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THE DIVORCE PROCESS: WHAT TO EXPECT

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What To Expect

Divorce may be a stressful and foreign process to you. Having an understanding of the legal process and the legal terms you will hear repeated throughout the proceedings can help to alleviate some of your anxiety, facilitate your decision making, and enable you to set and manage your expectations.

My job as your attorney is not only to guide and shepherd you through the process, but to educate and empower you to make informed and intelligent decisions.

The aim of this guide is to demystify the process and introduce you to the “legalese” of divorce.

If knowledge is power, then I want to arm you:

- **To understand the terms you will hear throughout your case,**
- **To facilitate your understanding of the process,**
- **To allay some of your anxiety and**
- **To empower you to strategize with me to achieve the best possible resolution in your case.**



Retaining an Attorney

Once you decide to divorce, the most important thing you can do is to retain an attorney – right away. That’s because having an attorney right from the beginning is the best and most effective way to ensure your “side” is represented.

When you hire an attorney in a New York divorce action, you will be asked to sign a retainer agreement. The retainer agreement is a written contract between you and your attorney, detailing the services your attorney will perform for you and how you will pay your attorney. Some services may be offered for flat fee and others at an hourly rate.

After you retain your attorney, you will work together to develop a strategy based upon the unique facts of your case. Will you litigate, negotiate, mediate or collaborate? Will the divorce be contested or uncontested?



Commencing the Divorce

Unless your spouse has already served you with divorce “papers,” your attorney will prepare the summons. The summons is the first legal paper filed in court; it is the filing of the summons and purchasing the index number that actually commences the matrimonial action.

The summons details the grounds for the divorce. Since New York is now a no-fault state, the summons will typically claim that divorce is being sought because the marriage has irretrievably broken down. The summons could also demand equitable distribution of the marital assets, custody of the children, payment of maintenance and child support and even the right for the wife to resume using a maiden name.

The summons also contains a “notice of automatic stays” which prevents both parties from transferring assets, terminating insurance policies or changing beneficiary designations during the divorce.

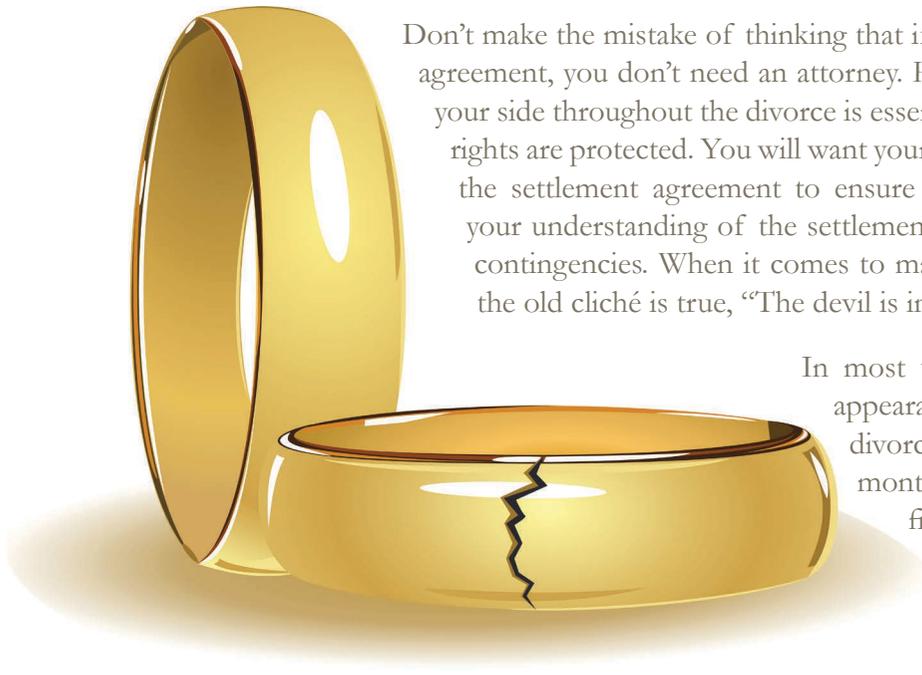


The Uncontested Divorce

Thanks to movies like *Kramer vs. Kramer* and *The War of the Roses*, many people are familiar only with the concept of a divorce that is fought in a courtroom. Some divorcing couples are able to work out their divorce through negotiations aided by their attorneys.

If all the issues of the divorce have been resolved, the parties can proceed to judgment as an uncontested divorce. For those couples who can hammer out an agreement without protracted litigation, the benefits can be significant. Studies have shown that divorces resolved through negotiations typically involve less stress and achieve more satisfactory results than those that are litigated. Why? Because the parties involved in the divorce better understand the circumstances surrounding their case than the judge, who has a fleeting interest in the case. The parties are best-positioned to find a fair and workable resolution to their issues.

The good news is that most divorces that begin as contested settle at some point before trial.



Don't make the mistake of thinking that if you and your spouse are in agreement, you don't need an attorney. Having a divorce attorney by your side throughout the divorce is essential to ensure that your legal rights are protected. You will want your attorney to draft and review the settlement agreement to ensure that the agreement reflects your understanding of the settlement and that it provides for all contingencies. When it comes to marital settlement agreements, the old cliché is true, "The devil is in the details."

In most uncontested divorces, court appearances are not required. The divorce will be granted a few months after the all the papers are filed in court.

The Contested Divorce

When the parties are unable or unwilling to work out all their issues, the divorce is contested. Unless the parties manage to come to an agreement, a judge will be required to rule on the disputed issues.

The divorce is commenced when the plaintiff - the person who initiates the divorce - serves and files a summons and complaint. The complaint contains basic information such as the names and addresses of the parties, the date and location of the marriage, and the names and birthdates of the children of the marriage.

The complaint will also allege the facts which support the plaintiff's grounds or legal basis for the divorce. Since New York allows for no-fault divorce, it is common for the complaint to allege that the marriage has irretrievably broken down with no hope of reconciliation for, at least, six months before the divorce was commenced.



The defendant - that is, the other spouse - will file an answer, responding to the allegations in the complaint. The defendant may also file a counterclaim which contains the defendant's grounds for the divorce.

Statement of Net Worth

Early in the divorce, you will be asked to fill out a statement of net worth. This comprehensive document contains all the information that will be used to work out financial issues in the divorce including equitable distribution, child support and maintenance. It is critically important to fill out the statement carefully.

The net worth statement will detail information about your income, your assets, including your home, savings and investment accounts, and your liabilities like credit card debt, car loans and mortgages. You will also need to itemize all your expenses – from big ticket items like your monthly mortgage payment and utility bills to much smaller expenses like magazine subscriptions and haircuts.

Transparency is critical

The statement of net worth will be the jumping off point for all the money issues in your case. All of the information you provide will be carefully scrutinized by your spouse, your spouse's attorney and the judge hearing your case.

You will swear to the truth of the information in your net worth statement. While it may be tempting to overstate your expenses or understate your income, especially if you feel your spouse is being unreasonable, doing so can destroy your credibility, and that can have a critical bearing on the rest of the case.

Completing the statement of net worth can seem overwhelming. Avoid the temptation to estimate items or include the costs for items you think you might need, but have not yet purchased. Just remember: You will have to provide your spouse with all your financial records during the discovery phase of your divorce. If the records you provide don't agree with what you swore to on your statement of net worth, you better be able to explain away the disparity.



The Preliminary Conference

In New York, the first court appearance in a divorce case is generally the Preliminary Conference, commonly called the PC. Some states refer to this initial appearance as a case management conference. The New York court rules mandate you be present for every court appearance, including the PC.

One of the primary purposes of the preliminary conference is to identify both the resolved and unresolved issues in the divorce. Once an issue has been identified as resolved in the preliminary conference order, it cannot be litigated.

During the conference, both parties have the opportunity to provide the judge with their “version” of the case. If child custody is involved, an attorney may be appointed to represent the interests of the children. The court also may order the parties to be interviewed by a mental health professional, who will prepare a forensic evaluation to assist the court in determining custody.

When there are issues over equitable distribution, and particularly when the value of an asset is in dispute, the court may appoint an expert to determine the value the marital property. Values can be determined for the marital home, a party’s interest in a business, or an educational degree earned during the marriage.

Lastly, at the preliminary conference, the judge will set a timetable to have the case become trial ready. The court will set a deadline for the parties to complete discovery and schedule compliance conferences to ensure that its deadlines are obeyed.

If your case is resolved at the preliminary conference or during the discovery phase of the divorce, this conference may be the only time you will need to appear in court.



Motions

The other way you may find yourself in court in a matrimonial action is if one party makes a motion.

A motion is a formal written request made by one of the parties for an order requiring or preventing the other party from doing something. A court decides a motion in an order.

The most common initial motion in a divorce action in New York is a motion for *pendente lite* relief (Latin for “while the matter is pending”). A common motion for *pendente lite* relief requests temporary maintenance, child support and an interim award of attorneys’ fees. Other common motions include requests for temporary custody of children, an order of protection when there are issues of domestic violence, or for contempt of court, when prior court orders have been disobeyed.

To decide the *pendente lite* applications, the court relies on affidavits submitted by the parties and their statements of net worth. The amount of temporary maintenance and child support may be calculated by application of statutory guidelines.

Like any other court order, if a party fails to obey a *pendente lite* order and pay the required payments, he/she risks being found in contempt of court.



Discovery

Knowledge is power, particularly in divorce. You can only make wise and informed decisions about settlement when you have access to all the facts.

So, how do you find out how much an asset is worth, what your spouse's income is or how much money is really in the bank account? While some spouses may feel comfortable relying on the information provided by the other spouse, many people prefer to learn these and other facts for themselves; that's what happens during discovery.

In discovery, the divorcing spouses and their attorneys attempt to learn all the financial facts in the divorce by exchanging information. Financial documents and records, testimony and other information exchanges can all be part of the discovery process.

The following page outlines some of the tools most commonly use during discovery.



- **Demands for Discovery and Inspection**

This discovery device is used to require your spouse to produce a laundry list of records including bank statements, check registers, investment account statements, credit card bills, income tax returns, and pay stubs. Computer hard drives and records from social media sites may be required to be produced. Virtually nothing is off limits.

- **Depositions**

At a deposition, parties are questioned under oath about relevant issues. A stenographic record is made of the testimony that reflects the exact words spoken. Later, during the trial, if the testimony given during the trial varies from the deposition testimony, the witness can be impeached, using their own words to attack their credibility.



- **Demand for Authorizations**

If your spouse makes a claim about employment status or a medical condition, you can demand that your spouse give you authorizations allowing third parties to provide you with your spouse's confidential records. For instance, if your spouse claims he or she is unable to work because of a medical disability, authorizations could be demanded to obtain the relevant medical records and doctors reports.

- **Appraisals**

In an appraisal, an expert is called upon to provide dollar values for an specific assets. Assets that can be valued include your home, artwork, pensions, businesses, professional licenses and even educational degrees.

The Trial

All the work and preparation that takes place during the earlier stages of divorce culminates at the trial. The legal theories and strategies are applied to the facts; all the evidence is presented to a judge in the form of testimony for a final ruling on all the unresolved issues.

If a trial is necessary in a divorce case, not every issue need be tried. Many issues are worked out during the pretrial process, and only those issues which have not been resolved need to be tried. For example, there could be an agreement on child custody and visitation, but not on child support and maintenance. In that case, the trial would be limited to those two unresolved issues. In other cases, there may be agreement on how some assets are equitably distributed, but not others.

There is no jury; all unresolved custody and financial issues are decided by the judge.

During the trial, evidence will be presented through testimony. The plaintiff presents his or her case first, followed by the defendant. Every witness may be cross-examined by the other side.

Once the trial is concluded, the judge will issue a decision. That decision will be final unless one party files an appeal. You cannot file an appeal just because you do not agree with the judge's decision; an appeal can only be filed if there was an error of law (the judge mis-applied a law) or an error of fact (the facts did not support the ruling).



Conclusion

This guide was intended to provide you with a simplified overview of what you can expect during your New York divorce. It is not a substitute for a consultation with an experienced divorce and family law attorney.

During your confidential consultation, your specific concerns and questions can be addressed, the facts of your case scrutinized, and the issues of your case analyzed

If you want to speak with an experienced divorce and family law attorney, please contact us:

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About the Author

Daniel E. Clement has been practicing divorce and family law since 1986 in both New York and New Jersey. His areas of practice include:

- Contested and uncontested divorce;
- Equitable distribution and maintenance;
- Child custody and visitation;
- Child support, paternity and enforcement; and
- Pre and post nuptial and separation agreements

Daniel writes and lectures on family law issues, and is sought after as a leader in the field by print, television and radio journalists. He is the author of *The New York Divorce Report* and a contributor to the Huffington Post.

He is a graduate of Brooklyn Law School and the State University of New York at Albany.

Daniel uses his vast skills, experience and knowledge to empower his clients and to protect their legal rights, whether they are stay at home parents, W-2 employees, entrepreneurs, business owners, or professional athletes.

Read more at [The New York Divorce Report](#)



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