

THE ULTIMATE NEW YORK DIVORCE GUIDE

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GETTING DIVORCED IN NEW YORK STATE

Divorce can come as a surprise even to the person filing for it.

Sometimes divorce can be a true shock, a rug-pull, that catches you without any time to prepare. But even if you're the one filing for divorce, if you've been thinking about this choice for months and years, you can surprise yourself to be going through with it. The fact is, outside of pulp noir novels, no one standing with a loved one in front of a priest or a justice of the peace plans to end up here, mired in the confusing, stressful, and lonely process of divorce.

In most cases, you're only going to feel more disoriented in the weeks and months after you serve or are served your divorce papers. Soon you'll be swimming in Latin phrases like *pendente lite* and *ab initio*, and hacking a path through acronyms like MSA, QDRO, IRA, and ICMC. You may end up discovering things about your spouse that surprise you, like hidden bank accounts and spending habits and even whole businesses. You'll be forced to confront your own values, and make tough decisions about what you want to spend, to discover, to compromise, and to fight. If you have children, that ambient background-worry you know that constant drone-note of concern for their safety, their happiness, their future, will rise in pitch and volume.

This can be a debilitating atmosphere. You may want to rush through the divorce as quickly as you can. You may think that you want to punish your spouse. Or you may want to pass most decisions off to your attorney and withdraw from the process as much as possible.

Divorce is adversarial. Excepting the rarest cases, when spouses have no disagreements whatsoever, the fact that one party has filed for a divorce essentially splits a former team into two opponents. How you fare in the divorce process, then, will depend more than anything else on the team that you now

form around yourself. You can't afford to leave the decisions ahead to anyone else – especially if you have children – and the first choice you get to make is picking your attorney. If you can find a good listener, a coolheaded counselor, and an advocate honest enough to inform you of costs, risks, precedents, and strategies, to shape your expectations and help you decide when to compromise and when to fight, you'll stand a much better chance of securing your assets, protecting your children, and smoothing the road ahead.

Before you pick your attorney, you might want to educate yourself about some of the common complications and outcomes of divorce cases in New York, and start to approach the questions that are sure to come up. Anything you can do to answer these and start planning will help you enter more confidently into this difficult effort ahead.

>> *Are there different types of divorce?*

As far as the legal result for you, the divorcé(e), there are not different “types” of divorce: one divorce will always have the same legal effect as any other.

We do typically classify divorces as either **contested** and **uncontested**, and while they bear the same legal result, the former will be much longer and more expensive.

In an uncontested divorce, there is no conflict: you and your spouse agree on all of the issues pertaining to the divorce. To obtain an “uncontested” divorce, you must draft and sign an agreement and file it with other necessary court documents before the judge will grant your divorce.

If you have good reason to believe that you and your spouse can agree on the terms of an uncontested divorce, you could save a lot of money in legal fees. To explore an inexpensive and efficient method of filing for an uncontested divorce, visit www.NYDivorceNow.com.

Most divorces are contested, meaning the parties do not agree on all of the issues that they need to resolve before a court will grant a divorce. Broadly,

these are the basis for the divorce, the division of assets, alimony, child custody, and child support.

>> What are grounds for divorce in New York State?

Historically, one could only obtain a divorce in New York State because of some demonstrable fault on behalf of one party. These grounds for a “fault” divorce included abandonment, imprisonment, cruel and inhuman treatment, and adultery. All states in the Union now recognize some form of “no-fault” divorce, meaning that the relationship between spouses has broken down and remained essentially unfixable for at least six months prior to one party filing. In 2010, the New York State Legislature added a provision for “no-fault” divorce. This has done much to reduce litigation in the state. Most litigants and attorneys now choose to file for divorce on a no-fault basis. There is a much lower burden of proof: the claim need rest only on one party’s sworn statement that the relationship has deteriorated.

>> Can I get divorced if I was married outside of New York State?

You may obtain a divorce in New York State even if you were married in another state, but there are residency requirements. If both spouses are currently living in New York State and have lived here continuously for one year, either may file for divorce. If only one party is living in New York State but has lived here continuously for two years, that party may file for divorce.

COMMON QUESTIONS ABOUT DIVORCE

>> How long will it take to get divorced?

The Office of Court Administration in New York publishes guidelines encouraging county courts to conclude divorce proceedings within six months. However, the length of a divorce case depends upon the level of conflict. If spouses are

largely in agreement or else are ready to compromise, it might be over in well under six months. If the parties have difficulty negotiating or throw up road-blocks, if documents are hard to find, and if more outside professionals – like forensic accountants and psychologists – have to get involved, the case can drag on for over a year. This happens more often with longer marriages and when there are children and significant assets involved.

As a general (and reliable!) rule, cases will cost more the longer they go on.

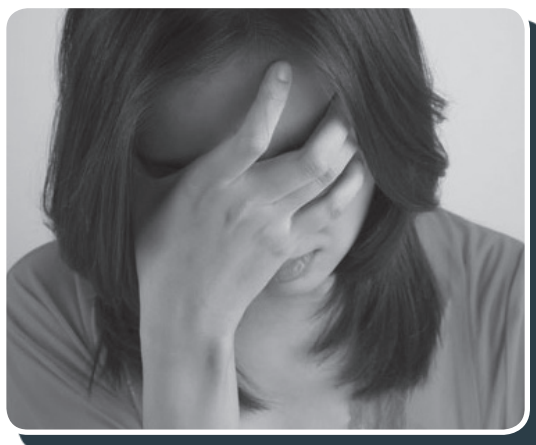
>> Can I make my spouse pay for my attorney fees?

In New York State, courts presumptively entitle the less moneyed or non-moneyed spouse in a divorce case to an award covering attorney fees. You may request this in court. This presumption rests, of course, on the income disparity, but a judge might consider other factors.

>> I'm not happy with my divorce agreement. Can I change it?

Circumstances change, and the obligations you settled and arrangements you made in a divorce might not fit in the future. If you and your spouse can agree to change your divorce settlement, you can draft and sign an addendum modifying the original terms.

You can also go to a State Supreme Court or Family Court. In either case a judge will still have the final say over a change to your original agreement. If you want to make a change but your former spouse doesn't agree, you may go to court and request a change – whether to spousal support, child custody, or child support – and demonstrate to the judge that your circumstances have changed significantly enough to merit this adjustment.



>> *Can I file a joint tax return during the divorce process?*

You can file jointly if you are not divorced before the end of the tax year. You're better served seeking the advice of a tax specialist rather than only an attorney in this case. While filing jointly may save both parties money, there may be other complicating factors to consider.

>> *Can I open my own bank account during the divorce?*

It will be a good idea for you to open your own bank account as soon as possible, even if you are still living in the same household as your spouse. Any income you make after one party files for divorce is *yours*, and not subject to equitable distribution along with marital assets. If you continue to deposit paychecks into a shared account, it may be difficult to keep these funds safe.

>> *Can I change my life insurance beneficiary during my divorce?*

Once an individual files for divorce in New York, the court issues temporary orders prohibiting certain actions. These include modifying a life insurance policy. If you're worried about a spouse dropping you from his or her health insurance, rest easy – the court prohibits this, too, along with the selling of major assets.

>> *My former spouse is threatening to take me back to court. What do I do?*

Sadly, parties far too often find themselves back in family court re-litigating old issues. Excellent records are the best possible protection. The better your records, the better your outcome, regardless of the allegations against you. The next best protection is appropriate behavior – including text messages, emails, and social media posts.

>> I'm afraid to see the respondent in court. What do I do?

If you've filed for an order of protection and are afraid to see the respondent in court, see a court officer as soon as you get to the court room. He or she can take you to a separate room so that you do not have to see the respondent. The officer will escort you to and from the courtroom. If possible, bring a friend, family member, or advocate. The point is, you should never feel scared or alone.

STARTING THE PROCESS

>> What do I do to prepare for divorce?

What you do to prepare for divorce depends on the kind of the divorce – whether it's amicable or high-conflict, and whether there are significant assets or children involved. No matter the particulars, you will need some basic documentation ready, including tax returns, credit card statements, and a statement of net worth. You should also be prepared to tell your attorney at your initial consultation about the history of your marriage, mentioning any time spent residing out of state, any children, and any history of domestic abuse, including verbal abuse.

The more assets you have, the more documentation you'll need to gather. You should be ready to share bank account statements, pension and retirement account statements, investment information, and information on property holdings. Your attorney will need to know if you own collectibles like art or cars or anything that appreciates in value. Even things like holiday bonuses and other aspects of your compensation structure at work will be subject to examination.

An experienced family law attorney can tell you, based on the particulars of your case, what other documents you may need or steps you may need to take to protect yourself, your assets, and your children.

>> *What if I can't locate my spouse to file for divorce?*

In New York State, absent the court's permission, you must personally serve an individual with a summons with notice or a summons with complain for divorce. Starting on the following day, your spouse will have 20 days to respond. If he or she does not respond before the deadline passes, you can proceed to a judgment of divorce **by default**.

This doesn't mean that you will retain all of the marital assets. If you and your spouse have lived separately – and financially independent – for many years, you may be able to retain all of the assets. However, if your spouse simply doesn't respond, and, say, you have had a pension or shared savings account for many years of marriage, a judge may still order the distribution of those assets.

LEGAL SEPARATION: AN ALTERNATIVE TO DIVORCE

Couples who find it impossible to live in the same household but have an interest in maintaining their married status can file for **legal separation**. A separation agreement is a contract between spouses settling the same issues a divorce would cover: separate living arrangements, the division of assets, alimony, child custody, and child support. The difference is that the separation agreement avoids a court judgment, and it doesn't end the marriage. After signing a separation agreement, the spouses remain married and cannot legally remarry. There are also consequences worth considering before filing taxes as "married but separate."

There are several reasons to consider legal separation as an alternative to divorce. Legal separation:

- » Provides spouses with time apart, to decide whether divorce is appropriate.
- » Allows spouses to remain covered under family health plans.

- » Provides a remedy to marital discord for people whose religious views reject divorce.
- » May permit military spouses to remain married long enough to qualify for benefits under the Uniformed Services Former Spouse Protection Act.
- » May allow spouses to remain married for the 10 years or more necessary to qualify for certain Social Security benefits.
- » Allows a spouse to file for New York no-fault divorce after a year of separation.

>> *Do I need a separation agreement to get an uncontested divorce?*

You do not need a separation agreement to obtain a no-fault or uncontested divorce, but, one year after filing the separation agreement, either spouse may use that document to request a no-fault divorce.

A separation may not be the best route to this no-fault divorce, though, especially if you're concerned about protecting your assets. The clock has been effectively "running" from the date of the separation to the date one spouse files for divorce. Any income earned, assets acquired, or investments appreciated during that year will go into the marriage "pot" and be subject to distribution.

MEDIATION: AN ALTERNATIVE TO LITIGATION

You might think of **mediation** as forward-looking and solution-setting, and litigation as backwards-looking and blame-laying. Mediation may be a cost-effective and time-saving alternative to litigation. It's a way to bypass the formality, expense, and uncertain outcome of a trial, and can encourage amicability and cooperation – the parties have more control over their outcome, including the division of assets, child custody, child support, and alimony.

After the mediation, your mediator will prepare a **Memorandum of Understanding** (MOU). This is not a legally binding document – it is only a summary of the issues you discussed and the agreements that you reached. Each party will bring this memorandum to his or her respective attorneys who will then draw up a legally binding document based on those terms, assuming there are no major objections.

>> *Do I need an attorney if I'm going through mediation?*

It's important to note before you enter the mediation process that a mediator cannot offer legal advice to either party, and can't even suggest an outcome. (And really, even if mediators could offer legal advice, no *one* person could give *two* spouses all the counsel that each needs.) Because of this, the dominant party in the marriage is generally the dominant party in mediation.

You can't afford to enter mediation without an advocate and advisor. You don't need to spend great sums on legal assistance during mediation – remember, you should be *saving* money by avoiding a trial – but you do need some guidance. Choose an attorney who can help coach you for your mediation sessions, helping you to draw up an outline of the outcomes you desire, look for “global” solutions, and avoid getting mired in minutiae.

DIVISION OF ASSETS

New York is an “**equitable distribution**” state. Equitable means “fair,” not “equal,” but in the most cases courts divide marital assets equally, valuing the contributions of spouses who stay at home to care for a family the same as spouses who work and earn the majority of a family's income. In some circumstances, however, a spouse can make a case for a greater share of certain assets.

“**Marital property**” means all income and any assets the parties acquire during the marriage, from the date a couple was married to the date one filed for divorce. This includes:

- » Bank accounts
- » Bonuses
- » Timeshares
- » Vehicles
- » Household items
- » Social Security benefits
- » Frequent flier miles and other corporate rewards
- » Houses and other properties
- » Collectibles (anything that appreciates)
- » Stocks and other investments
- » Businesses
- » Retirement plans including pensions, 401(k)s and 403(b)s

Spouses will keep “gifts” – including their respective wedding rings – as well as any inheritance held in only one spouse’s name. Almost everything else, though, is a “marital asset” and subject to equitable distribution. This does not mean spouses will actually “split” things like houses and businesses and collectibles like artworks or antiques. It means that each spouse will be entitled to a portion, probably close to half, of the *equity* of all these things. One spouse might “buy out” the other’s equity in a car, house, or business, for example.

These assets all carry their own complications. Ensuring equitable distribution depends upon the free sharing and thorough review of all relevant information about finances and assets, in a process called the **discovery phase**.

>> *What if my spouse is refusing to turn over financial paperwork?*

If you suspect your spouse is withholding information during the discovery period, you can obtain a court order to compel your spouse to release that information. You may also subpoena business partners, professionals from banks or investment houses, and any other relevant parties.



>> *Will I have to sell my house during a divorce?*

The marital house is sometimes the largest of the marital assets. If one spouse wants to retain the house, he or she must buy out the other spouse's equity in the house, either by refinancing the mortgage or by selling off or trading other assets. This can work to the advantage of *both* spouses, as they'd be saving on the percentage a realtor would take if they

sold the house on the market.

It may be the case that neither spouse has the cash flow to maintain the house. In other cases, if a couple goes to litigation, a judge may order that they sell the house.

>> *What will happen to a house I purchased before marriage?*

If you purchased your home before marriage, it's possible that you could retain it as separate property. If, however, you transferred the title to your spouse, the court might determine that you "gifted" all or a portion of the property. If the house remained in your name, the court will examine any appreciation in the value of the house. If the house appreciated *solely* due to market forces, you will retain the value of that appreciation as well as the original value. If, however, you and your spouse made any improvements to the house, or if your spouse made any financial contributions to the equity of the house, that property will become a marital asset subject to equitable distribution.

>> *I've won an injury settlement. Does that count as marital property?*

New York State law considers an injury settlement to be separate, not marital, property, and not subject to equitable distribution. However, as soon as you commingle those funds with marital property – by, for example, having the insurance carrier or other payer deposit those funds in an account you hold

jointly with your spouse – those funds will become marital property subject to distribution.

>> How can I protect my inheritance during a divorce?

If you receive an inheritance it may remain your separate property, even if you received the inheritance during your marriage. It depends, though, on how you kept that inheritance. If it was a cash inheritance and you kept it in a separate account under your name only, and did not commingle any inherited funds with funds in a joint account, the court will not consider your inheritance to be marital property. If the inheritance was a piece of real estate held in your name only, and you made no improvements to the property using marital funds, it will remain separate property. However, if you put your spouse's name on any cash account or property, you risk the court determining that all or part of the inheritance is marital property.

>> Will my spouse have access to an account with my parents' names on it?

If your parent or sibling wants to add your name to a bank account, your spouse will not generally be able to access that account or the funds within it. Your spouse may make a claim to those funds, but so long as you have not transferred any marital funds into the account (for example, in an attempt to hide or protect those funds), the court will most likely deny the claim.

>> What will happen to our shared business?

In most cases of shared business, one party will have a greater interest in the business. Then it would be natural for the principal owner and operator to retain the business, though the other spouse may be entitled to a share of its equity. In some cases, though, spouses have an equal interest in a business – for example, one they started together, with an equal investment and an equal hand in operations. In an amicable divorce, both parties might be able to continue to work together as business partners. With greater acrimony, this could

be inadvisable and even disastrous. In these cases, it's better for one spouse to buy out the other's equity, or for both to sell the business and split the proceeds.

>> Can I stay on my spouse's medical insurance after divorce?

Spousal medical coverage ceases once a divorce is finalized. If a spouse is concerned about the high cost of obtaining medical coverage, he or she can, with the cooperation of the other spouse, draft a settlement for separation rather than divorce.

>> What happens to life insurance after a divorce?

Life insurance is an issue related to streams of payments in a divorce. These include equitable distribution, child support, and alimony. Courts are likely to order or spouses are likely to negotiate a provision for life insurance ensuring security for the stream of payments should the paying spouse die before the payments have run out.

>> How do we handle mortgages and other bill payments during a divorce?

In some cases, one spouse will abandon financial responsibility for mortgages, credit card bills, and other payments. The court may order that both spouses share household expenses for the duration of the divorce proceedings to ensure that assets and equity are maintained and to preserve the status quo.

PENSIONS, RETIREMENT ACCOUNTS, AND QDROs

When couples divorce, they can divide the assets they've reserved for retirement proportionally without tax liability under ERISA, the federal statute that regulates retirement benefits. Whether your retirement plan is a **defined contribution** or a **defined benefit** plan, you will need a qualified domestic relations

order (that a judge signs and that the plan accepts) to effect a division of the marital portion of the fund. This is separate from and comes after a separation agreement.

Dividing a Defined Contribution Plan

A defined contribution plan would include a 401(k), an SEP account, a SIMPLE 401(k), profit sharing, and other similar plans where the employee or “plan participant” contributes to the fund. The plan participant’s employer may also contribute to the plan. These funds do not pay out a guaranteed pension payment upon retirement. Rather, the plan participant can access his or her account at a certain age and withdraw money for retirement.

Dividing a defined contribution plan after a divorce does not involve tremendous difficulties. With a QDRO, the plan provider can divide the plan in whatever proportion the parties agree upon or a judge orders. The non-participating spouse, or “alternate payee,” generally sets up a rollover IRA for his or her share of the funds. The transfer from the plan participant to the alternate payee is not taxable – although there would be a tax consequence for an early withdrawal.

Several issues can arise when dividing a defined contribution fund. For example, an employer may make contributions into the fund for one tax year in the following year. If parties are dividing a fund in a divorce, they need to consider any contributions an employer might owe.

Another issue is the appreciation or depreciation of a defined contribution fund after the date set for dividing the fund. For example, if a 401(k) contains \$40,000 and you and your spouse agree to divide that fund equally, you should not simply agree to give or take \$20,000 as a one-half share. The 401(k) will likely either appreciate or depreciate before the QDRO can be prepared, signed and implemented. Any agreement must

clearly state what will happen to appreciation or depreciation of that fund in the interim period. Likewise, any request to the court to divide a fund must include a request that the appreciation or depreciation of the fund be made a part of the court's decision regarding the fund.

Dividing a Defined Benefit Plan

A defined benefit plan is more like a traditional pension that provides a set monthly payment at the time of retirement. The plan participant may or may not contribute to the plan. These plans often provide many benefits in addition to the monthly payment upon retirement. For example, they may provide a pre-retirement death benefit, a post-retirement death benefit, a single life annuity, a joint and survivor annuity, early retirement benefits, and more. Each plan has unique benefits and each plan has its own requirements for the preparation of a QDRO.

The benefits that are available (and the impact if those benefits are not preserved) to the alternate payee can be significant. More importantly, if the alternate payee does not specifically set forth the benefits he or she desires in a separation agreement or court order, the QDRO will not include them. For example, if the parties enter an agreement and the agreement is silent on the issue of a survivor benefit, the alternate payee cannot obtain a survivor benefit through the QDRO.

>> Which party is responsible for dividing retirement accounts?

In general, the non-titled party is responsible for drafting the order to divide a deferred compensation or pension plan. If this requires multiple orders, it can get expensive. In these cases, a divorce agreement or court order can stipulate terms requiring the parties to share responsibility for dividing these assets.

>> *Can I protect my premarital retirement account?*

In many cases, one spouse will have a retirement plan that predates the marriage. Only the portion of the plan accumulated and appreciated during the marriage will be subject to equitable distribution. Contributions and value added before the marriage and after one party files for divorce are exempt. These calculations can be tricky, though, so you will need the help of an experienced attorney and possibly a Certified Public Accountant.

>> *Am I entitled to my spouse's Social Security benefits?*

In New York State, you will be entitled to your spouse's Social Security benefits if you've been married for 10 years or more, though the Social Security Administration will review your case.

>> *Can I disinherit my spouse to protect my assets?*

The Estates, Powers, and Trusts Laws of New York State prevent one spouse from disinheriting another in the event of a divorce. Even if you bequeath your assets to someone else, a former spouse can obtain his or her "elective share" of probate and non-probate assets.

>> *When will I receive my share of my spouse's pension?*

There are two types of defined benefit plans to consider in this situation: shared pensions and separate interest pensions. If your spouse has a shared pension, you are only entitled to receive benefits once your spouse retires. If your spouse has a separate interest plan, then either party can receive his or her share as soon as the participant is eligible to retire.

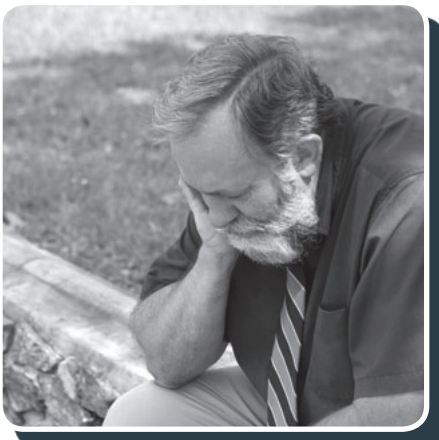
>> *What if we both have pensions and aren't sure when we'll retire?*

In some divorce cases, spouses are close in age and each has a pension plan, but both are unsure about the date that they'll want to retire. In this circumstance, the first spouse would face the difficulty of receiving only half of his or her retirement payments and receiving none of the former spouse's.

One option might be a separate interest pension, allowing each party to receive a share of *both* pensions when he or she elects to retire. If the pensions are roughly equivalent in value, each party may simply waive the right to the other's pension. If the pensions are not equivalent, an expert can evaluate both and provide counsel on options for dividing them.

>> *My spouse is refusing to retire. What can I do?*

Sometimes one party will attempt to retaliate against a former spouse by refusing to retire, blocking a spouse from a share in a pension or other retirement investment. In this case, you could go to a judge and ask for an order mandating a retirement age. You could also request spousal maintenance payments in lieu of pension payments starting on the date your spouse becomes eligible for retirement and continuing until your spouse retires.



>> *I can't access my share of a pension. What can I do?*

If a spouse has spent down or otherwise dissipated a pension to which you have a right (as set forth in a court order or agreement), you will have to go to court and seek an order for compensation. If your former spouse has any other assets, the court will assess those and order payment equivalent to your share in the pension.

CHILD CUSTODY

Child custody can be the most contentious issue in a divorce – even more than the division of assets. This is natural. In most other divorce issues, two parties negotiate (or fight) over what constitutes “fair” between them. The issue here isn’t at all what’s “fair,” but what’s best for the health, mental and emotional wellbeing, and education of a third party, the children of a marriage. The father will probably think it’s his in child’s best interest to see him as much as possible. The mother will probably think the same. And both are – probably – right. The job the spouses share – or the judge takes on, if a case goes to trial – is to navigate between these truths, between impossible positions, toward the best arrangement for the child.

New York State does not operate upon any gender bias in these deliberations. Since stability is generally in the children’s interest, especially during a time of upheaval like a divorce, the court prefers to maintain the status quo. This can mean identifying a parent who has been the primary caregiver and favoring that person in custody matters, just as the primary bread-winner would take primary responsibility for child support. A parent who has been largely absent in the children’s lives will have a difficult time suing for joint legal and physical custody during a divorce, as will any parent with a history of domestic abuse or drug use.

New York State law recognizes two kinds of custody: legal and physical.

- » **Legal Custody** – Legal custody determines which parent will make important decisions –for a child (e.g. healthcare and education). Legal custody may be joint (shared) or sole (reserved for one parent). Even when they’re not able to get along, most parents will insist on joint legal custody – and the courts will generally agree that this is for the best.
- » **Physical custody** determines where the child or children will reside. Parents can share physical custody equally, an arrangement based on the number of “overnights” a child stays at one parent’s residence. More commonly, there is one “primary physical custodian,” with the other parent taking some

lesser portion of nights, weekends, or holidays, in a schedule called “visitation time.” Convenience, proximity, school, and work obligations must factor into this schedule. If the parents cannot agree, the court will decide – an additional time and cost that should be an incentive for the parents to cooperate.

A judge won’t easily modify a custody order. If you are seeking to modify a custody order, the most effective way will be to seek your spouse’s agreement and approval. Circumstances do change, though. Even without your spouse’s approval you can petition a court to modify a custody order by demonstrating that the circumstances determining the original order have changed enough to merit an adjustment.

>> *Does my child have any say in custody?*

A child will have a “Law Guardian” who will stand on equal footing with both parents’ attorneys in the court, arguing on the child’s behalf. In the eyes of the law, a minor doesn’t have the ability – or the right – to determine his or her best interests. Just as a child under 18 cannot leave home without parental consent, so too, in child custody proceedings, the court will not in any case grant an order solely based upon a child’s wishes. That said, the older a child gets, the more weight a court will give that child’s wishes. There are no rules determining this “weight,” however – this is subject to a judge’s discretion.

>> *Where can I file a petition for custody?*

You can file a petition of custody in any county where either parent resides. If one parent files a petition in a county inconvenient for the you, your attorney can file a motion requesting the court to designate that county an inconvenient forum, and, if granted, move the proceedings. If your attorney files such a motion, the court will consider where both parties reside, where the child resides, and where witnesses reside.

>> *My spouse filed a false report with Child Protective Services. Can I bring this up in a trial?*

You can mention this, and personally testify about the circumstances surrounding a false CPS report, but once CPS has deemed a report “unfounded,” it is not subject to subpoena and you cannot enter it into the record as evidence in a trial, nor will you be able to call a caseworker in to testify.

>> *If I revert to my maiden name, can I change my child’s name as well?*

To change a child’s name after a divorce, you must file a petition in the State Supreme Court and serve the other parent with a notice of that petition. The court will not grant your petition if the other parent objects – no matter what the child wishes. Your child may change his or her legal name when he or she is no longer a minor.

>> *What are paternity rights in New York State?*

If a couple is married when a child is born, New York State law assumes that the husband is the father of that child. If an unmarried woman bears a child, New York State law does not, automatically, recognize any legal father. If parents are unmarried, they may sign an “acknowledgement of paternity,” a form readily available at any maternity hospital. The second option to establish paternity would be for both parents to petition the Family Court for an Order of Filiation. If there is any doubt about a child’s paternity, you should not sign an acknowledgement of paternity, and should instead go through the Family Court.

>> *Can I obtain custody of my niece or nephew?*

New York State courts prefer to keep children with their biological parents. You can, however, obtain custody of a minor relative by petitioning the Family Court and explaining your reasons. You may allege “extraordinary circumstances,” including abandonment, abuse, unfitness to parent, or consistent neglect as grounds for obtaining custody for a niece, nephew, stepchild, or grandchild. The “Extraordinary circumstances” requirement sets a high burden of proof. You

will want to contact an experienced family law attorney before attempting to win custody of any child.

>> Can I request a new Law Guardian for my child?

Because the court appoints a Law Guardian, or “attorney for the child,” it’s very hard to get these attorneys removed and replaced. The Law Guardian has pledged to put the interests of the child assigned first – your allegations that the attorney is biased in favor of the other parent will not easily convince a judge. You would need to demonstrate gross misconduct to have one of these attorneys removed.

These attorneys will continue to represent your child through any future issues involving Family Court. It’s generally best to let your attorney work with your child’s Law Guardian, rather than spending energy on an unlikely attempt to remove that attorney.

>> I’m pregnant and going through a divorce. Can I move out of state before the divorce is finalized?

A court in New York State cannot force a child custody case or relocation case before a child is born. If you’re in the middle of divorce proceedings and anticipate a move out of the state, it would be wise to move before you give birth to the child, at which point, if you were to remain in the state, your spouse and the court could effectively “freeze” you.

>> Can I move to another state with my child if I have sole custody?

Sole custody doesn’t immediately allow you to relocate with a child. It will weigh heavily in your favor, but you still need to petition a court for permission to relocate.



>> *My former spouse is refusing to let my child go on a trip. What can I do?*

When one parent wants to take a child out of the country on a trip, the child will need a passport, and that requires *both* parents' permission if they share joint legal custody (which is most often the case). If one parent refuses to allow the child to get a passport, the other parent must go to Family Court and ask for an order waiving the obstructing parent's right to decide on this issue. The court will rarely deny a parent's request for a passport.

>> *Do both parents have to consent to decisions about a child's college education?*

Today, many divorce agreements make some arrangement about paying for a child's college education. However, college tuitions vary widely, and college costs will be hard to predict for young children. If this section of an order or agreement is insufficiently thorough, it can cause issues down the line – if, for example, one parent objects to paying a private college's tuition. Each parent's involvement in the process and obligation to pay for a college may be contingent on his or her level of consent to the selected college.

It's best for you and your spouse to think through this issue together, imagining how you would have approached it if the divorce never happened.

>> *A parent is refusing to let me see my grandchild. Do I have visitation rights?*

New York State recognizes the grandparent/grandchild relationship as an important aspect of child development. If the custodial parent is refusing you access to your grandchild you may petition the court for an order upholding and enforcing your visitation rights. The court will examine the past standing of the grandparent/grandchild relationship as well as the current best interests of the child when hearing the petition.

>> *My former spouse is refusing to follow the court custody order. What can I do?*

If your spouse isn't following an Order of Custody issued in Family Court, you file a petition of enforcement through the Family Court. If the custody order was the result of a judgement of divorce, you can still file for enforcement in the Family Court so long as the Supreme Court didn't retain exclusive jurisdiction over custody. To obtain enforcement, you will have to present the valid existing order and prove that your former spouse has failed to uphold its requirements. The court may change the initial order or take other punitive measures against the negligent parent.

>> *Can I modify an out of state order?*

It will be difficult to modify a custody order issued in another state, because the issuing court retains jurisdiction to modify its own order so long as one party continues to reside in the issuing state. However, if neither party nor the child resides in the state that issued the order, or if the issuing court determines that a New York court would be the most appropriate venue to modify the petition, you might succeed.

>> *How can I enforce an out-of-state custody order in New York?*

To enforce in New York State a custody order that another state's court issued, you first have to register that order with the Family Court in the appropriate New York State county. Once you've done that, you can file an enforcement petition and follow the regular process.

CHILD SUPPORT

Child support refers to the obligations both parents have toward the costs of raising a child. Child support comes in the form of regular payments the non-custodial parent makes to the custodial parent. Child support obligations in New York State continue until a child turns 21, unless the child "emancipates" him or herself sooner (by leaving the home, starting a family, or joining the military).

The questions of *who pays* and *how much* can change many times as the circumstances of child care and both parents' finances change. If a court orders that a non-custodial parent pay child support and he or she later becomes the full custodian, for example, that individual must file with the Family Court to terminate the obligation.

The Child Support Standards Act (CSSA) provides a step-by-step formula used in every court in the state to determine the allotment of child support. Still, judges have considerable discretion in ordering child support, especially with regards to upper-income families and families with special needs.

When determining the amount of child support payments, the court will consider both parents equally responsible for “mandatory” and “discretionary” expenses, including:

- » Shelter
- » Healthcare
- » Clothing
- » Daycare
- » Summer camps (so long as the cost is comparable to daycare)
- » College costs
- » Food

A judge cannot order a non-custodial parent to pay for things like clothing above the basic child support payments. Extracurriculars, as neither mandatory nor discretionary, aren't covered.

Private school tuition is not a “mandatory” child support cost, even if a child attends a private school before and/or during the divorce. A court may still order a parent to cover this as a “discretionary” expense, however, especially if the child already attends a private school.

College is another discretionary expense. A court will examine the education level of both spouses, expectations for the child, and income before making an order about college expenses. This will continue only until a child's 21st birthday, so long as parties have not worked out an arrangement to extend payments. Parents may limit their contributions to a SUNY or public college expense level so long as both spouses agree to this in negotiations.

Either party may pay for a child's healthcare, but the party not directly paying for the policy will pay a portion of the premiums directly to the policyholding parent on a biweekly, monthly, or annually. Non-reimbursed medical expenses count as "mandatory add-ons," not part of the regular support payments, but expenses that both parents will have to divide based on their respective incomes. If one parent wants to keep a child on his or her health insurance policy between the ages of 21 and 26, both parents can come to an agreement to share the costs out of court, but a judge will not order a parent to pay during this period.

A judge will determine the amount of payments based on the child's need, the child's lifestyle before the divorce, and the noncustodial parent's ability to pay. A judge might look at a non-custodial parent's entire income including bonuses, calculate on base income and add a provision for bonuses, or calculate based on an average of the last two to three years of total income. In this last case, the non-custodial spouse would be paying child support based on anticipated income, including anticipated bonuses, which may or may not be fair. Be sure to discuss these details of your financial situation with an attorney before entering child support negotiations or a trial.

Mapping so many fluctuating particulars of child care can be daunting and very complicated. With the help of an experienced attorney, you can work with your spouse to ensure that you cover many eventualities, like college and car insurance, and costs not covered by child support orders, like extracurriculars, before they pop up years down the line.

>> *My former spouse isn't paying child support. What can I do?*

In this situation, you have to file a petition for enforcement of support with your local Family Court. If child support was incorporated into an agreement or court order of divorce, this might contain directions as to the first steps to take if one party stops paying child support.

>> *How can I file for child support if my former spouse lives in another state?*

New York State courts may not have jurisdiction to order someone living in another state to pay child support. This could depend on where the children were born, and whether the former spouse abandoned you and your children in New York. If it's not possible to file in New York State, you will have to file in an interstate proceeding or in the state where your former spouse is living. An experienced attorney can advise you as to the appropriate route in your circumstances.

>> *I've lost my job. Can I reduce my child support?*

There is no automatic reduction of child support if one parent loses his or her job. If you've lost your job, you must go to file a petition for reduction of support at the Family Court as soon as possible. If granted, the reduction will be retroactive only to the date that you filed, not to the date that you lost your job.

The court may not view one party quitting – or being fired for cause – as a change in circumstances warranting an adjustment to child support payments.

>> *How does child support affect taxes?*

Child support in New York is based on full income less FICA, Social Security, and Medical taxes. The guidelines under state law do not deduct income tax before calculating child support; likewise, child support is not deductible for the paying parent (unlike alimony). It is a tax-free income stream for the custodial parent.

According to the Internal Revenue Code, only the custodial parent may claim children as dependents. However, depending on the amount of support involved in a case, the number of children, and the financial situation of both parties, spouses can arrange to divide dependency exemptions.

SPOUSAL SUPPORT

Spousal support, or maintenance comes in the form of payments the higher-earning spouse makes to the lower-earning spouse to maintain the standard of living both enjoyed during the marriage. A married spouse can petition the New York Family Court to order spousal support; if a couple is separating or divorcing, the New York Supreme Court will consider spousal support as part of the marital action. Spousal support can be for a set number of years or an indefinite period. It is gender neutral, though occasions are few when the court orders the wife to pay the husband.

Just as the courts in New York have discretion in the equitable distribution of existing marital property, the court has latitude to consider “fairness” in awarding spousal support. The New York Domestic Relations Law sets out factors to consider, including:

- » The parties’ standard of living.
- » The income and property of the parties, including marital assets awarded during equitable distribution.
- » The duration of the marriage and the age and health of the parties.
- » The present and future earning capacity of both parties.
- » The ability of the party seeking maintenance to become self-supporting, including time and training necessary.
- » The presence of children of the marriage.
- » The tax consequences to each party.
- » The contributions of the party seeking maintenance as a spouse, parent, wage earner, or homemaker and to the career or career potential of the other party.
- » The wasteful dissipation of marital property by either spouse.
- » Any transfer or encumbrance made in contemplation of a divorce.
- » Any other factor that the court expressly finds just and proper.

New York State allows for **temporary maintenance** for the duration of the divorce proceedings, and **post-divorce maintenance** thereafter. In September 2015 Gov. Cuomo signed a statute applying a new formula to calculate alimony payments, and introducing a durational element, determined by the length of the marriage and the ability of the payee to become self-sufficient. This has restricted the vast discretion judges have heretofore exercised in ordering alimony.

>> Can I get spousal support without a separation agreement or divorce?

You can petition for spousal support without a separation agreement or a divorce; all you have to do is go to the Family Court in your county and file the appropriate paperwork, at no cost.

>> Can I discharge alimony by declaring bankruptcy?

Alimony is a domestic support obligation, and therefore will not be discharged if an individual files for bankruptcy. However, if you are entering a divorce agreement that contains a provision for spousal maintenance, you should include a failsafe clause prohibiting a spouse from discharging that obligation in any way, notwithstanding the specifications of the bankruptcy code.

DOMESTIC VIOLENCE

If you or your family members have been victim to domestic violence – including physical and verbal abuse, harassment or terroristic threats – your priority needs to be your safety. Call the police, who can remove the abuser from your home. Contact a family law attorney, who can help you obtain a temporary restraining order from the court. Only once you're safe should you start thinking about divorce proceedings.

There are many resources in the Albany and Saratoga area for victims of domestic abuse. These include Equinox in Albany, the Rape Crisis Center in Saratoga County, and the LGBT-based community hotline In Our Voices.

>> *How long does an order of protection last?*

The court will issue an order of protection when someone is harming you, keeping that person away. A **temporary order of protection** will last until your next court date. A **final order of protection** could last from one year to five years in cases of physical harm or threat with a weapon. If someone violates an order of protection against you, call the police and your attorney. You can follow up by filing a petition for violation of an order of protection with your local family court. Violation of either kind of order of protection could result in jail time or the loss of a driver's or other professional license.

>> *I've suffered domestic violence but can't afford an attorney.*

If you would like representation for a pending family offense case but cannot afford legal counsel, request court-appointed legal counsel. The judge will decide if you qualify, and assign an attorney if you do.

PRE-NUPTIAL AGREEMENTS

Negotiating a pre-nuptial agreement may not be the most romantic activity an engaged couple shares in, but for individuals with significant assets, it is a realistic and necessary precaution. You carry insurance for all the valuable assets you hold: auto, home, health and life. A pre-marital arrangement is marriage insurance.

As an "equitable distribution" state, New York assumes that whatever wealth or debt you bring to the marriage is "separate property," and all assets earned and debt incurred during the marriage is "marital property." This court divides "equitably," which does not necessarily mean equally, though it will usually fall at around 50/50.

A pre-marital agreement can assist in two regards. First, the agreement can definitively designate what property is separate. An accurate catalog of assets can be very useful later, especially if divorce proceedings become contentious. Second, a prenuptial agreement can explicitly waive the right to equitable

distribution, and state alternatively what marital assets the parties to the marriage are to receive and for what debt each will be responsible. The pre-nup can even set a time limit and dollar amount for spousal maintenance.

While a pre-marital agreement can set certain terms in anticipation of divorce, it cannot define the parameters of child custody, child support, or visitation. Your interests are not central to these decisions – the court will always prioritize the best interests of the child.