

Order in the Court

Answering parents' common legal questions about divorce.

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With more than 20 years of experience as a family and matrimonial law attorney in New York, I've worked with numerous clients to achieve the best possible outcomes for their legal needs. While each case is different, some issues are commonly encountered. Two of the more frequently asked questions are addressed below. I hope the information helps you better understand your rights when filing for a divorce and dealing with issues of child custody.

Q. What exactly are grounds for divorce? Can I file for a divorce myself?

A. If you are thinking about filing for a divorce, realize that the laws vary depending on the state in which you live. While most other states have some form of "no fault" divorce, in New York you have to prove what are called "grounds" for divorce. Essentially, one spouse must prove marital misconduct of the other spouse for the courts to allow the dissolution of marriage.

For the states that allow no fault divorce, however, either spouse can end the marriage without grounds. Many people cite irreconcilable differences, which can mean a number of things as simple as not wanting to be married anymore. Some states do require that spouses live separately for a certain period of time before they can officially obtain the no fault divorce. Be sure to check with the specific laws of your state.

If you do not want to wait to get your divorce or you are in a state like New York that does not provide no fault divorce, you must have grounds to proceed. Not surprisingly, adultery is one of the most common grounds for divorce. To prove adultery, you must have actual evidence of the affair. Even if your spouse admits to the extramarital relationship, independent evidence such as photos or the testimony of the paramour is needed. Clearly, it is a difficult way to obtain a divorce.

More typical grounds for divorce include cruel and inhuman treatment and abandonment for one year or more. Cruelty may take the form of physical or mental abuse. Abandonment can also take two forms. Most prevalent is the physical abandonment by a spouse who walks out of the marriage. However, sexual abandonment is also recognized as grounds. This exists when one spouse refuses the other person sexual relations without a good cause.

Again, evidence is needed, such as proof of injury or the testimony of a mental health professional who can state that it is unsafe or improper for the marriage to continue. While these circumstances may be easier to prove, you should still have qualified legal representation to make sure your interests are being protected during the divorce process.

While you can file for a divorce without an attorney, it is not something I recommend. Because the law is complex and the system is difficult to maneuver, doing so without an attorney is risky. Each state has different laws and procedures when it comes to divorce, and I suggest staying away from a generic book or kit to do the job. Basic fill-in-the-form procedures can lead to a lot of problems later on, especially if children and support are involved. Consulting with an attorney helps clarify and answer questions about your rights and obligations. Using an attorney to prepare documents also ensures they are legally binding and enforceable in the future.

Q. How is child custody decided when parents divorce?

A. Experience shows that sharing parental rights and responsibilities works best when parents are cooperative and capable of working together to raise the children. However, in some circumstances, the case can be made that one parent is better suited to have sole custody. Let's face it, if parents got along well enough to agree on all of their children's issues, chances are they wouldn't be separating or divorcing.

Child custody is one of the most case-specific and fact-sensitive areas of law. However, there are many defined factors that are considered by the courts in determining child custody and the most appropriate form of parenting. The health of the parents (physical and psychological), any former and current alcohol or drug use, the desire to keep siblings together and the financial situation of the parties involved are all factors for consideration by a court. In New York, the courts are mandated to consider any history of domestic violence or abuse.

In addition, judges tend to favor a parent who has more time to spend with the child or children. Courts consider who is the primary caretaker of the child, to whom the child is more psychologically bonded and who can provide a more stable living environment. Depending on the age and maturity of the child, the preference of the child is taken seriously, as well. While a child is not forced to choose one parent over the other, the court considers the child's wishes and the reason for the preference. Often the courts appoint a lawyer for the child to represent the child's wishes.

The bottom line is that when disputing custody, the parents divorcing defer to the courts the job of deciding a very important issue— what is in their child's best interest. Whenever possible, parents should guard that decision as one for them to decide collectively. When that is not possible, use the above guidelines.

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