

David Dikman DM Podcast

An experienced New York City divorce lawyer discusses issues that affect divorce in New York, including asset division, child custody, spousal support, and domestic violence.

How can someone protect their assets before they get married?

Dikman: There are several ways. Most people are familiar with prenuptial agreements, because they come up in conversations about celebrities. A prenuptial agreement is a good tool that people can use to protect their assets. It is a contract entered into before marriage and it will preserve certain properties and assets that a person owns prior to marriage. It may also cover and preserve assets acquired over the course of the marriage, whereas much of what was acquired during the marriage would otherwise be considered marital property and could be divided.

What's most important, and what most people don't know, is that prenuptial agreements can be challenged. In New York, there have been cases that have set aside and vacated these agreements when they were thought to be extremely unfair in their application. Fortunately, my firm has never once had a prenuptial agreement set aside or vacated by any court; every prenuptial agreement we have drafted has been enforced.

Prenuptial agreements are not very romantic. Asking your soon-to-be spouse to sign an agreement is not what many people consider true love, so it's a difficult topic for people to raise in their relationships. In the absence of a prenuptial agreement, the law recognizes assets you owned before marriage as well as assets you came into during marriage by gift, inheritance, or personal injury award as separate property.

There are devices that can be used before you get married without a prenuptial agreement that will also protect your assets should the marriage not work out. For instance, the use of certain types of trusts, properly identifying and documenting all premarital assets, and abiding by certain rules and strategies as to how to hold those assets during the marriage will preserve them if the marriage ultimately ends in a divorce.

Do people who are remarrying ever use prenuptial agreements to protect their children's rights to property?

Dikman: Protecting their own children from their first relationship when anticipating a marriage to someone else is a common reason people look into prenuptial agreements. A prenuptial agreement is one way to protect your children's rights to your property, but you could also apply many of the same strategies used anytime someone contemplates a marriage while they are not in a position to successfully negotiate a prenuptial agreement.

How long does a divorce usually take in New York?

Dikman: The length of a divorce is unique to each set of circumstances. I've settled cases in a week but, unfortunately, I've also settled cases in a couple of years. Sometimes cases never settle and have to go to trial. One rule of thumb is once you

reach an agreement in settling all the issues of the case, the final paperwork is going to take somewhere in the range of three to six months to process, merely due to court wait times and understaffing, until they finally get around to signing the divorce judgment.

On the other hand, if a case is never settled and is going to trial because one or more issues could not be resolved by an agreement, the general rule of thumb is that a trial would take place 18 to 24 months after the case was first filed and brought into the courthouse.

Do divorce cases ever settle on the courthouse steps?

Dikman: Cases do sometimes settle on the courthouse steps, so to speak, but usually it's more of a hallway situation. In most divorce cases, there are many issues that need to be covered. Most attorneys and most people going through the process are not necessarily comfortable settling right outside the courthouse.

When the case does settle in that location, it's because there have been numerous drafts of long stipulations or proposed agreements to resolve all the issues that have gone back and forth between counsel and that the parties have reviewed. Sometimes the final editing may have just been completed so that the parties are signing off on the agreement when they are actually near the courthouse.

When that's not the case, a deal might be struck in the courthouse. Maybe there were only a few issues remaining and the parties have come to an accord, but thereafter the lawyers will leave the courthouse and draft an agreement to adequately reflect components of the deal. It may not necessarily be done right there in the courthouse.

How much does an average divorce cost? What is the range?

Dikman: There are certain divorce situations that will not result in substantial fees, as well as other high-net-worth cases where there are highly contumacious matters involving extensive litigation and a range in costs that is much higher than an average case.

My firm represents people of all economic ranges – both high-net-worth individuals and blue-collar workers who may not have much in the way of assets at all. You don't need to have assets and money to have problems; you can still have child custody problems and a variety of other substantial issues that need resolution.

Generally, aside from court costs of \$400-\$500 that are paid to process a divorce case, someone should expect the fees to be somewhere in the vicinity of \$2,500 or higher to resolve their case. However, if it's highly litigated, those fees could reach \$75,000.

Is a separation agreement required in order to get a divorce in New York?

Dikman: It is not required in New York that a separation agreement exists. A separation agreement is an agreement between two spouses where they are not agreeing to become divorced, but they are agreeing to resolve all issues regarding economics and money as well as all children-related issues, such as custody and visitation. A separation

agreement covers all of the issues that would be addressed in a divorce case, but it is not required to get a divorce.

How does a judge determine if someone qualifies to receive spousal support? Is spousal support only available to legally married spouses?

Dikman: In New York, spousal support is only for legally married spouses. Anyone who is not legally married to his or her significant other would not have a spousal support claim.

There are differences as to how a judge would handle a request for spousal support depending on whether it is made during the pendency of the divorce case for a temporary award, or if the court is deciding the final support award at the end of a case after a trial. There are two separate laws for each situation, but with respect to final spousal support there are 20 different factors that the law discusses, including the length of the marriage, the age and health of the parties, the present and future earning capacity of both parties, and a variety of other factors. The last factor is any other factor that the court shall expressly find to be just and proper.

If it is a temporary support request, the court is obliged to use a computational formula to determine what the temporary support award should be. However, the court is free to deviate from the formula by citing certain reasons, which include a variety of factors that the law references.

Neither partner is eligible for spousal support if a couple is not legally married, but what if one partner helped put the other one through school? Is there any financial award available to recognize their contributions to the relationship?

Dikman: In New York, there is not. There are certain other claims that occasionally rear their head. You may have a situation in which one party is claiming certain express promises were made to them that, although they were not married, they were always going to be taken care of and that their significant other was going to provide certain things to them in exchange for certain things they brought to the relationship. These are very difficult claims and there aren't too many of them in New York, because oral agreements in that regard won't be upheld and you need an agreement to have much of a case.

How does the tax treatment of spousal support and child support differ?

Dikman: Child support is never a taxable event. All money paid to the primary physical custodian of the children, whether it's a man or a woman, is non-taxable. It's not income to the recipient and it's not deductible for the person who pays the child support. Whereas spousal support is usually a taxable event where the recipient has to declare income and the payor takes a personal income tax deduction for the amount being paid. In the end, after the tax treatment, spousal support costs a bit less than what is actually laid out monthly to the recipient by the spouse who pays it.

What is stopping someone from saying his or her child support payments are actually spousal support in order to receive the tax deduction?

Dikman: It is not an option for an individual to make a determination as to whether support payments are allocated as child support or spousal maintenance. It's going to be established by a court order that is the result of a trial, a former motion that's being decided, or as a result of a settlement agreement in which the specific award is being designated as to what portion will be taxable spousal support and what portion will be child support.

Are the New York child support guidelines meant to cover all expenses related to children?

Dikman: The guidelines are intended, at least for legal purposes, to cover all financial means of the children. People going through the process are sometimes surprised to learn that certain items aren't anticipated by the guidelines.

The guidelines are a computation based upon the respective incomes of each parent, which designates how much child support ought to be paid by the non-custodial parent to the custodial parent. These computations are easiest for somebody who is a W-2 wage earner, where there's no question as to what they earn and no perks that they receive from their job or other benefits that reflect income not identified on their tax returns.

A W-2 wage earner's income is adjusted by taking off Social Security, Medicare tax, and New York City income tax from the gross earnings, as well as spousal support if it is going to be a taxable event. Once the income is adjusted, the payor will pay 17% for one child, 25% for two children, 29% for three, and it goes up a little bit from there.

It is supposed to be like a good tomato sauce; it has all kinds of vegetables mixed in that you can't see. Money for food, shelter, and clothing is all included in the computation and factored into a presumptively correct child support award. All of the child's needs are included in the child support amount.

Courts sometimes deviate from the guidelines for reasons that they must specify if they choose to do so. The add-ons are specified by law and there are a few mandatory add-on expenses, which are limited to a pro rata division of the childcare costs that need to be paid by the custodial parent in order to work, pro rata division of any medical-related expenses not covered by insurance, as well as a pro rata division of the medical insurance premiums for the children.

The law provides for a few discretionary add-on expenses, such as certain educational costs (private school, college, etc.), or any special needs or aptitudes that cost money. Sometimes people are concerned with things like summer camp when there is no childcare needed, certain parties or events such as a Bar Mitzvah or Christening, and various extracurricular activities and team sports. The law does not anticipate these extra expenses, but sometimes people are able to agree to divide some of the costs in addition to the base support.

Can the court impute earnings for self-employed people, particularly in a case where they're living in an expensive house but only declaring \$20,000 of income?

Dikman: Yes. Imputation of income or the determination of income for purposes of computing support is a hot topic. It comes up in many situations, whether it's someone who has quit a job purposely to avoid paying a higher support amount, someone who is underreporting their income, someone who is completely off the books, or a business owner who runs expenses through their business account and is carrying charges on their house in an improper fashion and then showing only \$20,000 of income on a W-2 form.

A court is free to determine the income of either party based on their tax returns. If the court feels that the person is working to less than their capacity based upon their knowledge, training, and acumen, then it can impute income and charge them with the ability to earn support at a higher level. The court could also impute income as a result of certain perks, expense accounts, and cars that have been paid for by businesses or various other expenses that are written off – typically by small businesses that don't reflect actual business expenses on the tax return. The court is free to impute income in a variety of ways and in a number of different factual circumstances.

How do parents decide whether sole custody or joint custody is best for their family?

Dikman: The primary concern as to what custody label is going to be used when settling a case is to what extent the parents have been able to co-parent effectively and communicate between themselves. Joint custody and sole custody do not have anything to do with how much time each parent spends with the children. Many people think there's a correlation, but there is not. There could be a mother who has sole custody of a child and a father who sees the child 50% of the time or there could be parties with joint custody where the mother sees the child for two hours every month. The custody label has to do with decision-making powers on behalf of the children on the major issues that affect the children's lives, health, education, welfare, and religion. There are some people who have significant religious differences that become more apparent or more divisive during a divorce when they're no longer together.

There are also issues regarding therapeutic treatment of children. There's a high prevalence of children diagnosed with ADHD or ADD and there are issues surrounding whether the child should be medicated or not. If parents are reasonably confident that they can communicate effectively and have had no significant problems in the past, it's probably best for the family to have a joint custodial arrangement where each parent has an equal say in child-related issues. Following a determination of joint custody, neither parent has a superior ability or right to decide on major issues. Once in a while an issue may develop that may be very hard for the parents to decide, but not too often.

Sole custody should be reserved for the situations where parents cannot communicate effectively. Unfortunately, in highly contentious divorce matters, there are many people who fit that profile. Whether one custody label or the other is used, each parent will usually still have equal access to information from doctors, teachers, and schools with respect to the children as long as an agreement or order so specifies.

If someone is concerned that their ex-spouse is going to try to remove the children from the country, is there something they can do to prevent it from happening?

Dikman: Yes. Relocation or child kidnapping is a very serious matter and there are a variety of remedies that could be sought, but it depends what stage the relationship is at. Divorce agreements or final custody agreements between unmarried individuals often include provisions about relocation. As long as the person who is complaining about someone's prospective move has custodial rights, then the Hague Convention – two acts which are designed to prevent parental kidnapping – would apply and an application could be made to the court.

The Hague involves other countries as opposed to just moving out of state within the continental U.S. or associated islands. However, sometimes in the beginning of a divorce matter before there is a custody agreement or order, one parent may be making moves to leave or may actually have left the jurisdiction of New York. Maybe they went to visit their family in Florida on what was supposedly going to be a short trip, but then didn't return. Even though there were no custody orders, there are very serious rights and considerations involved. If any parent finds themselves in those shoes, it is extremely urgent that they find counsel immediately. New York is likely to be considered the home state of the child for a period of six months from the day that the child was removed. New York would have exclusive jurisdiction to determine all custody and visitation issues so long as a claim is brought within that time frame. However, if a parent sits on his or her rights and complains to everybody but the courthouse for six months, then the new state or residence would become the home state where custody and visitation litigation would have to take place.

Even though New York is a no-fault state, can fault affect child custody, property division, or any other issues related to the divorce?

Dikman: Marital fault can affect a few areas in a divorce, but it doesn't often come into play. In New York, there have been very clear case decisions from the highest court indicating that marital fault should have no impact on the division of assets or the economics of a case, unless the fault was found to be so egregious as to shock the conscience of the court.

Such egregious marital fault would not include many of the things that imperfect human beings do in relationships, such as having an affair, not being particularly nice to their spouse, or not providing adequate funds to have fun with. Most of the problems that lead to a divorce would not be egregious fault and would not impact asset division. However, contracting to kill your spouse and getting arrested, prosecuted, and convicted of conspiracy to attempt to kill would be so egregious as to shock the conscience of the court.

Also, the law says that marital fault in the form of domestic violence must be considered by a court in arriving at any order related to child custody or visitation. Assuming the domestic violence occurred during the course of a marriage, it is a form of marital fault that always has a place in custody and visitation determinations.

How does a victim of domestic violence get a restraining order in New York?

Dikman: It's important to call 911 if there is an emergency and you want to report it to the police, whether it involves an actual attack or criminal behaviour. One way to get a restraining order, commonly known as an order of protection, is if an individual is

arrested following a domestic violence complaint. The arrested party will be held for a period of time, usually overnight, and will see a judge in the criminal court. In almost every such case, an order of protection is immediately issued ordering the offender to stay away from the protected individual or individuals, to not commit other criminal offences against them, and various other provisions.

You don't necessarily need a police complaint to obtain an order of protection. The family court is available in the absence of a police complaint. A person may file a petition without a lawyer, although many petitions are prepared by attorneys. A person can go to the family court, preferably as soon as possible, after an upsetting event that constitutes a family offence under our law.

A family offence is a name given to various crimes and violations of the penal law when they occur between people who bear a certain relationship to one another, such as a spouse or someone with whom you have a child in common. A petition can be filed in family court and you would see a judge the same day, generally a few hours after you arrive at the courthouse. A judge would immediately assess whether a temporary order of protection should be issued. Thereafter, the case would be on file and the other individual would be served with the order of protection and the petition might then lead to further proceedings, possibly a trial hearing, if the issues are ultimately resolved.

Are there any legal remedies for someone who has been wrongfully accused of, and perhaps even charged with, domestic violence?

Dikman: There are very few legal remedies for being wrongfully charged with a crime or family offence and having been arrested for it and prosecuted.

I was a prosecutor for nine years in Queens County District Attorney's Office Homicide Bureau where I tried many murder cases and other serious felony cases. Notwithstanding that I practiced mostly in the area of matrimonial family law, I did defend people in criminal court charged with crimes when they occurred in domestic settings. Anyone who is arrested on the heels of domestic violence complaint needs to obtain counsel to defend his or her rights in criminal court. Most situations will resolve themselves without actually going to a trial.

In terms of a remedy, while orders of protection are very good devices, they are sometimes misused and abused by people who are trying to get an advantage in other litigation, whether it has to do with child custody or other matters. There are probably quite a number of false complaints that result in arrests because the police, the prosecutors, and the judges all run a little bit scared of the one maniac that may do something seriously harmful to someone on their watch. Everyone is very careful with these issues and overprotective in some ways. However, in the rare circumstance where someone is found to be not guilty or the case is actually dismissed, a remedy might exist by bringing a case against police or against the other spouse or loved one for false arrest, false imprisonment, or other federal claims – but that situation is very rare.