuptial Agreement

When a party desires to have a prenuptial agreement held invalid under Illinois law, the first aspect that must be considered is the date of execution. Different standards will apply depending on when the parties entered into the agreement. The principles of the Illinois Uniform Premarital Agreement Act ("IUPAA") govern any agreement executed on or after January 1, 1990, while common law controls prior agreements.

A prenuptial agreement signed prior to 1990 will be upheld so long as: (i) it does not create an unforeseen state of poverty; (ii) the parties had full knowledge of the other's finances prior to signing; (iii) it was entered into voluntarily; (iv) and the agreement is fair and reasonable at the time of enforcement of the agreement. For premarital agreements signed after 1989 under the IUPAA, the fair and reasonable standard is no longer applied. A party seeking to invalidate a post-Act agreement must only prove that at the time of execution, the agreement was unconscionable that the agreement was improvident, totally one-sided, or oppressive. Thus, the enforcement of a prenuptial agreement may hinge on its date of execution.

> "Enforcement of a prenuptial agreement may hinge on its date of execution"

In addition to the higher standard for unconscionability under the IUPPA, the Act further provides that proving the terms of an agreement are unconscionable is not enough, on its own, to invalidate an agreement. A movant must also prove that there was inadequate financial disclosure provided prior to the execution of the agreement. In order to meet this requirement, the movant must show that he or she was not provided with a fair and reasonable financial disclosure, did not voluntarily waive in writing the right to disclosure beyond that which was provided, and did not have or reasonably could have had adequate knowledge of the other's finances. Thus, the IUPAA is clear that even unconscionable agreements are not to be automatically invalidated. Under the Act, a party who knowingly enters into an unconscionable agreement will be bound by the bargain he or she made.

The provisions under the IUPAA are more stringent than common law, since one objective of the Act is to make challenges to the validity of agreements more difficult. Despite the brevity of the IUPAA, the change to the standard of enforceability significantly reduces the chances of a party being able to invalidate an agreement.

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Schiller DuCanto & Fleck LLP

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IN THE NEWS

Deborah A. Carder was chosen by the Law Bulletin Publishing Company as one of the 2010 "40 Attorneys Under 40 In Illinois to Watch". Eight other Schiller DuCanto & Fleck LLP attorneys have received this distinction over the past ten years.

Jay P. Dahlin has been appointed to the Board of Directors for the Boys & Girls Club of Chicago. Mr. Dahlin also had an article appear in the Spring 2010 SRR Journal published by Stout Risius Ross discussing 529 educational accounts.

Jason N. Sposeep completed the American Bar Association Family Law Trial Advocacy Institute in Denver, CO. He was also elected as an officer to the Board of Directors of the Collaborative Law Institute of Illinois.

Stewart J. Auslander has been added to the list of approved Child Representatives in both Cook and Lake Counties.

Dorothy A. Voigt joined the CBA Chorus and is one of 100 voices singing at the John Paul Stevens Gala Award Dinner on September 15, 2010.

We Welcome Patrick Kalscheur & Shannon Burke as New Associates of the Firm

Patrick M. Kalscheur

Shannon R. Burke

Dialogue on Family Law Issues Sparks Collaboration Among Professionals

The Schiller DuCanto & Fleck "Family & Future" forum provided an opportunity for mental health professionals, the religious community and lawyers in Lake County to develop a model for working collaboratively.

The well-being of families on the "North Shore/ Lake County" before, during, and after a divorce was the primary focus of an interactive discussion by members of the legal, mental health, and faith communities on June 22nd in Lake Forest. Sponsored by Schiller DuCanto & Fleck LLP, the group raised some of the most critical challenges facing families going through divorce today.

"Education is key," said Jodi Sheffield of Transition in Life Consultants in Winnetka. "Most people base the divorce process on misconceptions. They don't understand their options," she added.

"Traditional divorce matters may end up in the courts with litigation," explained Charles Fleck, a Partner at Schiller DuCanto & Fleck LLP. A former Presiding Judge of the Domestic Relations Division of the Circuit Court of Cook County, Fleck acknowledged, that while there is a place for litigation in the divorce process, over the years processes such as mediation and collaborative law have provided more family friendly outcomes. "Both these processes are designed around a model where the legal community and mental health professionals work together for the family," he said, adding that "through cooperative efforts a paradigm shift may occur bringing even better outcomes for divorcing families."

Jane Waller, a former Presiding Judge of the Lake County Family Court, who joined Schiller DuCanto & Fleck last year as a Partner to focus on mediation as a method for divorcing families, agreed. "As family law professionals we are in the middle of the human condition, by working cooperatively we are in the position of helping families through one of the most stressful times in their lives," she added.

In addition to education on the divorce process options, the group agreed that divorce can be extremely difficult for some people and mental health support is essential. "All too often, parents going through divorce are not emotionally available to children. It is imperative that we try to develop solutions for them," noted James Galvin, founding member of the Collaborative Law Institute of Illinois, and a partner at Schiller DuCanto & Fleck." "A more therapeutic process such as mediation or collaborative law can produce an outcome of better emotional health for families," he added.

In concluding the forum, Carlton Marcyan, a Partner in Schiller DuCanto & Fleck LLP, stressed the firm's commitment to build and support a community based interprofessional network in order to promote ongoing dialogue that will best serve families on the North Shore before, during and after divorce.

UPCOMING EVENTS

Family & Future Breakfast
Presented by Schiller DuCanto & Fleck LLP

Wednesday, October 20, 2010
7:30-9:30 a.m.

The Grille on Laurel
181 East Laurel Ave., Lake Forest, IL

Couture & Cocktails
Presented by the Women's Network of Schiller DuCanto & Fleck LLP

Thursday, October 28, 2010
5:30-7:00 p.m.

Barneys New York
15 East Oak Street, Chicago, IL

Expert Witness Bootcamp
Sponsored by the American Institute for Expert Witness Education

Arnold B. Stein, Guest Speaker
Monday, November 8, 2010

Hotel Monaco
225 North Wabash Ave., Chicago, IL

Karen Pinkert-Lieb, Editor *David Young, Layout/Design*

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