



Matrimonial Law: *Frequently Asked Questions*

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What are the grounds for divorce in New York?

Broadly speaking, New York has two general categories of grounds for a divorce, fault based divorce and so-called no-fault divorce. The fault based grounds, set forth in the next section, were for many years the only available grounds. This has changed significantly, particularly since late 2010 when, in addition to the previous “no-fault” divorce based on a Judgment of Separation or a Separation Agreement, a statutory amendment adopted “irretrievable breakdown” of the marriage as yet another ground. These no-fault based grounds are discussed briefly below as well.

Under Domestic Relations Law Sec. 170, fault-based grounds for divorce are: (a) the cruel and inhuman treatment of the Plaintiff by the Defendant, such that the conduct of the Defendant so endangers the physical or mental well-being of the Plaintiff as renders it unsafe or improper for the Plaintiff to cohabit with the Defendant; (b) the abandonment of the Plaintiff by the Defendant for a period of one (1) or more years; (c) the confinement of the Defendant in prison for a period of three (3) or more consecutive years after the marriage of the Plaintiff and the Defendant; (d) the commission by the Defendant of adultery.

No fault-based grounds for divorce under Domestic Relations Law Sec. 170, include those based upon a legal separation when: (a) the Plaintiff and Defendant have lived apart after the granting of a Judgment of Separation for a period of one (1) or more years; and (b) the Plaintiff and Defendant have lived separate and apart for more than one (1) year pursuant to a written and acknowledged Agreement of Separation. Adopted in 2010, a Judgment of Divorce may be granted when the relationship between Plaintiff and Defendant has broken down irretrievably for a period of at least six (6) months, provided that one party has so stated under oath.

Except for exigent circumstances placed on the record by the Court, no judgment of divorce shall be granted under this subdivision unless and until the economic issues of equitable distribution of marital property, the payment or waiver of spousal support, the payment of child support, the payment of counsel and experts' fees and expenses as well as the custody and visitation with the minor children of the marriage have been resolved by the parties, or determined by the Court and incorporated into the Judgment of Divorce.

Are there recent changes in New York divorce law which might impact my case?

There have been several recent changes to New York's Domestic Relations Law which can impact your divorce action. There are new grounds (irretrievable breakdown) as described above, and there are new guidelines for the determination of maintenance (spousal support) to be paid. The guidelines address the determination of maintenance to be paid during the pendency of the action, as well as once the divorce is finalized. The guidelines set forth many factors which must be considered in addition to the income of each of the parties.

What is a Separation Agreement?

A Separation Agreement is a formal written contract between two parties to address some or all of the legal issues of their separation. It must be signed and acknowledged in the presence of a Notary Public. Most often, the parties intend that the Separation Agreement address all the issues between them, and that it will become the basis of finalizing their divorce, either immediately or sometime in the future. A Separation Agreement can become the basis for a no-fault divorce after one year from the date of its execution. A Separation Agreement can also settle the issues between the parties even when fault is alleged. Such agreements or a Memorandum of the agreement is frequently filed in the County Clerk's Office following its execution.

Will my spouse have to pay my attorney fees?

Not necessarily. There are many different circumstances under which your spouse may be ordered to pay some or all of your attorney fees. Your attorney can advise you in this regard once he/she understands your specific financial circumstances.

What happens to pension, retirement and deferred compensation interests?

That portion of a retirement account which was earned or accrued during the marriage is considered marital property subject to equitable distribution. This can include a pension or a contributory account such as a 401(k) or 403(b). It also embraces Individual Retirement Accounts (IRA's) and other types of retirement plans including military retirement programs. The attorney will work with you to examine in detail the accounts which are subject to division and the tax and other impacts of dividing the funds. Division of these types of retirement accounts often requires the preparation of a Domestic Relations Order (DRO) or Qualified Domestic Relations Order (QDRO).

Should I change the beneficiary on my life insurance?

You should not change any beneficiary designations until your divorce is finalized. While a divorce is pending, there are "automatic orders" in effect to prohibit either party from changing the status quo without the written consent of the other party or an order of the court. This includes, among many other things, changes to any existing life insurance policies, automobile insurance, homeowners and renters insurance policies.

How will health insurance coverage issues be handled?

If the parties have entered into a Stipulation of Settlement or Settlement Agreement on or after October 9, 2009 (the effective date of Domestic Relations Law Sec. 255) resolving all of the issues between the parties, the Settlement must include a provision relating to the health care coverage of each party. That provision shall either (a) provide for the future coverage of each party; or (b) state that each party is aware that he or she will no longer be covered by the other party's health insurance plan and that each party shall be responsible for his or her own health insurance coverage, and may be entitled to health insurance on his or her own through a COBRA option, if available. Coverage of minor children will be discussed as part of the divorce settlement negotiations.

How does a divorce impact my tax status?

In addition to changing your filing status from married to single, the determination as to whether the dependency exemption for any child(ren) will be shared or by whom it will be claimed must be determined. Tax returns during the pendency of a divorce action can be filed as "married, filing jointly" if the parties agree to do so and cooperate in the necessary sharing of information and tax return preparation. Absent agreement, the default filing status would be "married, filing separately" although a "head of household" filing status may be available in certain circumstances.

How is a visitation or parenting time schedule developed?

Considering your or your spouse's work schedules, and the child's (ren's) school and extracurricular activities, a plan may be formulated for custodial time with the child(ren) which will consider times during the week and on the weekends, along with transportation, times and locations for pick-up and drop-off, etc. In addition to regular visitation, parents must consider who will have custodial time whenever the children are not in school, determining specific school holidays and whether or not these holidays will change regular visitation schedules. Absent agreement, the court will establish these terms, generally after one or more hearings on this issue.

How are child support payment amounts determined?

Child support payments are based upon a mathematical formula designed to determine the basic child support obligation, contributions to child care expenses, extracurricular activities, health insurance coverage, and health care expenses which are not covered by insurance. It is an extremely complex and personalized determination and is fully based on the current finances of yourself and your spouse. You and your spouse may "opt-out" of the statutory child support standards. Opt-Out Agreements are governed by strict statutory mandates which your attorney can explain to you.