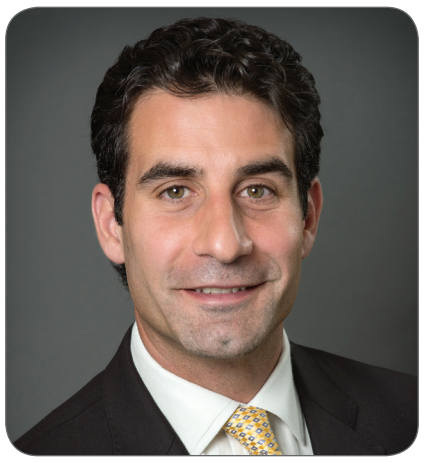
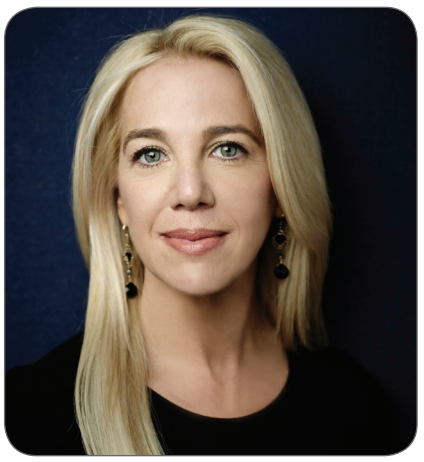
FAMILY LAW: The Executive Divorce

Strategies, Advice for When Marital Partners Split



JOHN M. D'ARCO
Partner
Beermann, Pritikin, Mirabelli, Swerdlove LLP

BEERMANN
BEERMANN PRITIKIN MIRABELLI SWERDLOVE LLP
FAMILY LAW. BUSINESS LAW.
ONE FIRM THAT DELIVERS BOTH.



MARCELLE KOTT
Principal
Berger Schatz

Berger Schatz
Matrimonial and Family Law Attorneys

JOSHUA T. FRIEDMAN
Partner
Davis Friedman

DAVIS | FRIEDMAN

ARNOLD B. STEIN
Managing Partner
Schiller DuCanto & Fleck LLP

SCHILLER DUCANTO & FLECK LLP

With an estimated half of all marriages ending in divorce, Crain's Custom Media turned to four prominent Chicago-based family lawyers to get their thoughts about executive divorce in Illinois, and how high-net-worth individuals can best protect themselves and their families.

John M. D'Arco is a partner at Beermann Pritikin Mirabelli Swerdlove LLP, with offices in Chicago and Bannockburn. He's recognized for handling the most complex and contentious family law disputes in divorce, custody, complex division of assets, child and spousal support, paternity and business valuation matters. He's also known for his business and financial acumen, keen sense of the law and experience litigating and negotiating countless high-stakes family law matters. He's been repeatedly recognized by Leading Lawyers Network and Super Lawyers Magazine, and is named among the Best Lawyers in America.

Joshua T. Friedman is a partner at Davis Friedman, a Chicago-based firm exclusively practicing family law since 1946. He has more than 22 years of experience representing clients in complex matters. As a divorce lawyer, he looks first at his clients' needs and values before exploring the financial legalities of their case. He's an author and frequent lecturer on family law issues including business valuations, maintenance awards and prenuptial agreements. He holds a bachelor's degree from Miami University (Ohio) and a law degree from Washington University Law School.

Marcelle (Marcy) Kott is a principal with Berger Schatz, a matrimonial and family law firm with offices in Chicago and Lake Forest. She has more than 20 years of experience as a trial attorney and negotiator, and is a certified divorce mediator and Fellow of the Collaborative Law Institute of Illinois. In 2015, she was recognized by Leading Lawyers as one of the top 10 adoption attorneys and top 100 women attorneys in Illinois. She holds a bachelor's degree from Indiana University and a law degree from John Marshall Law School.

Arnold B. Stein is the managing partner of Schiller DuCanto & Fleck LLP, a family law firm with offices in Chicago, Lake Forest and Wheaton. He represents closely held business owners and their spouses in family law matters, including cases in jurisdictions outside of Illinois. He's a Phi Beta Kappa graduate of the University of Illinois, and received his law degree from Northwestern University Law School. He's listed in the Who's Who of American Lawyers, and since 1991 has been named among the Best Lawyers in America.

How should people go about selecting a divorce attorney?

MARCELLE KOTT: Look for a larger firm that limits its practice to matrimonial and family law. Attorneys, accountants and other professionals are good referral sources. Friends and acquaintances who've been through divorce may also give useful referrals, but it's important to remember that what worked for your friend may not work for you. Research any attorney you decide to consult before you meet with that person, and it's a good idea to consult with more than one attorney before hiring anyone. The best "fit" is someone who understands you and your needs, who communicates clearly in a way that makes you comfortable, and who understands and can achieve your goals.

JOHN D'ARCO: If you're a business owner, make sure that the attorney has experience with business valuations and the impact personal goodwill has on the value of a business. To the extent that the goodwill of the business is personal to the owner, it should not be considered an asset of the business when determining the value of a marital business. Additionally, because the owner of a private and closely held company has no access to an active market to sell or transfer their business interest, the attorney should ensure that a proper discount is applied to the value of the business for lack of marketability. Finally, the attorney should be knowledgeable about the issues associated with the classification of assets in a divorce to ensure that their client's non-marital assets are protected from any claim by their spouse.

THE LAW ON PRENUPS

"Illinois has adopted legislation saying that premarital agreements are valid and enforceable even in situations where the terms appear to be grossly unfair."

-ARNOLD B. STEIN, SCHILLER DUCANTO & FLECK LLP

How can attorneys help clients streamline the divorce process?

D'ARCO: By educating their clients on the law, and focusing on those issues that can be resolved through the divorce process. Attorneys should prepare their clients by giving them a preview of what to expect from the other side, and the court throughout the proceedings. This will go a long way in helping the client handle potentially stressful situations that may arise during the divorce process.

KOTT: The best divorce attorneys see the level of conflict, assess the risks and benefits of the client's stated goals, and identify the options for resolution that are most likely to achieve those goals. Their job is to help clients see the "big picture," beyond what they're experiencing in the moment. The family law practitioner's most important role is to advise the client, help them identify their goals, and work to obtain the best possible outcome based on their needs.

What are the advantages and disadvantages of alternative dispute resolution, such as mediation and collaborative law?

JOSHUA FRIEDMAN: ADR frequently results in creative solutions, longer-lasting outcomes and greater satisfaction. It's generally confidential, less formal and less stressful than traditional court proceedings, and often saves money and accelerates the settlement process. It's particularly useful when parents want to preserve their relationship so they can jointly raise their children. Mediation is effective when emotions or unrealistic expectations impede a resolution, but may not be effective if one person has a significant financial or emotional advantage. A good mediator listens to the couple and their attorneys and helps them communicate in a productive and nondestructive manner. Arbitration is better for cases where the divorcing couple wants another person to decide the outcome of their dispute while avoiding the formality, time and expense of a trial. It can also be good for complex matters where the parties want a decision-maker with training or experience in the subject matter of the dispute. In binding arbitration, though, an arbitrator's award generally cannot be appealed, so the parties risk being bound by an unfavorable result.

KOTT: For ADR to be successful, both parties must be realistic about their options, and the parties must be able to accept an outcome that does not feel like "winning." Divorcing partners will sometimes agree to mediation with one of the parties expecting to persuade the mediator that the other is "wrong," only to be frustrated when the mediator remains non-judgmental. At other times, mediation can end up replicating a dysfunctional marital dynamic. Anyone going through a divorce must understand that the goal of ADR is to reach an agreement without making any determination on who is "right." ADR can be a useful tool, but anyone using it should also have a competent, trusted family law attorney to help protect his or her rights.

D'ARCO: One of the advantages of mediation is the flexibility it provides to the parties and their attorneys when trying to resolve disputes. Mediators typically have more time to dedicate to the parties versus a judge sitting in the domestic relations division. The mediation process is most effective when each side has all the financial information and the mediator has the knowledge and experience to understand the range of possible outcomes. Therefore, I'll often select a mediator who is a former family law judge. Mediation is most effective when the parties and their attorneys are participating in the process. One of the disadvantages of mediation is that it is not binding, and parties can back out of their agreement before it is approved by the court.

What's the process for equitable division of investments, stock options and retirement plans in a divorce?

D'ARCO: It depends on whether the assets are marital or non-marital. Retirement plans, unlike other assets, can have both a non-marital and marital component. Stock options are not always divided equally. The court will take into consideration the vesting schedule; whether the stock option award was for past, present, or future efforts; whether it was to promote future performance or employment, or any combination thereof. The court also considers the length of time from the grant of the option to the time the option is exercisable. Therefore, the person who owns the stock option may be entitled to a greater percentage if it's divided.

PROTECT ESTATE PLANS

"A prenuptial agreement can prevent a spouse from overturning the estate plan, even making sure a specific heirloom remains with the original owner's family."

-JOSHUA T. FRIEDMAN, DAVIS FRIEDMAN

How is the division of a closely held business or professional practice determined in a divorce?

ARNOLD STEIN: If the interest involved is considered marital property, closely held business interests and interests in professional practices are subject to equitable distribution. The first step is to determine the fair market value of the interest under review. Under current law, the court hearing a matrimonial dispute has wide discretion in selecting the valuation data to be used. The standard is fair market value: what a willing buyer will pay to a willing seller, both being fully informed of all relevant facts and neither being under a compulsion or duress to buy or sell. Once the value has been established, it's reflected on the balance sheet of the parties, subject to division. In most instances, the asset will be awarded to the title-owning spouse, who will be required to buy out the other spouse. This is typically achieved by awarding other assets in the marital estate until parity is achieved. In estates where the closely held business interest represents a significant disproportionate percentage of the estate, a payment over time secured by the asset is frequently used.

D'ARCO: The value should be determined by a valuation expert. An attorney representing a business owner should ensure that proper consideration is given for personal goodwill and discounts are made within the valuation report for lack of marketability and minority interests. There are many situations where a closely held private company could have little to no value due to the personal goodwill attributable to the owner. Once a value is determined, any division of the marital estate should protect the business owner's ability to continue to operate the business or professional practice. To the extent that the business owner can show that the business was started prior to the marriage, or acquired during the marriage with use of the business owner's non-marital property, the business should be classified as non-marital property and therefore awarded to the business owner free and clear of any claim by the spouse.

FRIEDMAN: Primary considerations should be the fair market value of the owner-spouse's interest and if the case facts favor an in-kind division or a buy-out. In-kind division can be complicated by legal restrictions or prohibitions on sale or transfer of closely held businesses. Likewise, statutory law may preclude ownership transfer of a professional practice to the non-owner spouse. For instance, only a licensed veterinarian can own a pet clinic. One alternative to in-kind transfer is buy-out: cash payments or an offset of other marital property for the other spouse's share of a martial business. A buy-out, however, may be impracticable because of valuation issues, including the fact that the costs of valuation may exceed the value of the business interest in question. Another alternative is for the owner spouse to retain legal ownership of the entire business interest, holding the other spouse's share in the capacity of a constructive trustee for the life of the business. This requires careful consideration of future taxes and the legal burden of the owner-spouse to act on behalf of the non-owner spouse.

What are the main factors a court analyzes in determining a maintenance award for the spouse of a high-income earner?

STEIN: Illinois law specifies maintenance for families with annual combined incomes under $250,000. For families above that level, the court has wide discretion regarding the amount and duration of maintenance. The factors most heavily considered are length of the marriage, standard of living enjoyed during the marriage, future ability of each spouse to acquire assets and income, ages of the parties, and income and property of each. Maintenance is based on income from all sources, including non-marital income. For marriages of 20 years or more, the trend is to award indefinite (permanent) maintenance.

FOCUS ON SPOUSE NEEDS

"It's critical for an attorney representing a high-income earner to focus the Court's attention on the needs of the spouse versus the income of the client."

-JOHN M. D'ARCO, BEERMANN, PRITIKIN, MIRABELLI, SWERDLOVE, LLP

KOTT: Where the supporting spouse is a "high-income earner," courts still have leeway to set maintenance awards based on a variety of statutory factors. The most important is the marital standard of living. Where sufficient income's available, the law presumes that both parties are entitled to maintain their "marital lifestyle" after the divorce. However, determining the actual cost of that lifestyle is a fact-intensive process of analyzing the income, the expenses and the spending habits of both spouses dating back years. In a high-income situation, this can become one of the most complex issues presented to the court.

FRIEDMAN: A significant amount of time will be devoted to assigning a dollar amount to each spouse's financial needs, as well as challenging the accuracy of the other party's numbers. A common misconception is that a maintenance claim will be rejected if the maintenance claimant receives a substantial property settlement. A court may not require the maintenance claimant to liquidate assets to meet financial needs if the other spouse has income sufficient to support his or her own needs while contributing to the needs of the maintenance claimant.

Other common factors in high-income cases include any impairment of the maintenance claimant's earning capacity due to devoting time to domestic duties or having foregone or delayed education or career opportunities; and any parental responsibilities for minor children that affect the claimant's ability to contribute to his or her own support through appropriate employment.

D'ARCO: It's critical for an attorney representing a high-income earner to focus the Court's attention on the needs of the spouse versus the income of the client. Although the guidelines in the maintenance statute don't apply to high-income earners, many courts look to the guidelines when determining the amount of maintenance to be paid. Therefore, it's important to educate the Court on the standard of living of the family and particularly the needs of the spouse seeking maintenance to avoid a maintenance award that is a windfall to that spouse.

Do heterosexual and same-sex couples in a common-law marriage have any rights to maintenance, property or retirement benefits if the relationship ends?

STEIN: In Illinois, couples in common-law marriage have no rights to maintenance, property or retirement benefits if the relationship ends. The seminal case on this issue is *Hewitt v. Hewitt*, a 1970s decision that clearly rejected common-law marriage. *Hewitt* remained unchallenged until recently when an appellate court in the case of *Blumenthal v. Brewer* rendered a contrary decision which resulted in that case being heard by the Illinois Supreme Court. Although many family law practitioners felt that the Supreme Court would use this opportunity to reverse *Hewitt*, the court did not do so and *Hewitt* remains a good law. Thus, an Illinois court will not recognize common-law relationships between heterosexual and same-sex couples, and will not divide or otherwise deal with any property acquired by the parties during their common-law relationship, or award maintenance. It's significant to note, however, that the Supreme Court decision in *Blumenthal* appears to contain an exception where the conflict between the parties involves property owned by one of them before the relationship as opposed to property acquired during the relationship. This distinction is likely to be the subject of future litigation.

In what circumstances is a prenuptial agreement advisable? What are the requirements for finding premarital agreements valid?

KOTT: Prenuptial agreements are advisable in two situations: 1) when one party has a significant premarital estate or comes from a family with a business or assets that need protection; or 2) in a second marriage where one or both spouses have families from previous relationships. Courts generally presume that premarital agreements are enforceable. However, the court can invalidate an agreement if the individuals failed to execute the agreement voluntarily, or if the agreement is unconscionable and one party either failed to disclose their property and financial obligations, or failed to waive the right to such disclosure in writing. A court may also nullify a provision limiting or eliminating a spouse's right to maintenance, if enforcement would cause an undue hardship in light of circumstances that were not foreseeable at the time the agreement was signed. To protect the validity of a premarital agreement, they should be negotiated by parties using experienced matrimonial attorneys.

SEEK MULTIPLE REFERRALS

"Friends and acquaintances who've been through divorce may give useful referrals, but it's important to remember that what worked for your friend may not work for you."

MARCELLE KOTT, BERGER SCHATZ

STEIN: Prenuptial agreements are also advisable in first marriages where one or both individuals have sizable premarital estates held in trusts created by their parents or grandparents. Illinois has adopted legislation saying that premarital agreements are valid and enforceable even in situations where the terms appear to be grossly unfair. An additional point: An agreement may be valid and enforceable but still subject to attack if its terms are ambiguous and subject to conflicting interpretation.

FRIEDMAN: A well-prepared prenuptial agreement can shorten the divorce process, save money on attorneys' fees and costs, and help the parties—rather than the courts—take control. If they remarry, a prenuptial agreement can ensure their assets are distributed per their wishes, so neither their first nor their new family is cut off. If they're a business owner with no prenuptial agreement, their spouse could have a valid financial claim against the business, or could even become an unwanted partner. A prenuptial agreement can prevent a spouse from overturning the estate plan, even making sure a specific heirloom remains with the original owner's family.

D'ARCO: Every business owner should have a prenuptial agreement. The discovery process within a dissolution of marriage proceeding can be time-consuming and costly to a business and the owner. A prenuptial agreement can eliminate the need for discovery and the valuation of the business in a divorce. Prenuptial agreements are particularly helpful in insulating the business and other owners within the business from the divorce process. For a family business, they can ensure that ownership remains within the family and not with a divorced spouse.

How can post-nuptial agreements provide protection for entrepreneurs, business owners or other individuals who might experience significant increases in their net worth while also experiencing marital problems?

FRIEDMAN: Under Illinois law, all property acquired during the marriage is presumed to be marital. Marital property includes, for example, income from employment, any new business started during the marriage, or any contractual rights to acquire equity in a business through stock options or restricted stock grants. Marital property continues to accrue until the parties' divorce, at which time it is subject to an equitable—not necessarily "equal"—division between spouses. A valid post-nuptial agreement allows spouses to decide in advance what will constitute marital and non-marital property, and how that property will be allocated if a divorce occurs. They can agree, for example, to halt the accrual of additional marital property immediately or at any other time prior to the completion of their divorce. A post-nuptial agreement may also address future claims to maintenance, although Illinois law is less clear on the enforceability of that provision.

D'ARCO: Post-nuptial agreements provide many of the same protections as a prenuptial agreement. Entrepreneurs, business owners and others can protect their businesses and investments by limiting the amount their spouse would receive in the event of a divorce. Post-nuptial agreements also eliminate much of the time and expense required to produce business and financial records during a divorce. With a post-nuptial agreement, the entrepreneur or business owner can have the freedom to take on new projects and business opportunities without having a concern for how those new opportunities may be adversely impacted by a divorce. Like prenuptial agreements, post-nuptial agreements cannot determine the parties' rights with respect to their children or child support.