

NEW YORK STATE BAR ASSOCIATION

Divorce & Separation

In New York State



DIVORCE AND SEPARATION

The unprecedented increase in the marriage failure rate during this century has had its effect, directly or indirectly, on virtually every family in the country. The following information is designed to briefly summarize New York State's divorce laws.

Marriage is a civil contract. The state has an interest in preserving marriages. Accordingly, the marriage relationship only can be dissolved by a court, by either a divorce or an annulment. It also may be altered by a decree of separation granted by our courts. In any case, there must be a proceeding in the Supreme Court in which the person seeking the divorce, separation decree or annulment must prove "grounds."

How does one obtain a divorce, separation decree or annulment in New York State? First of all, "grounds" or valid reasons prescribed by law must exist and be proven to the court, even if both parties agree that the marriage relationship should be altered. Unlike most states, New York will not grant a divorce for incompatibility, "irreconcilable differences," or for a "dead" marriage. We do not have a "no-fault" divorce in New York State except where the parties have been separated pursuant to a separation decree or a separation agreement for more than a year and the party seeking the divorce has substantially complied with the terms of the separation decree or the separation agreement.

Divorce

Four of the "grounds" in this state are based on the fault of one of the parties: cruel and inhuman treatment, abandonment for one or more years, imprisonment for three or more years, and adultery. The other grounds: one year of living apart under a separation agreement, and one year of living apart under a separation decree granted by a court, afford New Yorkers a "no-fault" divorce, in which neither spouse is judged to be at fault.

Cruel and inhuman treatment

Cruel and inhuman treatment can involve either physical or mental cruelty. To be a reason for divorce, the treatment must have such a serious effect on the physical or mental health of the divorce-seeking spouse, that it is not safe or proper for the parties to continue the marriage. Mere incompatibility between husband and wife is not enough to obtain a divorce in New York.

Some examples of acts that courts have held to be cruel and inhuman treatment for divorce purposes include physical attacks upon a spouse; constant screaming, profanity or other verbal abuse; gambling away the household funds; staying away from the house too often without an explanation; going out with another man or woman; and wrongfully accusing the other spouse of adulterous relations with another man or woman.

Alcoholism, by itself, usually is not a sufficient basis for divorce, unless your spouse becomes cruel or violent when intoxicated, so that you fear for your health and safety.

Mental illness also is not a sufficient basis for a divorce on the grounds of cruel and inhuman treatment, unless a spouse's other behavior could be defined as "cruel and inhuman treatment." However, mental illness is not a defense to cruel and inhuman treatment. Nevertheless, a court may declare a marriage void when a spouse has been incurably mentally ill for a period of five (5) years or more.

The courts have held that when there is long-term marriage (often fifteen or more years married) the acts of cruelty must be more substantial to justify a divorce. What might be cruel in a short marriage may not be sufficient basis for divorce in a more mature marriage relationship.

Each case, however, stands on its own facts. The court decides whether or not these facts justify a dissolution of the marriage. Generally, the acts or conduct on which the divorce is based must have occurred within five years prior to the commencement of the action to be considered by the court.

Abandonment for one or more years

Abandonment means that your spouse has intentionally left you without your consent, and of his or her own accord (that is, you did not force or lock your spouse out of the house) and without justification.

You must also prove that your spouse had no good reason for leaving (such as your ill treatment or your consent), that your spouse left with the intention of never returning, and that your spouse did not offer in good faith to return. Unjustified refusal by a spouse to have sexual relations is also considered a "constructive abandonment" and may also be considered cruel and inhuman treatment.

When a wife has established her own career, which would either be terminated or severely reduced as a result of being required to accompany her husband in the event he moves, her failure to move with her husband is no longer considered an abandonment. Abandonment must exist for a continuous period of at least one year before the action is started to be a basis for divorce in this state. There is no statute of limitations on abandonment. However, a separation agreement eliminates the ground of abandonment, since both parties when they sign an agreement, consent to living apart.

Imprisonment for three or more years

Divorce on the grounds of imprisonment for three or more years means that the defendant actually must have served three years or more in prison before an action can be brought; even if the conviction is later overturned or reversed.

Adultery

Bringing an action on the ground of adultery, especially if your spouse is going to contest it, is not a simple matter. The proof of adultery here is difficult. You are not permitted to testify against your spouse, and you must have a witness ready to convince the court that your mate did engage in sexual relations with another person. Adultery is usually proven by circumstantial evidence, that is, by showing that your spouse had the opportunity, inclination and intent to engage in sexual relations with the other person.

In addition, there are four defenses to the charge of adultery, and if any of these are proven, the court will deny the divorce:

1. "Procurement" or "connivance"-Procurement means that one spouse actively encouraged the other to commit adultery. Connivance is similar to "collusion" or "consent" by a spouse to the adultery.
2. "Condonation" or "forgiveness"-Having sexual relations with your spouse after discovery of his or her adultery is an absolute defense to your divorce action based on the adultery.
3. "Statute of Limitations"-This means that there is a time limit (five years from your discovery of the first unforgiven act of adultery) for you to bring the divorce action.

4. “Recrimination”—This defense means that you, too, were guilty of adultery. No matter how convinced the court is that adultery was committed by both parties, it is forbidden from granting a divorce on grounds of adultery. Thus, if each spouse proves the adultery of the other, neither can obtain a divorce against the other on that ground.

Living apart and separations

Living apart, without a formal written agreement of separation or a court judgment of separation, is not recognized as a ground for a New York State divorce, no matter how long you continue to live separately.

Regarding separations, there are only two valid ways to dissolve a marriage. Each requires separation of one or more years. The law requires that you and your spouse live apart either under a written contract of separation or under a court judgment of separation and the spouse seeking the divorce must have substantially complied with the terms of the agreement or judgment.

Separation agreement

A separation agreement is a detailed contract which should be prepared by attorneys, where the parties agree to live separate for the rest of their lives. It should set forth the respective rights and duties of husband and wife with respect to the custody and access to children, support payments, distribution of property, and all other matters pertaining to the marital relationship. According to Ethics Opinion #258 issued by the New York State Bar Association’s Committee on Professional Ethics, it would be improper for a lawyer to represent both spouses at any stage of marital problem, even with full disclosure and informed consent of both parties, no matter how “friendly” the matter may appear on the surface.

Certain vital formalities must be carefully followed, or the written agreement will not qualify as a ground for divorce. Here, the skill and experience of the attorneys for the husband and wife are uniquely valuable in helping them reach an agreement which will be fair, just and reasonable to both parties and their children.

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The agreement or a memorandum of the agreement is filed (with complete confidentiality) with the clerk of the county where either spouse lives. At the end of one year from the date of the agreement, either spouse may sue the other for a “no-fault” divorce.

All that must be proven to the court is that the agreement was duly executed and acknowledged and was properly filed; that the spouses have in fact lived apart during the period of the agreement up to the time of the divorce action; and that the plaintiff has substantially complied with the terms of the separation agreement. The court will grant a divorce based on that proof.

Separation decree

Another form of separation is through a judgment of separation granted by the Supreme Court. This judgment is based on the same four “fault” grounds as for divorce. However, the abandonment may be for less than a year. In addition, “non-support” is a ground for a decree of separation, although not for a decree of divorce.

One year after the filing of the court’s judgment of separation, either party may sue for a “no-fault” divorce, based upon one year of living apart. A divorce does not occur automatically after a year. Court action must be taken.

Annulment

A man and a woman must be legally capable of entering into a valid marriage. If the parties are under a disability, the marriage can be annulled, that is, it can be voided. If either spouse is incurably incapable of having sexual intercourse, the marriage may be annulled. Both parties must be over the age of 18 years unless a party is between 16 and 18 years old and has parental consent to marry or is under 16 years and has both parental consent and court approval to marry. No person under the age of 14 years may marry under any circumstances. A marriage between persons under the age of 18 may be annulled, at the discretion of the court, if the spouse under 18 wants an annulment.

If, after marriage, either partner becomes incurably insane for five years or more, the marriage can be annulled. However, the sane spouse may be required to support the insane spouse for life.

The parties must knowingly consent to the

marriage. It may be voided if either spouse consents to marry as a result of the force or duress of the other spouse; or if either spouse cannot understand the nature, effect and consequences of marriage.

It may also be annulled where the consent was obtained by fraud, provided the fraud was such that it would have deceived an ordinarily prudent person and was material to obtaining the other party's consent. The fraud must be such as to go to the essence of the marriage contract. Only the injured spouse, their parent, or their relative with an interest to avoid the marriage can obtain the annulment on lack of consent. However, cohabitation (sexual intercourse) evidencing forgiveness is an absolute defense.

Special proceeding to dissolve a marriage

Where your spouse is absent for five years, you may bring a special proceeding in Supreme Court to dissolve the marriage. You must prove that your spouse has been absent for five successive years, without being known to be alive; that you believe that your absent spouse is dead; and that you made efforts to discover that he or she is still living and no evidence was found. After the dissolution becomes final, the reappearance of your absent spouse does not revive your marriage.

Equitable distribution law

Division of assets and the fixing of support are covered by the Equitable Distribution Law. The statute is founded on the philosophy that a marriage, especially one of long term duration, is an economic as well as a social partnership. Two classes of property were created, known as "marital" and "separate" property. Marital property is all property acquired during the marriage (regardless of how title is held), except inheritance, gifts from third persons, compensation for personal injuries and property acquired after the start of a divorce action.

Marital property and marital debts are distributed between spouses in a dissolution action on flexible and equitable principles. Valuation of marital property may require expert advice. Alimony under the statute is referred to as "maintenance" and based upon factors set forth in the statute may be permanent or limited to duration. The distribution of marital property and the award of support as a result of matrimonial negotiations or proceedings may involve complicated and vital tax consequences

to both parties which require expert advice.

Spousal maintenance and child support

1. Spousal maintenance may be awarded to either party based upon a number of factors including the prior standard of living of the parties, the present and future earning capacity of the parties, and the ability of the party seeking spousal maintenance to become self-supporting. The spousal maintenance awarded may be for a limited period of time or for an indefinite period of time. The parties may, by written agreement, waive the right to spousal maintenance.
2. The basic child support obligation to be paid by the non-custodial parent is based upon a percentage of the combined parental income. For one child the amount is 17%, for two children 25%, for three children 29%, and for four children 31%. In addition to the basic child support obligation, the non-custodial parent may be obligated to pay for a portion of the child care expenses related to the custodial parent's employment or education which would lead to employment. Health care expenses for the children are apportioned between the parents based upon their combined parental income. The non-custodial parent also may be directed to pay for educational expenses. However, if the amount of the basic child support obligation is unjust or inappropriate, the non-custodial parent's prorata share of the child support obligation may be determined by other factors and not by the percentages mentioned above. The parents may avoid the use of the percentages in determining the amount of child support by executing an agreement setting forth the amount of child support which they believe to be fair. An agreement determining the amount of child support must satisfy certain technical provisions of the Child Support Standards Act. A lawyer can help the parties comply with these technical provisions. Neither parent has any obligation to support a child once the child reaches 21 years of age. Child support may end before 21 years of age under certain circumstances such as the gainful employment of the child or the child's willful refusal to maintain a relationship with the non-custodial

parent. Child support will be awarded by a Family Court as part of a child support proceeding or by Supreme Court as part of a divorce, separation, or annulment proceeding. Even if there is no matrimonial judgment awarded, the court will make an award of child support to the custodial parent.

Matrimonial rules of practice

As of November 30, 1993, there are new Rules in matrimonial cases, many of which concern client-attorney relationships and much of which should expedite and streamline court process. Some of these Rules include the following:

1. Prior to signing a retainer, a lawyer must give every matrimonial client a written statement of the Client's Rights and Responsibilities.
2. Representation requires a written retainer which must ultimately be filed with and reviewed by the Court.
3. There are no non-refundable retainers in matrimonial proceedings. However, minimum fees are permissible if they meet certain standards.
4. Security interests (mortgages, confession of judgment) must be specified in the Retainer Agreement and only are permitted by court order, once the opposing party is given notice.
5. Every sworn statement must be certified as truthful by the attorney. Most lawyers require clients to verify that the client has provided truthful information. If you tell your lawyer anything which will be contradicted by sworn statements in your case, the lawyer cannot certify anything which the attorney knows to be untruthful.
6. Fee disputes are now subject to binding arbitration if the client initially determines to seek arbitration.
7. Expedited court proceedings (sometimes known as "fast track" cases) will be utilized. Many cases which do not involve complicated matters (complex cases sometimes involve economically valuing closely held businesses) will be tried within six months after the court holds a preliminary conference. These conferences will be scheduled shortly after the first legal papers are served. Expert reports and responses will be served before trials.

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These and other changes in the way contested matrimonial matters are handled should make the process more effective for everyone.

This pamphlet, which is based on New York law, is intended to inform, not to advise. No one should attempt to interpret or apply any law without the aid of an attorney. Produced by the New York State Bar Association Committee on Public Relations in cooperation with the Family Law Section.



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