

the best interest of the children. A parent who is financially unable to obtain private counsel may request a court-appointed attorney for disputed custody/visitation issues only.

#### Equitable Distribution of Property:

When getting a divorce, both spouses are entitled to an equitable portion (fair), but not necessarily half, of the marital property. Marital property includes assets and debts obtained by either spouse during the marriage but before a separation agreement or divorce case is filed. Marital property may include a house, car, bank account, pension, stocks, and household items. These assets are considered marital property, even when only one spouse is listed as the title owner. Property acquired before the marriage is considered separate property and is generally not included in equitable distribution. In addition, gifts received from a person other than the spouse, an inheritance, and compensation received for personal injuries are all considered separate property.

#### Maintenance:

In a divorce, one spouse may request maintenance, formerly known as alimony, from the other spouse. In determining whether a spouse should be awarded maintenance, the court considers several factors, including: the income and property of both parties; the duration of the marriage; the age and health of both parties; which spouse has custody of the children; and whether one spouse contributed to the other spouse's career or education. Due to these considerations, it is difficult to be awarded maintenance when the length of the marriage was short, the parties are relatively young and healthy, or if the other spouse earns a low income and has little property. Maintenance is usually ordered for a set period of time.

#### Child Support:

In a divorce, the parent who lives with the minor children of the marriage has the right to ask for child support from the non-custodial parent. Child support is determined by the non-custodial parent's income and/or the child's need.

#### Order of Protection:

If there has been a history of domestic violence (physical and/or emotional abuse) and one spouse feels that the other spouse threatens his or her safety, that spouse may request an order of protection. Such an order may require the other spouse to refrain from abusive behavior and to stay away from the home or place of work of the spouse seeking the order of protection.

#### Exclusive Occupancy of the Marital Home:

In deciding whether a spouse should be ordered to move out of the marital home, the court considers several factors, including: history of domestic violence; the presence of children in the marital home; and the duration of the marriage.

#### Other Relief:

Plaintiff may also request other forms of relief such as the legal use of a pre-marriage surname, health insurance coverage for yourself and your children, and that the other spouse name the children beneficiaries of his/her life insurance plan.

A different kind of relief, called *pendente lite* ("while the action is pending"), may be granted on an emergency basis while the case is proceeding. *Pendente lite* relief is temporary until the divorce is finalized. Examples of such relief include temporary orders of custody, visitation, child support, maintenance, order of protection, exclusive occupancy of the marital home, insurance coverage, and restraining one or both parties from spending or transferring of marital property.

Beginning on September 1, 2009, once a matrimonial action is commenced, an automatic stay goes into effect restraining both parties from transferring assets, incurring unreasonable debts, or changing insurance coverage while the case is pending.

#### Confidentiality:

##### **1. Are family law related court files confidential?**

Family Court and Supreme Court matrimonial files are confidential. Only parties, their attorneys, or someone with a written authorization signed by a party may have access to them.

## KNOW YOUR RIGHTS

# ABOUT DIVORCE

What you should know if you are going through or thinking about a divorce.



MAKING THE CASE FOR HUMANITY

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# KNOW YOUR RIGHTS

## ABOUT DIVORCE

What you should know if you are going through or thinking about a divorce.

### 1. Who can file for divorce in the State of New York?

In filing for divorce in New York State the following three criterion must be met:

1. The residency requirement must be fulfilled
2. The court must obtain jurisdiction over the defendant spouse. This occurs when the defendant spouse is served with a Summons and Complaint or a Summons With Notice.
3. A ground for divorce must exist.

### 2. What are the residency requirements?

If you are filing for divorce in New York, one of the following residency requirements must be met:

1. The marriage ceremony was performed in New York State and either spouse was a resident of the state at the time of the commencement of the action and resided continuously in this state for one year immediately before the action began.
2. The couple lived as husband and wife in New York and either one is a resident and has resided in this state for a continuous period of one year immediately prior to the commencement of the action.
3. The grounds for divorce occurred in this state and either party is a resident and has lived in this state for a continuous period of one year prior to commencement of the action.
4. The grounds for divorce occurred in this state and both parties are New York residents at the time the action is commenced

5. If the parties were married outside of New York and never lived together as husband and wife in this state and the grounds for divorce did not occur in this state -- either spouse must presently be a resident of New York State and have resided continuously in the state for at least two years prior to bringing this case

### 3. How is jurisdiction over the defendant obtained?

A divorce action begins when an index number is purchased for \$210.00, or poor person relief is granted and the index number is free, and the summons for a divorce is filed with the County Clerk's office. The spouse must then be served with a copy of the summons by being personally given the document. It is important to determine where the spouse is located.

If he or she lives in New York State, the server must be more than eighteen years of age, and CANNOT be a party to the action (this means that you cannot serve your spouse with the summons).

If the spouse is presently residing outside of New York State, the spouse must still be personally served with the summons by someone over the age of 18 and not a party to the case.. It is preferable to have this service accomplished by a New York resident, although this might be costly. If a non-New York State resident serves the spouse outside of the State, the server must be a qualified attorney, solicitor or the equivalent in that state or nation. Otherwise, the person must be authorized to serve papers pursuant to the laws of that state.

The person that serves the papers must fill out a notarized affidavit of service as proof that the server did indeed serve the papers.

### 4. What are the grounds for divorce in New York?

In New York State you must show grounds (a reason) in order to get a divorce. The legal grounds are:

#### Irretrievable Breakdown:

Either party must state under oath that the marriage has broken down irretrievably for a period of at least six months. This ground can only be used if all other issues in the divorce (such as custody and support) have been decided.

#### Cruel and Inhuman Treatment:

Plaintiff must show that the other spouse has been physically, verbally or emotionally abusive within the last five years, such that plaintiff cannot continue to live with him/her. The court requires proof, not just that the parties do not get along with one another.

#### Abandonment:

The other spouse must have willingly and voluntarily abandoned the plaintiff for a period of one or more years in order to claim abandonment. A mutually agreed separation does not qualify as abandonment.

#### Constructive Abandonment:

If the other spouse has refused to engage in sexual intercourse with plaintiff for a period of a year or more without justification or a preventative physical condition. This ground can also include the other spouse excluding plaintiff from the marital home for a year or more without a just cause.

#### Three Consecutive Years Imprisonment:

This ground can be raised if the other spouse has been incarcerated for three or more years during the course of your marriage. However, plaintiff can't claim this ground if the marriage occurred after the other spouse was incarcerated.

#### Adultery:

Plaintiff must be able to show that the other spouse voluntarily engaged in adultery (a sexual relationship with another person) during the marriage. This is usually hard to prove in court since evidence of the relationship is required.

#### Conversion Divorce after legal separation by Separation Decree or Separation Agreement:

*Separation Decree:* A divorce can be granted after a husband and wife have lived apart pursuant to a separation decree (court order) for at least one year. A separation decree is an order by a court legally separating spouses. A separation decree must also have grounds. These include cruel and inhuman treatment, abandonment, failure to support spouse, adultery, and three year imprisonment during marriage.

*Separation Agreement:* A divorce can be granted after a husband and wife have lived apart pursuant to a written, properly executed separation agreement for one year or more. This separation agreement must have been filed in Supreme Court. The agreement does not have to show "grounds."

### 5. What can be asked for in a divorce?

When starting a divorce proceeding, Plaintiff has the right to ask the court to grant several different forms of relief. Relief is usually granted by the court in the final stage of a divorce proceeding. Relief may include, but is not restricted to, the following:

#### Custody and Visitation of the Children of the Marriage:

Requests regarding the custody and visitation of children can be made in a divorce proceeding. Both parents have an equal right to ask for custody or visitation. When determining custody and visitation, the judge will generally consider what is in