A Roundtable Discussion

FAMILY LAW:

Trends and Issues Affecting Divorcing Couples

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New guidelines for maintenance and support, alternative dispute resolutions and international custody laws are just a few issues impacting today's divorcing couples. Four Chicago-based family lawyers shared their thoughts on these topics and more with *Crain's Custom Media*.

BURTON S. HOCHBERG is a partner at Schiller DuCanto & Fleck LLP, a family law firm with offices in Chicago, Lake Forest and Wheaton. He has more than 40 years of experience as a matrimonial lawyer, helping high-net-worth clients in the areas of property valuation, child support, child custody and maintenance. A certified mediator and litigator, he has been designated as one of the nation's top matrimonial lawyers by Best Lawyers in America. He is a member of the American Academy of Matrimonial Lawyers and has served on the Hearing Board and Inquiry Board of the Illinois Registration and Disciplinary Commission of the Supreme Court of Illinois. Prior to joining Schiller DuCanto & Fleck, he headed his own law firm.

MOLSHREE "MOLLY" A. SHARMA is a partner at Boyle Feinberg Sharma PC, a family law firm with offices in Chicago and Arlington Heights. She handles complicated family law matters that require high-level financial experience with assets in real estate, investment accounts, business valuations, tax and retirement benefits. As the daughter of a high-ranking diplomat, she traveled the world as a young woman and developed a passion for international family law. She has a special expertise in handling international custody disputes and Hague convention cases, a treaty with over 90 signatory countries which resolves issues of child abduction and jurisdiction. She is a four-time recipient of the Illinois Super Lawyer Rising Star award, and a three-time recipient of the Leading Lawyers Emerging Lawyer award.

DANIEL R. STEFANI is the co-founder of Katz & Stefani LLC, a family law firm with offices in Chicago and Bannockburn. He has been recognized nationally for innovation in litigation and settlement of financial issues. Leading Lawyers Network (since 2003) and Super Lawyers Network (since 2005) have selected him annually as a top family law practitioner in Illinois. Since 2010, he has been selected by U.S. News & World Report for its annual Best Lawyers in America list, and he has also been named a Top Family Law Practitioner by Chicago Magazine. He writes and lectures extensively on the role of accountants as expert witnesses, business valuations, grandparent visitation rights and the proper disclosure of trial witnesses.

TODD R. WARREN is president and senior partner at Katz, Goldstein & Warren, a family law firm based in Bannockburn. He has been named to the Best Lawyers in America ranking and received the AV Preeminent® Rated Attorney designation by Martindale Hubbell. Leading Lawyers Network has named him among the top five percent of Illinois attorneys in the field of domestic relations, and he has been recognized as a Super Lawyer by Law and Politics Magazine. In 2004, the Illinois Law Bulletin named him a Top 40 Under 40 Illinois attorney. He is a frequent author and lecturer on domestic relations, child support and maintenance, and has served as an adjunct professor at DePaul University College of Law.

What are some current trends you're seeing in family law?

Todd Warren: There's a clear movement to treat maintenance, child support, college education and even parenting time as a formulaic calculation, using a one-size-fits-all model for all families. While the intent may be to shorten the length and costs of the divorce, the end

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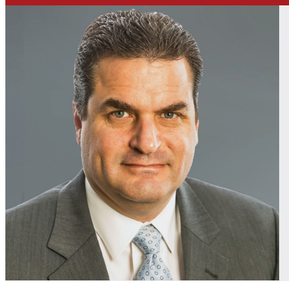
50/50 PARENTING



"There's a movement in Illinois to create a presumption in the law that 50/50 parenting should be the standard going forward for divorcing couples. I'm not a proponent, as I think that every family has its own set of variables which may influence what's in the best interests of the children."

TODD R. WARREN, KATZ, GOLDSTEIN & WARREN

result often overlooks the standards of living and history of the particular family in question, often to the detriment of one or both parents, and their children. Divorce is not an exact science. Formulas have their place in divorce, but shouldn't be the sole consideration in trying to navigate a family through what is undoubtedly their most difficult journey.

Daniel Stefani: In light of the duration of the maintenance being based on a formula, determining when a person with a maintenance obligation has retired in good faith is becoming hotly contested. Also, what used to be the unwritten non-custodial parent schedule of alternating weekends and a midweek dinner/overnight has changed to judges awarding significantly more time to a non-custodial parent. Finally, the propriety of using trusts to transfer money from the estate as well as in lieu of a premarital agreement is a new trend.

Burton Hochberg: Many more clients are choosing alternative dispute resolution such as mediation, arbitration or collaborative law. Courts are also turning to mediators more often, even where issues are financial and not limited to parenting issues. It's often a more cost-effective and time-saving option.

Molly Sharma: There's greater equity in parenting time for both fathers and mothers. This results in child support awards dependent on parenting time and income of both parties. Also, we're seeing greater international custody issues and less ability to negotiate maintenance.

How will changes in the federal tax laws taking effect in January 2019 impact how maintenance is calculated?

BH: After December 31, 2018, maintenance payments will no longer be deductible by the payor or includable in the income of the payee. Therefore, a recalculation of maintenance on or after-tax cases for both parties should be done. In situations where the divorcing spouses are in the same tax bracket, the change in tax treatment is not as important.

TW: At present, the formula for maintenance provides that 30 percent of the payor's gross income, less 20 percent of the recipient's gross income, is the effective amount of maintenance to be paid, up to a combined gross income of $500,000 per year. Above that level, there's a more subjective determination and calculation. The court also has the ability to attribute income to either party based on their ability to earn income if they're unemployed or under-employed. Since maintenance will no longer be taxable to the recipient and tax deductible to the payor, the Illinois legislature is considering changing the formula to focus on a calculation of net, rather than gross, income based on the upcoming change in the federal tax laws. Though this law has not yet been finalized, it will likely adjust the resulting outcome to closely parallel the previous formula used when the payments had income tax consequences.

DS: Ultimately, this change in the tax treatment of maintenance, while creating more complexities than with the prior law, will not be creating any unique challenges since child support has always been calculated on a net-dollar basis. The maintenance analysis won't change because both sides will still want to know the net impact to their individual cash flow; however, the implementation of the payments will now be the same or similar to the more cumbersome way child support has always been addressed.

MS: Unfortunately, the changes reduced the ability of divorcing couples to negotiate a disproportionate share of assets in lieu of maintenance, since the incentive of not paying tax on maintenance is no longer available.

What kind of recordkeeping should divorcing couples do leading up to and during their divorce?

BH: An accurate record of personal, family and household expenses, such as a Quicken report, is helpful. Three to five years of tax returns, as well as bank and credit card statements, also should be maintained. Having a trusted accountant prepare a balance sheet of all assets and debts can be a real plus and help the parties prepare their required financial affidavits.

TW: If a business is involved, the business tax returns, financial statements, general ledgers and bank records are typically gathered for the most recent five-year period. Having this information organized and available at the beginning saves time and money, and helps advance the case forward in a much more productive and efficient manner.

CRAIN'S CUSTOM MEDIA ADVERTISING SECTION

MS: Recordkeeping should also include notes regarding the soon-to-be ex-spouse's visitation, as well as whether they consistently exercise their parenting time, miss significant events at the children's school, or use alcohol or drugs. Individuals should also monitor credit cards and bank accounts.

DS: The logical organization of all of these documents will go a long way toward making the divorce process more efficient and less costly. The best structure is to organize the documents by calendar year and then further into subsets for each account or category for each particular year. As an added step, it's helpful when parties have a contemporaneous or after-the-fact breakdown of their sources of income, annual or monthly expenses, and a basic balance sheet of their assets and liabilities.

Is 50/50 the standard relative to parenting time?

TW: There's a movement in Illinois to create a presumption in the law that 50/50 parenting should be the standard going forward for divorcing couples. I'm not a proponent, as I think that every family has its own set of variables which may influence what's in the best interests of the children. Focusing on the best interests of the parents, rather than the children, should not be the standard. There are certainly many situations where a 50/50 parenting schedule would make sense. With more couples both working outside the home, a 50/50 outcome can make it much easier for children to spend time with parents instead of child care providers or others when one parent is unavailable due to work commitments. The proximity of each household, the age and schedules of the children, the ability of the parents to effectively cooperate, and how well the children are able to manage transitions, are just some of the factors that would be considered in making any parenting determination. Assuming a one-size-fits-all approach that a 50/50 schedule is appropriate for every family is a premise that, in my view, is not appropriate.

DS: In Illinois, there are 17 factors in the statute that the court is directed to consider in determining a child's "best interests." One of the most relevant is a parent's prior involvement in the caretaking of the child. While it's not uncommon for a parent to be allocated more exclusive parenting time subsequent to a divorce than they had when the parties were married and residing together, the parties' prior involvement is often used as a guideline. Given that every family is different—children's ages, activities and needs vary, as do parents' work schedules and other obligations—every parenting schedule is different. Parents should try to work together to determine what will work best for their child and not feel that the parent allocated the majority of the parenting time somehow "wins." In reality, everyone wins if the parenting time schedule works for the entire family and provides for an amicable resolution of one of the most emotional—and important—aspects of a divorce.

BH: There are many factors the court is required to consider in allocating parenting time. Some judges believe that equally dividing parenting time is in the best interest and, when challenged, ask the parent who opposes 50/50 "Why shouldn't it be 50/50?" The attorney

COMMUNICATING WITH CHILDREN

"If there's a mutual feeling and agreement by the two divorcing parties that they should share information with their children, speaking to them together with one voice is a good idea."

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for that party better have good responses. Things to consider might include that such an arrangement is contrary to the longstanding status quo of the family, or the age and maturity of the children among other relevant factors.

MS: Parenting time is still dependent on the best interest of the child, with the understanding that non-homemaker parents and dads are getting more time than they ever did before.

How much information about their pending divorce should parents share with their children?

MS: Minimal information should be shared—only that both parties love their children, that the children will continue to have time with both parents, and that the children will continue their activities, social life and school life. Often those last things are the most important to children.

BH: Generally speaking, less information is better than more. If there's a mutual feeling and agreement by the two divorcing parties that they should share information with their children, speaking to them together with one voice is a good idea.

TW: Depending on the age of the child and the particular question at hand, it may be appropriate for a parent to speak directly to the child in a therapeutic setting, to help the child process the answer and to help relieve some of the anxiety that may exist.

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ALTERNATIVE DISPUTE RESOLUTION

"Mediation is a completely private process and therefore, all of the details are confidential—unlike litigation, where the details of your divorce are mostly public knowledge and occur in open court and any paperwork filed with the court is part of the public record."

DANIEL R. STEFANI, KATZ & STEFANI LLC

DS: Children should be protected from the conflicts and ugliness of any divorce to the greatest extent possible. While in the moment sharing with a child details might seem important or even feel like a vindication, in the long run, children really do need both their parents–even if a parent has significant flaws and limitations–and oversharing or disparaging never is in a child's best interests.

What are the advantages and disadvantages of resolving a divorce case through mediation?

DS: Mediation is a completely private process and therefore, all of the details are confidential–unlike litigation, where the details of your divorce are mostly public knowledge and occur in open court and any paperwork filed with the court is part of the public record. Mediation also allows for more creative solutions in resolving your divorce case, versus litigation where a court is limited in its remedies. Mediation allows divorcing couples to control their own destiny and not put their lives in the hands of the courts. Typically, the duration of the mediation process is many months shorter than going to court and litigating a divorce case. Since the process is typically much faster, there's much less emotional cost on the parties and their children and the financial cost is typically less than litigation as well.

TW: For mediation to be successful, there needs to be a high sense of trust between the parties that they're dealing with each other in good faith, and that they're both confident that the other party is making a full and complete disclosure of all of their respective information. Since divorce, by definition, presumes an adversarial situation exists between the parties, this is often a difficult mountain to climb, and may create situations of imbalance between the parties from the outset. Some issues, such as determining a parenting schedule for soon to be divorced parents, may have a higher success rate in mediation, then say trying to agree upon the value of a business.

MS: Mediation has the advantage that the parties are in control of the outcome, versus a stranger (a judge). Mediation can be a lot less expensive. A mediator is able to spend more time with the parties than a judge. However, mediation requires both parties to compromise, and be able to move the process forward to conclusion. If one person uses mediation to simply state why they're right or are not committed to settling, or if the power dynamic is imbalanced, the process is unsuccessful and both time and money have been wasted without an outcome.

BH: If you're mediating about custody, make sure the mediator has experience in dealing with child related family issues. Similarly, if you are mediating about finances, make sure the mediator has experience with both complex and simple financial issues. Finally, to guide the parties most effectively, it's often helpful for the mediator to have some experience and understanding of what a court might do if the mediation fails.

What impact does international jurisdiction have on custody cases?

DS: It all depends on in which country the case is pending. For the most part, in a newly filed case, jurisdiction is presumed to be where the child is located, unless they've not been in that location for the past six months. It's important to know if the foreign country has signed on to the relevant portions of The Hague Convention–a treaty with over 90 signatory countries that resolves issues of child abduction and jurisdiction–or are considered to violate the fundamental principles of human rights. Another law that sometimes comes into play is the Federal Parental Kidnapping Prevention Act.

MS: As more people from different countries are marrying or having children with each other, or even residing abroad for employment, there may be specific issues about which court decides the merits of custody. It can depend on the habitual residence of the child, whether the parties are married, or if both parties even have custody--depending on the meaning of the term as defined by the country of origin.

BH: Families that move internationally for work, or families where the spouses reside in different countries after the divorce, need to be conscious of which nation retains jurisdiction over their children. Those families should also register their judgments in the new country of residence to improve enforceability.

How should an individual go about selecting a divorce attorney?

DS: In an ideal world, people would be able to take all the time they need to interview lawyers, observe them in court, read their briefs, interview their previous clients and make a decision. Unfortunately, that's not realistic, and therefore a referral from someone the individual already trusts–like a business professional, a corporate or estate planning attorney, accountant, wealth manager or divorced friend–is a good place to start.

MS: Individuals should meet at least two or three attorneys and check for personal compatibility. They should ask the attorneys how they can be reached in an emergency, especially when little children are involved, and if they're open to options such as mediation. People should also check the Super Lawyers website for complaints against attorneys they're considering.

TW: The most important factors to consider are reputation, experience and integrity. Many lawyers will "promise the moon" at the initial consultation, or claim to be "a shark" who can make life miserable for the prospective client's spouse. These overtures are usually hollow and typically only result in a more divisive situation and a needless increase in legal fees. Communication skills are also vital. Email and text messaging is helpful, but being able to communicate directly and in person is paramount to an effective attorney-client relationship.

BH: Social media reviews can be helpful. So also are friend recommendations. However, there's no substitute for an in-person face-to-face interview where questions can be asked and the "chemistry" measured. While some attorneys will do a consultation without charge, many attorneys charge for the initial consultation.

What are the potential pitfalls and safeguards of prenuptial agreements?

MS: Prenuptial agreements can be contested, and even if they're held to be valid, the litigation process around that can be extremely expensive. They can be rigid, with fewer settlement options. The biggest pro is certainty for both parties. The party that may have a greater estate can reassure their future spouse that they will be taken care of financially but still limit their exposure as to the amount and extent of what they will have to provide if there wasn't any prenuptial. This can be especially important for business owners who need to protect businesses, and people with children from previous relationships. The pitfall of course is that often a prenuptial provides a lot less than what the outcome would be without one.

BH: Prenuptials are recognized as binding only in those states that have enacted the Uniform Premarital Act. A potential pitfall may exist where there's unequal bargaining power in the negotiation or one person isn't fully educated as to the complete financial picture of the other person. Also, an individual may not clearly understand the lifestyle they'll be creating during the marriage and the disadvantage they may face in the future if they bargain away their right to certain financial benefits. Protracted litigation may sometimes result if the prenuptial terms and conditions are either not clearly drafted or are unconscionable.

INTERNATIONAL JURISDICTION

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TW: If one or both of the parties to the agreement is marrying for the second time, prenuptial agreements can provide a useful means to protect assets acquired prior to the marriage, either for one party's children from a prior relationship, or their heirs upon their death. The keys to a successful agreement center on having good counsel and making sure that each party has fully disclosed their respective assets and incomes. Alternatively, trust and estate planning documents may play an effective role in preserving such pre-marital wealth if a prenuptial agreement is not the chosen method of protection.

DS: If a prenuptial agreement is drafted by a competent and skilled attorney, there should only be safeguards and no pitfalls. No agreement can address the allocation of parenting time or decision-making for children, nor can the agreement address issues of support for children. These are issues that can't be dictated in advance in any type of prenuptial agreement. It's important to contact an attorney well in advance of the wedding date to ensure an agreement can be finalized without undue stress and pressure and possibly even financial concessions in the days leading up to a wedding.