# ILLINOIS

## Trends and Developments

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### Introduction

During the past few years, family law practitioners have noticed significant shifts in matrimonial, divorce, and parentage cases – with trends revealing a rise in premarital agreements among younger generations, more equal parenting time, and how the Tax Cut and Jobs Act of 2017 has affected financials. One of the most noteworthy changes, however, is how practitioners are embracing ADR options and utilising technology to resolve family law disputes.

### Premarital Agreements

A premarital agreement is a contract entered into by two people before they get married. Generally speaking, a premarital agreement sets forth the rules by which the parties are agreeing to be bound with regard to their property and the obligations they have to each other when the marriage ends either by divorce or by the death of one of the parties. The provisions in a premarital agreement differ from the statutory provisions in respect of both divorce (Illinois Marriage and Dissolution of Marriage Act, 750 ILCS 5/) and death (755 ILCS 5/Probate Act of 1975).

In Illinois, premarital agreements are governed by the Illinois Uniform Premarital Agreement Act (750 ILCS 10/1-11). Unless otherwise agreed upon by the parties by an amendment or revocation, the premarital agreement will remain valid for the entire duration of the marriage. In order to be enforceable, premarital agreements must be in writing and signed by both parties. Although a premarital agreement can include provisions regarding classification of assets/property as either marital or non-marital in the event of a divorce and can also address a spouse's entitlement to receive or pay maintenance in the event of a divorce, it cannot address any issues regarding child support and allocation of parenting time/responsibilities. Moreover, the terms of a premarital agreement take precedence over a will or surviving spouse's award and the surviving spouse's statutory right to renounce the will.

Traditionally, premarital agreements were utilised primarily by parties entering into second (or third) marriages – often in situations where:

- a party hoped to preserve their assets for their children from a prior marriage; or
- wealthy families were trying to protect and keep their wealth within the family.

Given such limited circumstances, premarital agreements were historically viewed by many as either unnecessary or taboo and, as such, they had a negative implication. In recent times, however, premarital agreements have undergone a massive rebrand. Now the benefits of a premarital agreement are being widely recognised and utilised by the younger generation. As a result, younger couples have frequently been entering into premarital agreements even before their first marriages and in situations where there is no family wealth.

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***Why are younger people turning to premarital agreements?***

The past decade has ushered in an era of increased financial literacy due in large part to social media and self-help books. The boom of social media platforms such as TikTok and Instagram have completely changed the culture. Moreover, there are thousands of social media accounts and podcasts dedicated to teaching young people the importance of short-term investing, paying off credit card and student loan debt, contributing to retirement accounts in their early 20s, and more.

With overwhelming access to free and low-cost financial advice, financial planning and investment advice is more popular and accessible to young people than ever before and premarital agreements are often promoted to young people as a way to protect assets and avoid needless incurrence of debt. Premarital agreements have transformed from being something perceived as “taboo” – and useful only to older and/or extremely wealthy couples - into something that is both socially acceptable and increasingly common in the younger generation, to whom such agreements symbolise self-preservation, empowerment, and financial freedom.

In the past, substantial investment portfolios and sizeable retirement accounts were not accumulated until people were further advanced in their careers and well into their marriages. Today, many young people are accumulating wealth at an earlier age. As such, the demand for premarital agreements parallels this increase and a premarital agreement can be a good idea for couples of all ages - not merely those who are remarrying or generationally wealthy.

The COVID-19 pandemic may also have something to do with the increase in popularity of premarital agreements. Many young couples delayed their weddings, spent an inordinate amount of time together, and had plenty of time to consider their financial futures. Perhaps the combination of a global pandemic, the current financial crisis and the increased cost of living is inevitably creating an increased desire for control in the face of chaos - especially for millennials, who crave and appreciate financial stability. Premarital agreements provide young newlyweds with a sense of control and security over their future finances.

Prior to the enactment of the Uniform Illinois Premarital Agreement Act in 1990, premarital agreements were often vacated on grounds of duress, coercion and unconscionability. Today, that is generally no longer the case – as evidenced by recent case law such as In re Marriage of Woodrum (2018 IL App (3d) 170369) and In re Marriage of Solano (2019 IL App (2d) 18011), in which premarital agreements were upheld despite incomplete financial disclosure and allegedly insufficient legal representation. As long as they are thoughtfully drafted, provide sufficient financial disclosure and are conscionable, premarital agreements are providing long-term security for married couples of all ages.

**Parenting Time and Decision-Making for Minor Children**

On the whole, the US has witnessed a shift away from the “traditional family” construct of one parent as homemaker and one parent as breadwinner throughout past decades. While presumptions about parenting schedules for children post-divorce have been slower to change with the times, at this point, there is clearly a strong trend in favour of more equal (or close to equal) parenting time.

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Illinois' most recent child support maintenance/alimony guidelines (750 ILCS 5/504 and 505) now impute income to parents even if they are or have been historically unemployed, thereby setting a clear expectation and inducement to employment for all parties - irrespective of the parties' employment or roles prior to the divorce. Where there are two full-time working parents in a household, as in the majority of American families, many courts will likely consider close to equal parenting time under the existing "best interest" standards - without the need to create presumptions for same. However, not all jobs are created equal in terms of the availability they provide parents to care for young children. Therefore, courts will continue to need to look at the specific facts of each case when awarding parenting time.

In the past several years, multiple attempts have been made in the Illinois legislature (and legislatures around the country) to enact legislation that would create a presumption in favour of equal decision-making and equal parenting time, thereby effectively limiting the discretion of the trial court to weigh the multitude of "best interests" factors in determining a custodial structure and schedule that is best for each family. These legislative initiatives, which have been largely driven by "fathers' rights" lobbyists and related organisations, have thus far been defeated - see, for example, 2021's Illinois House Bill 620 and currently 2023's Illinois House Bill 41. However, these efforts seem to be gaining steam across the country despite vocal opposition from a wide variety of interest groups.

The legislation being proposed in Illinois (and similar legislation either passed or proposed in many other states) essentially does the following:

- creates a rebuttable presumption that equal parental involvement is in the best interests of the children;
- creates a presumption that both parents should have equal input and decision-making power (for major decisions regarding education, health, etc);
- abolishes one of the statutory factors a court has historically been required to consider when allocating parenting time - ie, the caretaking roles of both parties within the two-year timeframe prior to the filing of the divorce case (or parenting allocation petition).

The third above-mentioned provision is the most concerning, in that it limits the court's ability to give weight to the status quo that children have experienced in the recent past leading up to the divorce. This can lead to outcomes that are likely to be more disruptive and destabilising for children.

A *Washington Post* article of 18 January 2022 ("Who Gets the Child?" by Sushma Subramanian) describes the recent national debate surrounding proposed legislation in several states that is similar to the legislation being proposed in Illinois. On one side of the issue are fathers' rights advocates, now lobbying under the neutral moniker "National Parents Organization", who argue that mother-centered custody presumptions are outdated and firmly rooted in gender discrimination. The argument is also being made that the significant discretion judges are given to decide custody cases is dangerous and makes consistent and predictable outcomes impossible – thus leading to more litigation.

The contrary view is that a court should be able to take into consideration the unique attributes of each family when deciding what parenting time allocation works best for the children. Even

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when both parents work full time, for example, their respective availability to the children is very different if one works from home and the other has a long commute or frequently travels for business. In addition, equal parenting schedules (with the exception of "week-on/week-off" schedules) require a lot of transitions between the parents' homes. Not all children are capable of frequent transitions – particularly children with learning limitations or special needs.

Although equal parenting time is workable for many families post-divorce, a cookie-cutter approach to the allocation of parenting time and decision-making is not in the best interests of children. The most important things to get right in any divorce are the aspects of the decisions that directly impact children.

**Financial Trends in Family Law**

One of the bedrocks of family law for more than 40 years was the alimony or separate maintenance deduction. This essentially allowed for the transfer of income from the payor spouse (who was generally in the higher tax bracket) to the recipient spouse (who was generally in the lower tax bracket), thereby maximising the dollars available for the family's support. This tax arbitrage advantage was eliminated by the Tax Cut and Jobs Act of 2017, which repealed Section 215 and Section 71 of the Internal Revenue Code (IRC) - allowing for the alimony deduction and inclusion respectively – for any divorce or separation instrument executed after 31 December 2018.

This momentous change in the law left practitioners grappling with the conundrum of how to shift the taxable dollars between parties, so that the family could preserve funds that would otherwise be paid to the Internal Revenue Service. In other words, given that those dollars would be tax-deductible, what mechanism could be used to shift income between the parties so that the payor could afford to pay more support to the recipient?

The answer was revealed in another section of the tax code. Outside of divorce, retirement assets are protected against creditors and cannot be assigned to any third parties. Section 414 of the IRC, however, permits benefits from retirement plans to be divided between spouses as marital property or community property in dissolution of marriage cases. Issued by a state court, a qualified domestic relations order (QDRO) assigns an interest in a retirement plan or pension to a former spouse, who is known as the "alternate payee". A QDRO only applies to a retirement vehicle that is governed by the Employee Income Security Act (ERISA) and does not apply to Individual Retirement Accounts. One of the significant benefits of a QDRO is that even though there is normally an early withdrawal penalty for funds withdrawn from a retirement account if the recipient is under the age of 59½, assets distributed via a QDRO are exempt from this excise tax.

Using this divorce planning technique, a maintenance payor contributes to an ERISA-governed retirement vehicle with pre-tax dollars, and those funds are excluded from the payor's income when contributed. Next, an alimony or separate maintenance recipient receives a percentage of the contribution or value of the plan as a marital or community property award via a QDRO. Instead of transferring the funds into a separate retirement account, the recipient keeps the funds and reports the distribution in their income without incurring a 10% penalty. This mechanism accomplishes the shifting of income from one spouse to the other and allows the family to take advantage of the tax arbitrage effect previ-

ously only available under Section 215 and Section 71 of the IRC.

This tax-planning strategy can be particularly effective for business owners, executives, or other highly compensated employees who are eligible to make significant tax-deductible annual contributions to retirement plans or who have already funded deferred compensation plans with pre-tax dollars. Multiple QDROs can be entered to enable transfers to be made annually to the recipient spouse in lieu of support. Not only does this mechanism preserve dollars that would ultimately go to pay taxes – it also frees up the available cash flow of the payor spouse, given that alimony is paid from an asset as opposed to income.

Although many provisions of the Tax Cut and Jobs Act are scheduled to expire in 2025, the repeal of the alimony tax deduction is permanent, which translates to less after-tax dollars available to support families of divorce in many cases. Luckily, creative planning by family law practitioners can blunt some of the impact.

**Alternative Dispute Resolution (ADR)**

Thanks in large part to COVID-19, there has been a myriad of changes with regard to how to resolve divorce disputes. From videoconferencing to zoom trials and settlement negotiations, how to orchestrate divorce matters has been revolutionised during the course of the past few years.

Many court systems were stopped in their tracks by COVID-19, without a Plan B, and most jurisdictions required months to assemble and effectuate online access to judges. With paused or reduced access to justice, there was a substantial increase in the use of out-of-court settlements as a primary way to move a divorce matter forward to completion.

Naturally, mediation and the collaborative divorce process became sought-after avenues to resolve matters, as they could be done via the likes of Zoom without the need for a judge. What was once done by way of a series of in-person meetings spread out over weeks and months, owing to busy professionals' schedules, ended up being completed through a computer screen in a matter of days from the comfort of everyone's homes. Scheduling became easier, as practitioners were not physically traveling from courthouse to courthouse. Emotionally challenged parties were not forced to sit in the same physical space with their soon-to-be ex-spouse.

As ADR options continue to gain traction, so does the trend for "divorce coaching". As defined by the American Bar Association, divorce coaching is a flexible, goal-oriented process designed to support, motivate and guide people going through divorce in order to help them make the best possible decisions for their future, (based on their particular interests, needs and concerns). Thanks again to COVID-19, access to and openness to divorce coaching has increased now that the work can be achieved by way of virtual platforms. Having a divorce coach involved in a divorce is one of the best ways to increase efficiency and decrease costs, as the inherent "soft issues" that permeate divorce matters are addressed by trained professionals who charge substantially lower hourly rates than most divorce lawyers.

Although the legal aspects of divorce can be complex, it is most often the parties' emotional entanglement that makes the transaction extremely cumbersome and time-consuming and - as a result - costly. Given that divorce

coaches are most often trained mental health professionals working regularly in the divorce space, having greater access to this resource creates additional options and insights for the parties and practitioners by infusing the process with a focused expert who can help "translate" emotions and advise with regard to the everyday emotional hurdles.

Virtual ADR and divorce coaching have had one of the biggest impacts on "grey divorce". According to the National Center for Family and Marriage Research, which coined the term, "[t]he divorce rate among adults aged 50 and older doubled between 1990 and 2010". In today's world, one in four people getting divorced is aged 50 or over. Older individuals are often more sedentary or likely to spend their time in multiple states and, as such, have less ability to be physically present or to physically navigate the court system. With the robust virtual options available in the ADR space, this population can easily participate in settling their divorce mattes via Zoom from wherever they are located.

While the impacts of COVID-19 have largely subsided, trying and settling cases still substantially involves the use of virtual platforms. Virtual access to the courts significantly assists those that cannot afford to take time off work or commute to the courthouse and pay for parking, as they can now participate via Zoom in a matter of minutes. The cost for parties has also markedly decreased as lawyers are not charging for commuting to court and parties are not having to pay their lawyers to wait in long lines for their time with a judge. Many of the judges take advantage of working from home as well, which makes them more accessible as they are no longer commuting or being distracted by other office personnel either.

These new benefits for parties, professionals, and court administration are too large to ignore. As such, most of these beneficial changes in most jurisdictions are here for the long haul.

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**Schiller, DuCanto & Fleck LLP** is one of the largest family law firms in the US specialising in high net worth divorce. The firm's team comprises 42 attorneys, with offices located in Chicago, Lake Forest, and Wheaton, Illinois. Founded in 1981, Schiller, DuCanto & Fleck helps affluent clients resolve family law disputes through a variety of avenues such as litigation, mediation and ADR. The firm prides itself on its exceptional discretion and the unmatched resources it provides to clients, including access to prominent lawyers who are experts in divorce tax matters, forensic accounting, financial planning, handling highly complex cases dealing with multimillion-dollar estates and multi-generational wealth, employee benefits, commercial litigation, high-stakes parental responsibility, international law, and more. The firm represents celebrities, high-profile athletes, C-suite executives, business professionals, entrepreneurs, and their spouses dealing with family law matters.

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