
Divorce: It's Not Just for Divorce Lawyers Anymore

Explosions of wealth have paved the way for a new era in matrimonial litigation, which welcomes those with securities and commercial backgrounds. Firms like Rottenstreich Farley Bronstein Fisher Potter Hodas are designed to handle the modern divorce.

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Emily Saul

While matrimonial law has historically been a volume practice, changes in New York State law and the ways in which individuals accumulate wealth have reshaped the contours of divorce cases.

Modern divorce for high-net worth individuals can now—in terms of size and complexity—easily require more involved and aggressive litigation than the average commercial case.

Rottenstreich Farley Bronstein Fisher Potter Hodas partners Dan Rottenstreich, John Farley, and Zachary Potter attribute the shift to a number of factors: changing distribution and custody laws, explosions of different kinds of wealth, and traditional matrimonial practices not keeping pace with the change.

“These legacy firms that had been in the space for a long time, they entered the space when the skill set was different and the composition of clients, and the law, and the composition of the assets were all less complicated,” said Farley, a founding partner. “So there was a mismatch, I think, in skill set, background, and even desire about what you want to do with your career as a lawyer, and what it meant to be a divorce lawyer, as there were more rich people and their wealth became more complex.”

RFB Fisher Potter Hodas, which opened its doors in August 2023, is aimed at addressing that disconnect. The medium-sized firm is made up of lawyers who cut their teeth in securities and commercial litigation and are now applying those skills to the matrimonial space.

“In the old days, someone was a chairman of a publicly traded company and had stock options; you look at the stock price to figure out the value of the assets; it was not complicated,” Rottenstreich, a managing partner, said. “Today, somebody could create an app the next thing you know, they have a company valued at a billion dollars with no sales. It's hard to properly value a lot of these companies.”

Potter, a managing partner of the firm's Palm Beach office, said clients also have different expectations now.

“There's more transparency in terms of quality than there was twenty or thirty years ago or even more. Now, people call up their corporate and estate planning lawyers at the big firms, and those lawyers make it their responsibility to find the right lawyer to handle a large, complex matrimonial case,” Potter said. “Those lawyers can do a level of due diligence

that didn't exist before. Further, the corporate and estate planning lawyers know that the future wealth of their clients depend on the quality of work that is done by the divorce lawyer, so they have a strong incentive to find and hire the best."

The Odeon

In 1980, New York State implemented equitable distribution, requiring judges to distribute assets as fairly as possible. Prior to that change, there wasn't much to litigate, Rottenstreich explained.

But that decision, combined with increased wealth—internet, tech, funds, real estate—has changed the game over the last 40 years.

"Once people realized that their assets would be valued and distributed as part of the divorce, they started to hide assets; they started putting assets in trusts," Rottenstreich said. "That opened-up a whole new front in divorce litigation. You now had trusts being formed in different states and different countries holding millions, if not billions, of assets that would otherwise be distributed in a divorce."

That is now a major part of the playbook, he added.

"The country's been financialized," Farley stated. "There are a lot of entrepreneurs. There's a lot of capital sloshing around in complicated ways. And if the music stops by virtue of a divorce action being filed, and all these fluid assets that were expected to have ten or fifteen or twenty year integrated shelf lives, well now we're valuing them on, say, July 10, what's the whole package worth? It's not easy. Being able to do that is critical. And I imagine it wasn't critical, if even important, ten or fifteen years ago."

The trio come from different backgrounds. Rottenstreich was a certified public accountant who worked as a senior auditor prior to law school. He began his litigation career at Cravath, Swaine & Moore, and later worked at Kirkland & Ellis and before joining Cohen Clair Lans Greifer Thorpe & Rottenstreich.

Rottenstreich first met Farley in the summer of 1999, where they were paired as office mates at Cravath.

Farley started his legal career as a litigation associate at Cravath, and then moved to Goodwin Procter, becoming an equity partner. He later joined Cohen Clair Lans Greifer Thorpe & Rottenstreich.

Potter has a commercial litigation background, and was a partner at Holland & Knight after clerking in the Second Circuit for late U.S. Circuit judge of the U.S. Court of Appeals Richard Cardamone.

Farey and Rottensreich first met Potter while representing adverse parties, Linda Macklowe and Harry Macklowe, in a highly-contested, highly-publicized divorce that consumed the city's tabloids. Despite the high-octane case, opposing counsel was on good terms with one another, Rottenstreich recalls.

"We'd have lunch at the Odeon almost every day of trial and sat at 'competing tables,'" he quipped, referencing the well-known spot right across the street from the courthouse at 71 Thomas Street.

Tender Years

The "old days" saw fewer custody disputes thanks to the tender years doctrine, under which custody was granted to mothers and fathers had relatively few rights.

"There were exceptions, but there wasn't much by way of custody litigation," Rottenstreich said. "It is much different now. If you go into court, the question is why should there not be shared custody. Also, children are unfortunately used as pawns more often now. Someone may use custody to try and extract more favorable financial settlement."

Mental health diagnoses are also no longer viewed as a barrier to custody, Potter said

“Over time, judges have become more focused on questioning whether scientifically-validated methodologies are being used to determine the best interests of children, as opposed to basing decisions on historical biases and predispositions,” he shared.

Rottenstreich agreed.

“Mental health issues have gotten a lot more attention too; understanding the various disorders and how they can impact parenting—every lawyer has to be well versed in the DSM these days,” he said.

Chess Games

Electronically stored information, or ESI, is now a major part of divorce litigation, the partners said.

“The days of file cabinets are over. ESI is becoming more acceptable—and necessary—in complicated divorce matters,” Rottenstreich said. “That is where nearly all of the relevant information is located.”

“The solo practitioner who is a great divorce lawyer: that person can’t exist in the world of ESI anymore,” Potter said. “You just can’t do it. You need at least a medium-sized law firm in order to be able to process ESI. Otherwise, clients risk being sanctioned and losing their cases simply because of discovery ineptitude.”

While discovery is indisputably an integral part of any litigation, it hasn’t yet become a mainstay of matrimonial lawyering, they agreed.

“One major difference I noticed right away between my experience in commercial litigation and in matrimonial litigation was in discovery; it seemed to me that not all lawyers were using the panoply of disclosure devices,” Rottenstreich said.

For example, he said he always likes to serve interrogatories, and has been asked by judges why he’s not simply posing questions in depositions.

“There are a lot of questions that you just cannot properly ask at a deposition,” Rottenstreich stated. “For example, we sometimes need to figure out how much someone spent on an affair. Some people spend millions of dollars. If I ask that question at a deposition, they can credibly say they don’t know and we cannot realistically walk through hundreds or thousands of bank and credit card transactions. But if I serve them with an interrogatory, they can take their time to answer.”

Many lawyers learn to use discovery as a means to an end—to push for a settlement—rather than as a tool to win at trial, the partners agreed.

Farley said a common pressure tactic he’s seen used over the years is attorneys deploying discovery to turn the heat up, versus as a method for just resolution.

“They’re trying to make the economics sufficiently unattractive that someone’s gonna buy their way out of it,” he explained.

But if one is taking cases to trial, as they do frequently, then discovery needs to be targeted for trial-specific purposes.

“I always analogize it to a chess game—people who have never learned the ‘end game’ can’t play a middle game or an opening well because they don’t know the purpose of the moves they are making,” Potter observed. “Most civil practitioners will never know the end game because they don’t do trials. And so their middle game is usually highly inefficient and designed to drive the end itself.”

One wrinkle is that matrimonial judges are also attempting to protect estates, so they're loath to allow discovery disputes to drive up costs.

"Matrimonial judges have this almost like quasi-bankruptcy judge feature," Farley offered. "One thing they're trying to do is protect the value of the estate from being dissipated needlessly. So they don't want to hear about these giant discovery disputes."

But those disputes are necessary, because in their experience parties in these cases can play dirty.

"Sadly, in our field, it is much more common that people are committing frauds on the court," Potter said. "It's their personal wealth and they will do anything to keep it."

"We say it costs a hundred dollars to falsify a document and it costs a million dollars to unwind the fraud," he added. "That's because the people who engage in this kind of conduct are smart, and they will use every procedural trick in the book to stop you from getting access to the records you need to prove the truth. It takes relentless persistence to break through. Traditional matrimonial firms wouldn't be able to do that. They just can't. They don't have the time. They don't have the resources. They don't have the experience."

Document falsification is not an uncommon occurrence in matrimonial cases, Potter said.

The partner noted that in a three or four big cases over the last 10 years, the firm has found falsified documents that were held out as legitimate.

"Now we look for that kind of conduct in every case," he said.

RFB Fisher Potter Hodas does not only handle matrimonial matters. They also take on commercial litigation.

And while the firm has built itself on applying their diverse legal backgrounds to matrimonial matters, Potter says their experience in matrimonial law has also made him a better lawyer in other areas.

"One of the interesting things about matrimonial law is that there are more avenues in family law to use procedure to drive a beneficial outcome for your client that do not exist in the civil space, at least to the same degree," Potter explained, giving the example of interlocutory appeals. "And so if you're thinking about, 'how do I drive this case to resolution and prevent harassment and inefficiencies,' the rules of family law procedure give you the tools to do that."

"Also, the speed at which divorce cases go from "file to trial" forces you, as a lawyer, to get comfortable litigating high-stakes issues in the absence of perfect information and time for preparation," he said. "Once you get used to using procedure this way in family law, you start to see how you could employ the same tactics in complex commercial litigation through the Court's case management tools. But civil litigators often don't think of it because they operate from a different playbook, and they are often motivated by fear of taking strategic risks and losing as a result of it."

The partners have represented some bold-faced names over the years—including fashion designer Georgina Chapman and record producer and rapper Swizz Beatz. Rottenstreich says that while some of his biggest successes have been in those cases, there are others that are more personally rewarding.

"The most important cases to me have been representing nice, sophisticated, intelligent ladies who got trapped in horrific relationships with narcissists," he shared. "I have had quite a few of those cases and they are difficult. The wife is often hopeless at the outset, but you can see them evolve over time as they see their bully husband does not get to dictate how the case will play out."
