

# Ten Things To Know About Divorce in New York



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## Number 1: The Five Basic Issues in a Divorce

There are five basic issues in a divorce. They are: (i)

Equitable Distribution (i.e., dividing the marital assets); (ii) Child Custody and Child Support; (iii) Maintenance (alimony); (iv) establishing grounds and (v) the emotional impact.

## Number 2: Establishing Grounds

You need “grounds” to get divorced in New York. The valid grounds in New York are: (i) cruel and inhuman treatment; (ii) abandonment of one of the spouses by the other spouse for a period of one or more years; (iii) your spouse is in prison for 3 or more years; (iv) adultery; and (v) living pursuant to a legal separation agreement.

It is important to note there is no such thing as “irreconcilable differences” in New York. This means that if you and your spouse simply do not like each other, sleep in separate beds or never eat together, they are not valid reasons to obtain a divorce in New York.

A. **Adultery:** Adultery is one of the valid grounds in New York. However, it is difficult to prove and perhaps more importantly, it will be very expensive for you to attempt to prove this in Court.

What exactly is adultery? Adultery only includes sexual intercourse, oral sex and anal sex. It does not include kissing, fondling or dating.

To get a divorce, you only need to prove one act of adultery. However, if you forgive the adultery, then your spouse may be able to use that as a valid defense. In other words, if you catch your spouse “red-handed” (so to speak), but, you continue to allow your spouse to live with you, then you may have forgiven your spouse and the Court may not accept the grounds of adultery.

Finally, if you are also guilty of adultery, then you may not be able to use adultery as your grounds for divorce.

## B. **Cruel & Inhuman Treatment:**

This means that your spouse treated you so badly that it endangered your physical and/or mental health. Some examples of the types of conduct that qualifies for cruel & inhuman treatment:

- Physical Violence
- Verbal Abuse
- Threats of Violence
- Emotional Abuse
- Falsely accusing the other of infidelity
- Alcohol and/or Drug Abuse
- Compulsive Gambling

C. **Abandonment:** There are two types of abandonment: (i) Actual and (ii) Constructive.

Actual Abandonment means that one spouse leaves the marital residence for at least one year. However, it must be unjustified, voluntary, without your consent and against your will, and with no intention of returning. For example, husband says to wife “Honey, I’m leaving and I’m going to live in a hotel”. If the wife says: “Go ahead, you no good bum.” Then this does not qualify, as the wife consented to the husband leaving the house. Now, if the wife had instead said: “No, please stay, I love you and want to work things out.” Then the

husband's leaving would be without the wife's consent.

Constructive abandonment means your spouse has refused to have sexual relations with you for at least one year; without your consent, and it must be unjustified. Most divorces use this as their grounds for divorce.

**D. Living Pursuant to a Legal Separation Agreement:** If you and your spouse live apart for at least one year pursuant to a valid legal separation agreement, that will qualify as a valid grounds for divorce. The separation agreement itself does not have to state "grounds", just that you and your spouse are separating. The separation agreement must be written and filed with the county clerk or it can be ordered by the Court.

**E. In prison:** If your spouse has been imprisoned for at least three consecutive years after you were married, then you can get divorced.

### **Number 3: Extremely Unlikely That You Will Go To Trial**

It is extremely unlikely that there will be a trial in your divorce. Less than 10% of divorces go to trial (although many divorces will settle on the eve of trial or on the courthouse steps).

Therefore, you and your spouse will eventually "settle" the case and enter into an Agreement (also called the "Stipulation of Settlement" or "divorce papers"). The Agreement is a contract between you and your spouse and it will provide for dividing the marital assets, child custody, child support, custodial time, maintenance, as well as many other items.

What often happens is that after many months of fighting, you and your spouse are in court and an Agreement is

finally agreed upon. The court may ask the attorneys to put the Agreement "on the record." This means that the attorneys will verbally state what the terms of the Agreement are.

In my opinion, this is the worst thing you can do. A divorce is complicated and it is virtually impossible to state every term and condition verbally "on the record." Instead of putting the agreement "on the record", you or your attorney should ask for a two week adjournment (or more) so that the Agreement can be put in writing.

### **Number 4: Equitable Distribution**

Equitable Distribution means that the marital assets will be divided between the spouses. This does not necessarily mean that each person gets 50% of the marital assets. There are many factors to be considered, one of which is determining if an asset is to be considered a marital asset in the first place.

What is a marital asset? All property and assets acquired between the date of the marriage and before the execution of a separation agreement or the commencement of a matrimonial action. If the property was acquired while you were married, it doesn't matter the form in which title is held. Thus, if you buy a house after you are married, and the deed is in only one spouse's name, it is still a marital asset. In addition, marital assets may also include the appreciation in value of property during the marriage, even if the property was acquired before the marriage.

What is not considered a marital asset? Property that was acquired prior to the marriage and the following items (even if they were acquired during the marriage): property received as a gift or inheritance, or a personal injury award. However, your separate property can be converted to a marital asset if you put it in a joint savings or checking account.

Equitable distribution is a complex area. If you or your spouse have assets which you believe should be classified as a marital asset, it is highly recommended that you seek the advice of an attorney.

#### **Number 5: Maintenance (alimony)**

Maintenance (formerly known as alimony). The purpose of maintenance is to give a spouse, after the divorce, economic independence. Maintenance should continue only so long as it is necessary to allow that spouse to become self-supporting.

The Courts are required to consider many factors in determining whether or not there will be maintenance. Some of them are:

- If one spouse was not working and can not become self-supporting, there may be an award of maintenance;
- If there is a great disparity of income and/or property between the parties, there may be an award of maintenance;
- The duration of the marriage; and
- The age and health of the spouses

#### **Number 6, 7, and 8: Child Custody, Child Support, and Visitation**

##### **Child Custody:**

There are three basic types of child custody: (1) Sole Custody; (2) Joint Legal Custody; and (3) Joint Legal and Residential Custody.

Sole Custody means that one parent has sole decision-making power for all decisions concerning the child. That parent does not have to consult with the other parent on these decisions.

Joint Legal Custody means that both parents share decision-making power. Typically, each parent is supposed to consult with each other about all important decisions concerning the child. One parent will have residential custody, which means that they

have the children living with them most of the time and the other parent gets visitation (also known as custodial or parenting time). This parent will be referred to as the Custodial Parent or sometimes the Residential Parent. Usually when someone says that they have "Joint Custody", this is the type of Joint Custody they have. If there is a conflict between the parents, then almost invariably the Custodial Parent's viewpoint will prevail. This is why it is very important to have a very clear and explicit Agreement to detail who will make the decisions and how conflicts between the parents will be decided.

Joint Legal and Residential Custody is where the parents share decision-making power and in addition, they have close to a 50-50 in their physical time with the children. Neither parent would be deemed the "Custodial Parent." In practice, Joint Legal and Residential Custody is very rare.

##### **Child Support:**

If one parent has sole custody or is the Custodial Parent, then the other parent will be required to pay child support. The amount you pay in child support is based on your gross income. If you are a W-2 employee, you only get very limited deductions, they include, alimony paid to any former spouse, alimony paid to this spouse, child support paid to children from a previous marriage. You also get to deduct the amount you pay in Social Security Tax and Medicare (7.65%). Once you make this deduction, your income is called the CSSA Amount (Child Support Standards Act). If you have one child, you pay 17% of the CSSA Amount, two children, you pay 25%, three children, 29%, four children, 31%, five or more children, at least 35%.

##### **Visitation:**

Unless you have Joint Legal and Residential Custody, one parent will have

the kids most of the time and the other parent will get visitation (also called custodial time or parental time). You can be very creative in fashioning your custodial time. It does not have to be every other weekend.

For more information about child custody, child support, and custodial times, please read “Child Support and Child Custody Issues in a Divorce: What You Don’t Know Can Hurt You” © By David Badanes, Esq.

### **Number 9: Uncontested Divorce, Contested Divorce, Collaborative Divorce and Mediation**

An uncontested divorce means that the parties agree to get a divorce and that they also agree on all the issues relating to the divorce. You do not need to make any court appearances. Your attorney will file the appropriate documents with the Court. Once your attorney files the documents, it will take about two to three months before you are “officially divorced.”

In mediation, the mediator does not represent either party, but, instead, tries to get the parties to agree on all the terms of their divorce. If the mediation is successful, then the parties can get an uncontested divorce.

A collaborative divorce means that you and your spouse agree to get a divorce. However, instead of having the attorneys “fight it out”, you and your attorney, your spouse and his/her attorney all meet to try to come to a resolution. All of the people involved in the meetings (including the attorneys) agree to work together to achieve a settlement. If the meeting is successful, then the parties can get an uncontested divorce.

A contested divorce means that the parties will be going to court and having their respective attorneys represent them.

### **Number 10: What really happens at Court**

If you have a contested divorce, you most likely need to make at least one court appearance. When you go to court, the Judge will first ask to speak with the attorneys only. The attorneys will meet in the Judge’s chambers, out of sight of you and your spouse

When your attorney meets with the Judge, the Judge will ask for a very brief overview of the important issues involved in your divorce. The Judge will probably ask the attorneys to settle the case and give his/her guidance on the issues.

You almost certainly will not get to “tell your side of the story”. That would only really happen, if you went to trial. However, as previously stated, trials are very rare, so the Court will never hear your side of the story, at least not from you.

### **Conclusion**

Going through a divorce is complicated and difficult. If you require help, please contact David Badanes of the Badanes Law Office.

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