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Splitting up

Families are systems. Each person plays a certain role, and the family works together as a unit. Marriages are, in many ways, partnerships. By dividing responsibilities, the family unit can get more accomplished than if each member was acting alone.

When couples are splitting up, they are really going through a family reorganization. They have many decisions to make, like where will the partners each live? Where will the kids live? How much time will each parent get to spend with them? What will the new relationships look like? How will each partner be able to afford the new arrangement? The simplest routines have to be re-thought, and new routines have to be established. It is often a bumpy road, with a lot of disappointment, hurt and anger being felt all around.

If there are children involved, the family system must still operate on some level even after a break up. There is still a division of labor involving the child rearing, and involving financial responsibilities for the children, and sometimes, for each other.

Divorce is really the process of reorganizing the family system.

It has been said that people go through several different divorces - emotional, social, physical and legal. The first three apply whether the couple was legally married or not. Even though divorce only applies to people who are legally married, there may be legal issues that arise when unmarried couples split up, as well.

Emotional divorce occurs when the couple is no longer working as a team, when they no longer work together as a unit. There may be domestic strife or not, but it is an act of distancing from each other.

Social divorce can be summed up, as one friend put it, as “who gets custody of the friends?” Your family, friends, and other close people may take sides, or encourage one partner or another to take certain steps.

The *physical divorce* is perhaps the most obvious - when the couple (or one partner) physically moves out from the shared living space.

The *legal divorce* is the court's dissolution of the marriage contract. It is, in effect, another contract, assigning rights and responsibilities to each partner. For couples who were married, this is the actual divorce order. For unmarried couples, this may result in a custody and visitation order, a child support order, or a civil court order regarding the division of property.

All of these processes can take months or even years. Breakups never happen overnight. Often one partner is moving faster than another - it may even take the second partner by surprise. Psychologists have likened the process that divorcing partners go through to the four stages of grief that Elisabeth Kubler-Ross described after the death of a loved one. These are *denial*, *bargaining*, *anger* and *acceptance*.

What are the issues that need to be addressed in a legal divorce?

The biggest issues are:

- parenting (custody) and access (visitation)
- separation of property (in NYS this is called Equitable Distribution) (e.g. who gets the house? Do we split the pension plan? If so, how?)
- division of money (child support and spousal support)
- grounds (why is this happening? in NYS, whose "fault" it is)

How to get divorced

You may have heard the expression, "marriage is a contract." Well it is, but what is surprising, is that it is not simply a contract between wife and husband, but a 3-way contract between wife, husband and the State! Each state has slightly different rules. One rule that you should remember in New York State is that we do not have "no-fault" divorce. There are several ways to get divorced in New York State. (Note: in this essay I refer to the separating spouses as the "partners." By that, I mean the partners in divorce! They have to work together to form a new contract. How they do that is what we will talk about below.

Uncontested Divorce -

One partner files papers in court and serves the other. Both parties consent to the terms of the divorce, the court approves the papers, and issues a judgment of divorce.

Best if:

- you know your rights and believe that your partner is being fair
- you believe your spouse is honest about his/her financial situation
- will agree with you about how to divide things
- the marriage is short

- there aren't any major assets to divide (e.g. a house)
- there are no kids
- the partners still have good communication with each other
- or if the couple has gone through mediation or a collaborative process to work out those issues.
- You have been legally separated for a year and need the order converted to a divorce decree

Advantages:

- the least expensive
- quickest

Disadvantages:

- partners may be giving up some rights unless they consult with an attorney
- not appropriate for couples with an imbalance of power
- not appropriate if one partner is being coerced by the other
- not appropriate if either side is hiding assets
- must agree on all areas of the divorce

Mediation

The partners meet with a trained divorce mediator (usually an attorney or a mental health professional) who acts in a neutral manner to assist the couple work out issues in conflict. This will take a series of sessions, and may also involve input from neutral professionals who help assess the value of certain assets, or who help develop a financial plan or parenting plan. The mediator will write up a proposed divorce agreement or detailed plan. It is best that each party have that agreement reviewed by an attorney. The couple then files an uncontested divorce, incorporating the terms of that agreement. This process can also be used by unmarried couples. If the mediation falls through, the partners each hire their own attorneys to represent them in court.

Best for couples who are evenly matched, without significant imbalances in power. The first thing mentioned in the Model Conduct for Mediators is that mediation is based upon the principle of self-determination for the parties.

Another advantage of mediation and collaborative process is that, because negotiations happen outside of open court, it affords more privacy to the partners.

Best if:

- the partners trust the other to be honest
- each partner can stand up for him/herself

- the partners want to keep a good working relationship in the future (i.e. if they have small children)
- the partners want the terms of their divorce to be private

Advantages:

- the partners control the timing and tone of the meetings
- may provide for more flexible or creative outcomes than other processes
- it is geared toward self-determination
- non-adversarial, so the partners can concentrate on what is best for the children
- still inexpensive compared to litigation

Disadvantages:

- not appropriate if one partner is hiding assets
- not appropriate if one partner controls the other

Collaborative Law (aka collaborative divorce or collaborative practice)

The partners each have their own attorneys who “hold the meditative consciousness.” In a series of 2-way and 4-way meetings, the attorneys guide the partners through the collaborative process, sort of a modified mediation. Collaborative attorneys are specially trained in mediation as well as divorce. The key here is that if the process falls through, each partner must get a different attorney to represent them in court. In other words, the parties agree from the beginning that they will not go to court or threaten to go to court in this process.

The goal in mediation and collaborative process is for the partners to work together to develop a plan that will meet the most fundamental needs of each partner and their children.

The approach in both mediation and collaborative law is non-adversarial. In addition, you speak for yourself during negotiations, and you deal directly with your spouse. In addition, both approaches allow you and your partner to devise your own agreement based upon your unique situation, without having it be imposed by the court. Remember, the judge may know what the “norms” are, but s/he doesn’t know you, your spouse or your children. You are the experts on your own situation.

An excellent book describing mediation and collaborative law is Divorce Without Court: A guide to Mediation and Collaborative Divorce by Katherine E. Stoner (Nolo 2006).

Best if:

- the partners trust the other to be honest
- the partners want to keep a good working relationship in the future (i.e. if they have small children)
- the partners want the terms of their divorce to be private

Advantages:

- the partners control the timing and tone of the meetings
- may provide for more flexible or creative outcomes
- still geared toward self-determination and a mediative process
- attorney's presence helps to make up for power imbalances
- non-adversarial

Disadvantages:

- still inexpensive compared to litigation but more expensive than mediation
- if the process falls through each side has to start over with a new attorney

Contested divorce -

This is the most “traditional” form of divorce, where each side has an attorney, whose job is to zealously advocate for their client.

The attorney's job is to get their client the most they can, often by exposing the weaknesses in the other partner, in a win/lose manner. This can be divisive to the family system, and can severely polarize partners.

Most divorces don't actually go to trial, but they go through lengthy discovery processes, in which each side tries to expose the faults and weaknesses of the other. This can actually be one of the longest, most expensive, and most emotionally painful parts of the process.

A contested divorce may be necessary if you think that your partner is being dishonest about his or her assets, and about how much money he or she earns. It can also be useful if there is an imbalance of power, or if there is any threat of physical violence.

If you do go to court, it is likely that each side will want to hire their own expert witnesses to provide information about the value of a business, for example, or of the family home, or to provide opinions regarding the children. Unless the parties agree on a neutral, this can double the expense of the witness, as well as taking extra court time. It can also protract the litigation if the experts do not agree.

The judge will usually determine a custody dispute by deciding what would be “in the best interest of the child.” There is no presumption that either the mother or the father is the better parent, although mothers still usually are the ones to get custody. The “best interests” standard takes a lot of things into consideration, including which parent is more accessible to the child, which parent is more likely to allow involvement by the other parent.

Best for:

- couples where there is an imbalance of power
- couples that have big disagreements over the dividing of assets
- where one person appears to be hiding assets

Advantages:

- may be needed if one partner is secretive or dishonest
- may be needed if there is really a question about the fitness of one parent
- you will have your attorney guide you at each step

Disadvantages:

- can cost tens of thousands of dollars
- can be the most contentious - and therefore the most stressful on the partners and on the children
- can drag on for months or even years
- much of the assets partners are fighting over will end up in the attorneys' pockets

Temporary (Interim) Agreements

What happens while the divorce is being worked out? If you are going to mediate or work in a collaborative process, you can work out a temporary agreement. If you are litigating in court, your attorney will ask for a *pendent lite* order, which is a temporary (or interim) order requiring the other side to do something before a final order is issued.

Working with your Lawyer

Most divorce lawyers charge by the hour. In this case, time really is money. One of the best ways you can control expenses is to use your lawyer only for the things the lawyer does best (e.g. advise you about the law) and use your friends or your counselor to help you through the emotional pain of what you are going through. Ironically, one of the most cost-effective things you can do is to pay for a therapist or a divorce coach, no matter which process you use. Divorce is painful, and there is no shame in asking for help when you need it.

Like I said in the beginning, this is a process by which you have to reorganize your whole family system - a hard task!

Another thing you can do is to be well organized. Put together a folder of all of your important documents, including any financial information you have about all of the family's assets." Include information like the title of the house, the car and the bank accounts. But also include information about you or your spouse's pensions, and any degrees either of you obtained during the marriage. Remember to write down questions before you meet with a lawyer to make the best use of your time.

For more information, there are several good websites:

www.divorcenet.com - general information about divorce

www.divorcehq.com - general information, but a little more commercial

www.collaborativelawny.com - NY Association of Collaborative Professionals
about Collaborative law in New York

www.collaborativepractice.com - Int'l Academy of Collaborative Professionals
more info about the collaborative process

www.nysmediate.org - NYS Council on Divorce Mediation
about divorce mediation in New York State

www.fdmcgny.org - Family & Divorce Mediation Council of Greater New York
also about divorce mediation in the NYC area