

9.3: PART II- DIVORCE

The grounds for divorce in New York are set out in Domestic Relations Law (DOM) § 170. The addition of a no fault provision in 2010 significantly changed divorce case litigation. Plaintiffs no longer have to prove why they should be granted a divorce which in many divorce cases before 2010 was no easy task. So, while most divorce lawyers and clients now utilize the no fault provision of DOM § 170 (7), the other grounds for divorce are still on the books and are still available for plaintiffs and their divorce actions.

There are circumstances where a marriage should be annulled. In other words, one of the parties is seeking a court order to dissolve the marriage and have a court declare the marriage null and void, like it never happened. Some marriages are void by law, and some are voidable. What follows are the grounds for annulment in New York. This is followed by the actual statute for divorce grounds including a brief summary of each. It is important to know that the only court that can hear and issue a judgment of divorce is the New York Supreme Court, not Family Court.

Void Marriages and Annulment:

- If your spouse was legally married to someone else when you got married and that person is still living, you can seek an annulment. This ground can be asserted at any time during the lifetime of the parties. This marriage is void under the law. DOM § 6
- If the marriage is incestuous, it is a void marriage. You cannot marry someone that is an ancestor and a descendant like a father-daughter or mother-son, nor can a brother and sister whether half or whole blood, or an uncle and niece or an aunt and nephew get married. See Part I Marriage section above. DOM § 5
- A marriage which was solemnized by someone other than a person authorized under the law is void. See Part I Marriage section above.
- If one of the parties to the marriage was underage at the time of the marriage you can seek an annulment. This ground can be asserted until the underage party is legal of the age of consent. This is a voidable ground for marriage. See Part I Marriage section above. DOM § 7, DOM § 140
- If one of the parties has an incurable mental illness at the time of marriage, that is unknown to the other party, the court may grant an annulment. The non-ill spouse must commence the action as soon as they learn of the mental illness, and the mental illness is present when the annulment is commenced. This is a voidable ground. DOM § 7, DOM § 140, DOM § 141
- If one the parties is physical incapable of sexual relations with the other spouse at the time of the marriage, and this is not known to the other spouse at the time of the marriage, the court may grant an annulment within five years of the marriage. This is a voidable ground. DOM § 7, DOM § 140
- If consent for the marriage was obtained by force, duress, or fraud, the marriage is voidable. DOM § 7, DOM § 140
- If one or both of the parties is incapable of consent for want of understanding due to mental incapacity, then the marriage is voidable. DOM § 7, DOM § 140

Children of an annulled marriage are legitimate. (DOM § 24) Child custody, visitation, and child support are determined by statute in the same manner as in a divorce action. The same is true of property obtained during the marriage. It is divided by the court in the same manner as in a divorce. (See appropriate sub-sections below.)

Domestic Relations Law § 170

“An action for divorce may be maintained by a husband or wife to procure a judgment divorcing the parties and dissolving the marriage on any of the following grounds:

- (1) 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.
- (2) The abandonment of the plaintiff by the defendant for a period of one or more years.
- (3) The confinement of the defendant in prison for a period of three or more consecutive years after the marriage of plaintiff and defendant.
- (4) The commission of an act of adultery, provided that adultery for the purposes of articles ten, eleven, and eleven-A of this chapter, is hereby defined as the commission of an act of sexual intercourse, oral sexual conduct or anal sexual conduct, voluntarily performed by the defendant, with a person other than the plaintiff after the marriage of plaintiff and defendant. Oral sexual conduct and anal sexual conduct include, but are not limited to, sexual conduct as defined in subdivision two of section 130.00 and subdivision three of section 130.20 of the penal law.

(5) The husband and wife have lived apart pursuant to a decree or judgment of separation for a period of one or more years after the granting of such decree or judgment, and satisfactory proof has been submitted by the plaintiff that he or she has substantially performed all the terms and conditions of such decree or judgment.

(6) The husband and wife have lived separate and apart pursuant to a written agreement of separation, subscribed by the parties thereto and acknowledged or proved in the form required to entitle a deed to be recorded, for a period of one or more years after the execution of such agreement and satisfactory proof has been submitted by the plaintiff that he or she has substantially performed all the terms and conditions of such agreement. Such agreement shall be filed in the office of the clerk of the county wherein either party resides. In lieu of filing such agreement, either party to such agreement may file a memorandum of such agreement, which memorandum shall be similarly subscribed and acknowledged or proved as was the agreement of separation and shall contain the following information: (a) the names and addresses of each of the parties, (b) the date of marriage of the parties, (c) the date of the agreement of separation and (d) the date of this subscription and acknowledgment or proof of such agreement of separation.

(7) The relationship between husband and wife has broken down irretrievably for a period of at least six months, provided that one party has so stated under oath. 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 infant children of the marriage have been resolved by the parties, or determined by the court and incorporated into the judgment of divorce."

DOM § 170 Summary

Cruel and Inhuman Treatment DOM § 170(1):

- Physical or mental cruelty by one spouse against the other.
- Must prove it is not safe or proper for the parties to continue the marriage.
- Must have occurred within five years of divorce.

Abandonment DOM § 170(2):

- Must be for one year or more without consent.
- Can be "constructive abandonment" if you refuse to have relations without justification.

Imprisonment DOM § 170(2):

- Must be for three years or more.
- Must be without interruption.

Adultery DOM § 170(4):

- Sex outside of marriage within five years of divorce action.
- Must be proven by more than just the testimony of the spouse.
- Plaintiff must prove opportunity, inclination, and intent.
 - Defenses
 - If a spouse gives their consent to the sex outside of the marriage, it is not adultery.
 - If a spouse has sexual relations with their adulterous spouse after they know about it, they have forgiven the act and can no longer use the adultery as grounds for divorce.
 - The action for divorce based on adultery must be brought within five years of discovery, or it is beyond the Statute of Limitations.
 - If both spouses committed adultery, neither can use the grounds of adultery against the other.

Living Separate and Apart for More Than One Year Pursuant to a Separation Judgment DOM § 170(5):

- Similar to a separation agreement conversion divorce.
- This cause of action is very rare.

Living Separate and Apart for More Than One Year Pursuant to a Separation Agreement DOM § 170(6):

- Must be a valid separation agreement.
- The agreement must have been substantially followed.
- This is also known as a "conversion" divorce.
- Divorce is not automatic, must be filed for.

Irretrievable Breakdown of the Marriage for at Least Six Months DOM § 170(7):

- New York's version of a no-fault divorce.
- Either party can make the claim.
- Economic issues must also be resolved.
- Only available for marriages that are of six or more months in duration.
- If claimed by a spouse, there is no defense.

TYPICAL DIVORCE ISSUES

Once the grounds for a divorce have been established, the parties must also resolve the economic and parental responsibilities if children are involved. The following are very typical divorce issues that must be resolved by the parties or by a court.

- Child Custody
- Child Visitation
- Spousal Support/Maintenance
- Child Support
- Dividing Marital Property pursuant to Equitable Distribution

Child Custody:

Child custody is often the most contested and contentious part of divorce litigation. It is also an issue for non-married parents who are seeking orders of custody and support in Family Court. Regardless of the marital status of the parties, the standard for custody is the same, what is in the best interest of the child.

The following are factors a judge may consider in deterring what is in the best interest of a child.

- Which parent has been the child's primary caretaker.
- The quality of each parent's home environment.
- How "fit" the judge thinks each parent is based on the following:
 - Parent has a stable home and lifestyle.
 - Parent has demonstrated good judgment.
 - Parent is employed.
 - Parent has demonstrated good mental and physical health.
- Which parent the child is living with now, and for how long.
- Each parent's ability to provide emotional and intellectual support for the child.
- Which parent allows the other parent to be involved in the child's life and does not try to cut out the other parent.
- If the child is old enough and mature enough, which parent the child wants to live with.
- Whether the child would be separated from any siblings.
- Whether either parent has been abusive.

Types of Custody :

There are several different types of custody arrangements that parties can agree to. When custody is contentious and being litigated, it would be unusual for a court to award anything but sole custody to one of the parents. The rationale is that if the parties cannot come to an agreement regarding the custody of their child or children, ordering anything but sole custody will just lead to more problems between the parents.

- Sole Custody: The legal right to make all major decisions affecting a child under the age of 18. Usually includes the physical custody of the child and the child's primary residence with the sole custody parent.
- Joint Custody: Equally shared decision making even if child spends more physical custody time with the other parent.
- Joint Physical Custody: Equally shared decision making but the child resides about 50% of the time with each parent.

It is a legal presumption that natural parents should have custody of their children. A non-parent seeking custody would need to prove extraordinary circumstances to rebut the presumption like unfitness, surrender, abandonment, persistent neglect, or other extraordinary circumstances and then prove it is in the best interest of the child for that non-parent to have custody.

Child Visitation:

Parents can agree to whatever visitation arrangements they want. If a court must decide, visitation will be based on the best interest of the child. Common visitation is alternating weekends, allowing one day during the week for dinner during the school year, alternating holidays and birthdays, and allowing for extended time during the school summer vacation period. If determined to be necessary, supervised visitation may be ordered.

Generally, parents get to decide whether grandparents will be allowed visitation with their children. In *Troxel v Granville*, 530 US 57 (2000) a 6-3 opinion written by Justice O'Connor, the U.S. Supreme Court held that a Washington State ruling allowing grandparents to have weekend visits with their grandchildren, to which the parents objected, was unconstitutional. The Court invoked the "best interests of the child" principle and decided that "special weight" should be given parents in determining what is in their child's "best interests" in regard to allowing the grandparent's visitation rights as a matter of law.

New York law follows the *Troxel* ruling. However, there are exceptions under NY law. If a parent dies and leaves children behind, and that parent's parents (the grandparents) had normal and regular visitation with their grandchildren while their child (the parent) was alive, NY courts will grant grandparent visitation under those circumstances.

Legal Representation of a Child:

An Attorney for the Child must be appointed for all contested custody cases. This attorney will be appointed by the court. The attorney must meet with the child and represent to the court, the child's preference for custody. The attorney can only deviate from this if the attorney determines the child is not capable of understanding the ramifications of their preference to live with one parent over the other and it is not in their best interest.

Lincoln Hearing:

A Lincoln Hearing is an in camera interview by judge of the child to help the judge determine what is in the child's best interest in terms of custody and visitation. The judge meets with the child in the judge's chambers without the parents or parents' lawyers present. The only other people present are the Attorney for the Child and the court reporter who is recording the interview. The older and more mature the child is, the more a judge should take into consideration the child's wishes.

Modification of Custody:

Custody can be modified at any time when there is a change in circumstances. The change must usually be substantial regarding the emotional, financial, or physical condition of one or both parents, justifying a modification of a child custody or child support order.

Relocation:

Circumstances sometimes arise where the parent with custody wants to relocate out of the area. This relocation will affect the other parent's visitation rights. The standard regarding relocation cases is the best interest of the child. In a relocation case, the court will consider the impact of the move on the child, the relationship the child has with the non-moving parent, the reason for the move, and the benefits versus the harm that the child may experience from the move.

Spousal Support/Maintenance :

Spousal support used to be called alimony, and in some parts of the United States, it still is. There are two types of maintenance, temporary and durational. Temporary maintenance is ordered by the court from the time a court action is filed and a party requests temporary maintenance, until the divorce decree is issued. Durational maintenance is ordered after the divorce decree is issued and is for a specific amount of time.

The amount of temporary maintenance ordered is determined by Domestic Relations Law (DOM) § 236(B). It is a calculation based on the income of the parties, who has child custody, and the legal child and maintenance support obligations of the parties. Generally, the party with the greater income will pay temporary and durational maintenance. The fault of the parties is not a factor in determining support. The maintenance calculation is a rather complicated formula. So much so that to assist parties and lawyers in divorce actions, the New York State Unified Court system provides a variety of tools online, including a calculator to help parties and lawyers determine the actual maintenance calculation. Use the following link for more detail on how to calculate spousal maintenance.

<https://www.nycourts.gov/divorce/MaintenanceChildSupportTools.shtml>

Durational maintenance is determined in the same manner as temporary maintenance. The amount of time that durational maintenance is ordered to be paid is determined by the number of years the parties were married. The statute only provides guidelines to judges on how long they should order durational maintenance to be paid. The longer the term of the marriage was, the longer the term of durational maintenance order. Again, fault is not considered in determining spousal support.

Maintenance is generally meant to be a short-term obligation. It always terminates upon the obligor's death. It usually terminates upon the recipient's remarriage unless a separation agreement states otherwise. Recipient's cohabitation with someone else may terminate the obligation.

Child Support:

Parents are responsible for the support of their children up to the age of 21. In determining child support, whether in a divorce action or in family court with parents who are not married, the amount of child support to be paid is determined by the Child Support Standards Act of 1989. Child support is paid to the parent with custody of the child by the non-custodial parent. A court will determine who has custody of a child, even in situations of joint custody based on who the child resides with more, even if that means counting the number of nights a child sleeps in the home of one parent over the other.

The basic child support obligation is determined by a percentage the non-custodial parent's income and the number of children the non-custodial parent is responsible for with that particular custodial parent. Note that in determining the percentage to be paid based on the number of children one is paying child support for, it is not based on the total number of children one is responsible for with multiple custodial parents.

The basic child support percentages are as follows:

- 1 child = 17%
- 2 children = 25%
- 3 children = 29%
- 4 children = 31%
- 5 or more children = 35%

Income of a parent includes:

- Workers' compensation
- Disability benefits
- Unemployment benefits
- Social security benefits
- Veterans' benefits
- Pensions and retirement benefits
- Fellowship and stipends
- Annuity payments
- Maintenance received from a former spouse

In determining income, certain deductions are also allowed. They include:

- Maintenance actually paid to nonparty spouse
- Maintenance paid to the current spouse
- Child support actually paid to a nonparty
- Certain business or employment expenses
- FICA

What is FICA?

FICA is the acronym for the Federal Insurance Contributions Act. This is the law passed in 1935 that created Social Security. FICA is a contribution, (not technically a tax) that all employees and employers pay for Social Security and Medicare benefits. It is withheld from an employee's paycheck and paid to the federal government. Employers also match these payments. If a person is self-employed, they pay the employee and employer amount. The percentage of an employee's income that is used to determine FICA is 6.2% for Social Security plus 1.45% for Medicare. There is a cap on income at which point the 6.2% for Social Security is no longer deducted from an employee's paycheck. That amount in 2018 is \$128,700 and can change each year pursuant to the tax code.

Since child support and maintenance paid to other parties is deductible, the allowable deductions can affect that amount of child support a parent pays to various children they are responsible for with different custodial parents. For example, if Parent A is paying child support to Parent B first for one child and then also to Parent C for one child, the amount of support being paid to both Parent B and C will be different. The 17% percentage of Parent A's will be paid to both but since Parent B's obligation will be deducted from Parent A's income, the amount paid to Parent C will be less. Here is an illustration of this possibility

Parent A's income is \$100,000.00 after the FICA deduction. Parent A will pay 17% of the \$100,000.00 or \$17,000.00 annually to Parent B for their one child. Parent A will pay 17% of \$83,000.00 or \$14,110.00 annually to Parent C for their one child.

Dividing Marital Property Pursuant to Equitable Distribution:

In 1980, NY adopted the equitable distribution system for dividing marital property. It is not the same as community property. Marital property is not necessarily divided up equally. It is not equal distribution. Property is divided "fairly."

The underlying principle of equitable distribution is that marriage is an "economic partnership." This partnership includes both wage and intangible contributions towards this economic partnership. Ordinary marital fault not considered in equitable distribution. Fault must be "egregious fault" so much so that it "shocks the conscience of the court."

The parties are required to provide each other with full financial disclosure of their assets, liabilities, and income. This financial disclosure is certificated by their counsel.

The following factors are considered by the court in making an equitable distribution award:

- (1) The income and property of each party at the time of marriage, and at the time of the commencement of the action;
- (2) The duration of the marriage and the age and health of both parties;
- (3) The need of a custodial parent to occupy or own the marital residence and to use or own its household effects;
- (4) The loss of inheritance and pension rights upon dissolution of the marriage as of the date of dissolution;
- (5) The loss of health insurance benefits upon dissolution of the marriage;
- (6) Any award of maintenance under subdivision six of this part;
- (7) Any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services as a spouse, parent, wage earner, and homemaker, and to the career or career potential of the other party;
- (8) The liquid or non-liquid character of all marital property;
- (9) The probable future financial circumstances of each party;
- (10) The impossibility or difficulty of evaluating any component asset or any interest in a business, corporation, or profession, and the economic desirability of retaining such asset or interest intact and free from any claim or interference by the other party;
- (11) The tax consequences to each party;
- (12) The wasteful dissipation of assets by either spouse;
- (13) Any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration;
- (14) Any other factor which the court shall expressly find to be just and proper.

Equitable distribution is for marital property only. This means property that is accumulated during the marriage up and until the filing for the divorce. Who has title to marital property is of no consequence. For example, if a couple has separate bank accounts that they have their paychecks deposited in, those accounts are still marital property. The income is being accumulated during the course of marriage. However, not all property accumulated during the marriage is marital property and is considered separate property. Property accumulated before the marriage is separate property, but can become marital property. The following is a list of what is considered separate property under DOM § 236(1) (d).

- Property acquired before the marriage
- Property acquired by inheritance
- Gifts to one spouse from anyone other than the other spouse

- Compensation for punitive damages and pain and suffering from a personal injury
- Separate property acquired in exchange for separate property
- Appreciation of separate property remains separate if passive or the non-titled spouse did not contribute towards the appreciation
- Property designated as separate by a validly executed marital agreement

Separate property that is comingled with marital property can become marital property. For example, if a spouse inherits money from her parents, but then deposits the money in a joint bank account with her husband and they use the money to pay marital bills, that inherited money could be considered by a court to be comingled. If comingled, the once separate property is now marital property subject to equitable distribution.

Prenuptial Agreements:

Some couples sign a contract prior to getting married contemplating for the possibility of a divorce. These contracts are called prenuptial agreements. Prenuptial agreements settle issues of property division and support in the event of divorce. Prenuptial agreements are valid in NYS. They must be in writing and signed before a notary. Provisions that relate to children both born and unborn are not necessarily enforceable. Again, this is because the standard as to what is in the best interest of a child overrides any such agreement. A prenuptial agreement doesn't take effect until a couple actually marries. There is no obligation to disclose finances to each other before signing a prenuptial agreement. However, if a potential spouse chooses to disclose their assets and misrepresents their financial condition, the prenuptial agreement may be found by a court to be invalid. It is a misconception that only wealthy people sign prenuptial agreements. Couples who would not consider themselves wealthy find good reasons for signing prenuptial agreements.

SEPARATION AGREEMENTS

A separation agreement is a legal contract between the parties that resolves all the matrimonial issues like support, custody, visitation, and equitable distribution. Many, if not most, divorce actions will eventually have a separation agreement as part of the final disposition of the divorce. Why? Because eventually, most parties to a divorce action decide that they would rather compromise and work out all the custody, support, property, and financial issues of a divorce than have a judge do so for them. It saves them attorney fees, is faster, and provides them with the opportunity to negotiate a result that is at least acceptable. You never know what a judge will decide.

Many divorce litigants will negotiate and sign a separation agreement with one of the parties then filing for a divorce pursuant to DOM § 170(7) which is the no fault divorce provision called Irretrievable Breakdown of the Marriage for at Least Six Months. DOM § 170(7) requires that the "economic issues of equitable distribution of marital property" be resolved as part of the divorce action which a separation agreement fulfills.

A separation agreement can be used as grounds for a divorce. (DOM § 170(6)) This is often called a conversion divorce. When the parties live separate and apart pursuant to a valid written separation agreement for at least one year, either party can file for divorce on that basis alone. However, a divorce does not happen automatically. One of the parties actually has to file for a divorce. Some people never get a divorce after signing an agreement. They are still married but legally separated.

Separation agreements must be in writing. They must also be signed by the parties before a notary public and properly notarized. Separation agreements only need to be filed in the county clerk's office if being used for a conversion divorce. They can be filed at any time before or during the divorce proceedings.

Separation agreements can be found to be overreaching and therefore invalid. Fraud or duress is one way of proving overreaching. Having one attorney represent both parties is disfavored by the courts, and could be used as evidence of overreaching. If a separation agreement is overwhelmingly unfair in favor of one party over the other, it may be evidence of overreaching, but that fact alone may not be enough. An agreement that is overreaching can be ratified by the parties by their actions. If a party lives by an overreaching agreement for a substantial amount of time, it can be viewed by the court as ratification of the agreement and negate the overreaching.

Separation agreements are just what they say they are; an agreement to live separate and apart. But what happens if the parties decide to reconcile after signing one? Usually there is a provision in the agreement that dictates what happens if the parties reconcile. Reconciliation indicates an abandonment of the agreement which can occur by the actions of the parties. For example, it

can occur when the parties move back into the marital home together living as married spouses again for an extended period of time. A weekend would not be long enough for this to happen, but six months probably would.

Judicial separation agreements are a cause of action where a legal separation is granted by a Supreme Court judge. They are very rare. However, divorce stipulations are very common. A divorce stipulation is a voluntary agreement stated in open court during divorce litigation. It is an oral version of a separation agreement that is recorded by the stenographer.

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