

# USA – New York



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## 1 Divorce

### 1.1 What are the grounds of jurisdiction for divorce proceedings? For example, residence, nationality, domicile, etc?

The parties must meet jurisdictional requirements, found in New York Domestic Relations Law (“NY DRL”) §230, as follows:

- The marriage occurred in New York, one party has resided in New York continuously for at least one year immediately prior to the commencement of the action (“commencement”) and that party remains a resident as of commencement.
- The parties have resided in New York as Husband and Wife and one party has resided in New York continuously for at least one year immediately prior to commencement.
- The cause of action has arisen in New York and both parties are residents at commencement.
- Either party has resided in New York for a continuous period of two years prior to commencement.

### 1.2 What are the grounds for a divorce? For example, is there a required period of separation, can the parties have an uncontested divorce?

Grounds for divorce are set forth in NY DRL §170(1)-(7), as follows:

- Cruel and inhuman treatment (the conduct of the defendant must endanger the physical or mental well-being of plaintiff as to render it unsafe or improper for plaintiff to cohabit with defendant).
- Abandonment (actual or constructive, for a period of one or more years).
- Imprisonment (defendant incarcerated for three or more consecutive years after the marriage).
- Adultery.
- Living separate and apart for one or more years pursuant to a written separation agreement which was subscribed by the parties and acknowledged or proved in the form required for a deed to be recorded or pursuant to a decree/judgment of separation; plaintiff must have substantially performed all the terms and conditions of the agreement or decree/judgment.
- Irretrievable breakdown of the marriage for a period of at least six months, provided that one party states so under oath. (The court will not issue a Judgment of Divorce until the ancillary custodial and economic issues have been resolved.)

The parties may be granted an uncontested divorce, either in the event of one party’s default (failure to appear and defend) or

in the event that neither party is contesting the cause of action (grounds). Parties often submit uncontested divorce filings following a settlement. These documents would include a proposed Judgment of Divorce; if there is litigation and the parties appear at a Preliminary Conference before the court, the parties must indicate at that time whether they have resolved grounds for divorce. Even when the parties indicate that the grounds for divorce are resolved, in most instances the Judgment of Divorce is not granted until the conclusion of the proceedings.

### 1.3 In the case of an uncontested divorce, do the parties need to attend court?

No, provided that the necessary submissions have been filed with the Supreme Court of the State of New York, in the county where the parties are divorcing.

### 1.4 What is the procedure and timescale for a divorce?

There is no mandatory timescale and courts maintain discretion with respect to the length of individual proceedings. Courts in some counties have established timescale guidelines by level of case complexity.

### 1.5 Can a divorce be finalised without resolving other associated matters? For example, children and finances.

Upon consent or court approval, and with the exception of NY DRL §170(7) (irretrievable breakdown), the cause of action may be bifurcated from the ancillary relief, but this atypical. The Supreme Court, which hears all divorce actions, may also refer relief (e.g. custodial and child support issues) to Family Court for resolution, as set forth in New York’s Family Court Act. The New York courts may also address limited issues where another jurisdiction is the forum in which one or more requests for ancillary relief must be heard (e.g. the parties are divorcing in New York and addressing the ancillary financial matters in New York, but the custody/access matters must be heard in a different state/country which is the child(ren)’s home state or which otherwise has jurisdiction over the child(ren)).

### 1.6 Are foreign divorces recognised in your jurisdiction?

Yes, provided that they do not violate public policy.

### 1.7 Does your jurisdiction allow separation or nullity proceedings?

Yes. Actions may be maintained to void a marriage, for annulment or separation.

### 1.8 Can divorce proceedings be stayed if there are proceedings in another country?

Yes, they can.

## 2 Finances on Divorce

### 2.1 What financial orders can the court make on divorce?

The court may make orders which distribute marital and separate property, award spousal support and/or necessities, grant child support and direct that a party maintain disability and/or life insurance. The court may also award counsel and expert fees to the less monied spouse.

### 2.2 Do matrimonial regimes exist and do they need to be addressed by the court on divorce? Is there a default regime?

New York is an Equitable Distribution state. The definitions of marital and separate property are contained within NY DRL §236B(1). See question 2.7.

### 2.3 How does the court decide what orders to make? What factors are taken into account?

The court considers fourteen (14) factors set forth in NY Domestic Relations Law §236B(5).

### 2.4 Is the position different between capital and maintenance orders?

Yes, support orders are calculated to pursuant to formulaic guidelines. The court may also consider potential factors, distinct from the distribution factors, which are set forth in the Temporary and Post-divorce maintenance guidelines at NY DRL §236B.

### 2.5 If a couple agrees on financial matters, do they need to have a court order and attend court?

The couple does not need to attend court, but they will need to obtain a Judgment of Divorce, which is in the form of a court order. If the matter is simple, and there is no property distribution or other relief, the parties may submit an uncontested divorce packet which will result in a Judgment of Divorce. For more complex matters, the parties may submit a written Settlement Agreement or Stipulation of Settlement, acknowledged or proved in the manner required to entitle a deed to be recorded, with uncontested divorce filings, which will likewise result in a Judgment of Divorce.

### 2.6 How long can spousal maintenance orders last and are such orders commonplace?

Spousal maintenance orders may be interim (*pendente lite*) or final (following the resolution of an action by settlement or court order). Spousal maintenance is frequently durational and under certain circumstances, lifetime maintenance may be awarded. New York has adopted both Temporary and Post-divorce maintenance guidelines, at NY DRL §236B which provide for a presumptive amount and deviations from the presumptive amount in circumstances where the presumptive amount would be unjust or inappropriate; in that case, the court will consider various factors contained within the statute. In the case of post-divorce maintenance, the statute provides duration guideposts, which are percentage ranges applied to the length of the marriage.

Such orders are commonplace where a party is the dependent spouse.

### 2.7 Is the concept of matrimonial property recognised in your jurisdiction?

Yes, NY DRL contains a definition of “marital property” at §236B(1)(c). This includes “all property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action, regardless of the form in which title is held [...]. Marital property shall not include separate property as hereinafter defined”. Separate property is defined in §236B(1)(d) as “(1) property acquired before marriage or property acquired by bequest, devise, or descent, or gift from a party other than the spouse; (2) compensation for personal injuries; (3) property acquired in exchange for or the increase in value of separate property, except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse; (4) property described as separate property by written agreement of the parties which conforms with DRL §236B(3)”.

### 2.8 Do the courts treat foreign nationals differently on divorce, if so, what are the rules on applicable law? Can the court make orders applying foreign law rather than the law of the jurisdiction?

Foreign nationals are not treated differently upon divorce. New York law will be applied unless there is a marital agreement containing applicable choice of law provisions which require the application of foreign law.

### 2.9 How is the matrimonial home treated on divorce?

The court has the discretion to distribute the home to either party, to issue an order directing the home to be sold (upon decision after trial unless the parties consent earlier), either immediately or in the future. If one party retains the marital residence as his or her distribution, the other party will typically receive a credit for his or her interest in the marital equity. To the extent a party meets his or her burden of proof that he or she invested separate property into the marital residence, the separate property may be returned prior to distribution of the remaining proceeds/equity.

### 2.10 Is the concept of “trusts” recognised in your jurisdiction?

The court may consider distributions from a trust in determining a party’s income. To the extent that marital assets have been utilised to acquire property held by a trust, that property might, in certain circumstances, be deemed marital property.

### 2.11 Can financial claims be made following a foreign divorce in your jurisdiction? If so, what are the grounds?

To the extent that issues are left open by the foreign judgment for enforcement and/or modification by another jurisdiction or where the laws of the State of New York allow for enforcement and/or modification of the foreign judgment.

### 2.12 What methods of dispute resolution are available to resolve financial settlement on divorce? E.g. court, mediation, arbitration?

Alternative Dispute Resolution (mediation, arbitration and/or collaborative law) is available and may be entered into voluntarily by the parties, to be conducted by privately retained individuals.

Alternative Dispute Resolution programmes are also available in many county courts and judicial districts, which programmes either mandate party participation or permit voluntary participation by parties and/or their attorneys (e.g. matrimonial mediation programmes, matrimonial neutral evaluation programmes).

## 3 Marital Agreements

### 3.1 Are marital agreements (pre and post marriage) enforceable? Is the position the same if the agreement is a foreign agreement?

Yes, marital agreements are widely enforceable, as set forth in NY DRL §236B(3): “An agreement of the parties made before or during the marriage, shall be valid and enforceable in a matrimonial action if such agreement is in writing, subscribed by the parties and acknowledged or proven in the manner required to entitle a deed to be recorded.” Foreign agreements are largely enforced, provided that the necessary formalities are met for the agreement to be valid and enforceable. (This may be either compliance with the choice of law contained within the agreement or in the event that there is no effective choice of law provision pertaining to validity, then the formalities required by the place of execution will generally control.) An agreement’s terms must not violate New York’s public policy; there are limited other bases which might render an agreement, or certain of its terms, unenforceable (e.g. the agreement was procured by fraud, duress, coercion or contains unconscionable provisions).

### 3.2 Can marital agreements cover a spouse’s financial claims on divorce, e.g. for maintenance or compensation, or are they limited to the election of the matrimonial property regime?

Marital agreements may cover the spouses’ financial obligations during the marriage, financial claims upon divorce, including, without limitation, maintenance, distribution and counsel/expert

fees. The agreement might outline a process for the valuation and distribution of assets with specificity. Marital agreements often address estate and other rights upon death of a party.

### 3.3 What are the procedural requirements for a marital agreement to be enforceable on divorce?

For a New York agreement to be enforceable, it must be subscribed by the parties and acknowledged or proved in the form required for a deed to be recorded. These formalities, including the form acknowledgments, are found in New York’s Real Property Law.

## 4 Cohabitation and the Unmarried Family

### 4.1 Do cohabitees, which do not have children, have financial claims if the couple separate? What are the grounds to make a financial claim?

There is no relief available under NY DRL. There may be remedies available in a civil suit, especially if the parties entered into a cohabitation agreement or otherwise maintain a basis for court intervention (e.g. civil litigation related to the disposition of a jointly-titled asset).

### 4.2 What financial orders can a cohabitee obtain?

This is not applicable in our jurisdiction, with the exception of those outlined in question 4.1 above.

### 4.3 Is there a formal partnership status for cohabitants (for example, civil partnerships, PACS)?

It is possible to enter into a domestic partnership, however, domestic partnerships provide limited rights and can be terminated by either partner at any time by filing a termination statement in person at the city or county office in which the couple registered their partnership. The termination statement simply says that the partnership is terminated and the partners are no longer partners. If either domestic partner gets married to another person, or to each other, the domestic partnership is automatically terminated. Domestic partnerships are not dissolved by divorce courts.

### 4.4 Are same-sex couples permitted to marry or enter other formal relationships in your jurisdiction?

Yes, they are.

## 5 Child Maintenance

### 5.1 What financial claims are available to parents on behalf of children within or outside of marriage?

The court may award basic child support to the party who is the primary residential custodian of the child(ren). The parties may also be ordered to pay a *pro rata* share of additional (“add-on”) expenses articulated in NY DRL §240(1-b)(a) *et seq.* and New York Family Court Act §413, identical statutes referred to as the “Child Support Standards Act” or “CSSA”. Add-on’s may include child care, unreimbursed health-related expenses, and in the court’s discretion,

educational and enrichment costs). A party might also be directed to maintain health insurance for the child(ren) and to provide life insurance to secure child support obligations. The court may also award counsel fees to the party seeking support on behalf of the child(ren).

## 5.2 How is child maintenance calculated and is it administered by the court or an agency?

Child support is calculated pursuant to a formula. If application of the formula would be unjust and inappropriate, child support is further adjusted in consideration of factors set forth in the CSSA. These factors are commonly known as the “f” factors, in reference to their statutory location, and include:

- (1) the financial resources of the custodial and non-custodial parent, and those of the child;
- (2) the physical and emotional health of the child and his/her special needs and aptitudes;
- (3) the standard of living the child would have enjoyed had the marriage or household not been dissolved;
- (4) the tax consequences to the parties;
- (5) the non-monetary contributions that the parents will make toward the care and well-being of the child;
- (6) the educational needs of either parent;
- (7) a determination that the gross income of one parent is substantially less than the other parent’s gross income;
- (8) the needs of the children of the non-custodial parent for whom the non-custodial parent is providing support who are not subject to the instant action and whose support has not been deducted from income pursuant to DRL §240(1-b)(b)(5)(vii)(D), and the financial resources of any person obligated to support such children, provided, however, that this factor may apply only if the resources available to support such children are less than the resources available to support the children who are subject to the instant action;
- (9) provided that the child is not on public assistance (i) extraordinary expenses incurred by the non-custodial parent in exercising visitation, or (ii) expenses incurred by the non-custodial parent in extended visitation provided that the custodial parent’s expenses are substantially reduced as a result thereof; and
- (10) any other factors the court determines are relevant in each case.

## 5.3 For how long is a parent required to pay child maintenance or provide financial support for their children? For example, can a child seek maintenance during university?

Until age 21; however, the parties may agree to extend the age of emancipation beyond age 21.

## 5.4 Can capital or property orders be made to or for the benefit of a child?

No, they cannot.

## 5.5 Can a child make a financial claim directly against their parents?

Yes, in limited circumstances. Such actions are rare.

## 6 Children – Parental Responsibility and Custody

### 6.1 Explain what rights of custody both parents have in your jurisdiction whether (a) married, or (b) unmarried?

Married and unmarried parents have the same rights to seek custody of and access to their child(ren).

### 6.2 At what age are children considered adults by the court?

Although children are not considered emancipated for child support purposes until age 21, for custodial purposes, orders will terminate at age 18.

### 6.3 What is the duration of children orders (up to the age of 16 or 18 or otherwise)?

See question 6.2 above.

### 6.4 What orders can the court make in relation to children? Does the court automatically make orders in relation to child arrangements in the event of divorce?

In most circumstances, with the exceptions described in question 1.5, above, the divorce court must make a determination as to custody and access. The court can make orders with regard to how child-related decisions are made, and each parent’s access, including regular, holiday, vacation and other access. The court may, in certain circumstances, establish protocols with regard to the parents’ conduct and communications.

### 6.5 What factors does the court consider when making orders in relation to children?

The court considers the best interests of the child(ren), giving regard to the circumstances of the case and the parties. NY DRL §240(1)(a). The court must take into consideration findings of domestic violence and other findings which place a child at substantial risk of harm (e.g. if the child is a victim of abuse).

### 6.6 Without court orders, what can parents do unilaterally? For example, can they take a child abroad?

Parents have broad discretion and freedom of movement in the absence of court orders, however, a parent who is objecting to the removal of the child(ren) from the jurisdiction may contest the other parent’s removal by seeking court intervention. (Applicable laws are the federal Parental Kidnapping Prevention Act and the Uniform Child Custody Jurisdiction and Enforcement Act.) For international removals, see question 7.2 below.

### 6.7 Is there a presumption of an equal division of time between separating or divorcing parents?

No, there is not.

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**6.8 Are unmarried parents treated in the same way as married parents when the court makes orders on separation or divorce?**

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Yes, although for child support purposes, a court might consider whether the parties established a particular standard of living for the child(ren) within a joint household.

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**6.9 Is a welfare report prepared by an independent professional or is the decision taken by the Judge alone? If so, does the child meet the Judge?**

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If custody and access issues are disputed, oftentimes the court will appoint a forensic evaluator (*e.g.* a mental health professional) who prepares a report. The court maintains discretion to make a determination without such an appointment. The court is not bound by any conclusions or recommendations in the report.

Courts may interview the child, if the circumstances warrant. This is referred to as a *Lincoln* hearing (or *in camera* interview), where only the court, the Attorney for the Child and the child are present. Either party's attorney may ordinarily submit questions for consideration by the court. The transcript of the *Lincoln* hearing is sealed from access by the parties and their attorneys.

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**6.10 Is there separate representation for children in your jurisdiction?**

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Yes, the court may appoint an Attorney for the Child(ren).

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**6.11 What methods of dispute resolution are available to resolve disputes relating to children?**

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See question 2.12, with the exception of neutral evaluation, which involves discrete financial issues. Several county courts have established custody and access mediation programmes. Parents may also retain the services of a parent coordinator, who will assist the parties in resolving child-related disputes; the implementation of a parent coordinator is sometimes incorporated into the parties' final custody/access agreement.

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**7 Children – International Aspects**

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**7.1 Can the custodial parent move to another state/country without the other parent's consent?**

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No, however, there is an exception for emergency circumstances pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act.

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**7.2 If the court is making a decision on relocation of a child abroad, what factors are taken into account?**

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The court has broad discretion to consider the individual facts and circumstances of each case. In *Tropea v. Tropea*, the New York Court of Appeals articulated “[...] we hold that each relocation request must be considered on its own merits with due consideration of all the relevant facts and circumstances and with predominant emphasis being placed on what outcome is most likely to serve the best interests of the child. [...] in all cases, the courts should be free to consider and give appropriate weight to all of the factors that may be relevant to the determination. These factors include, but are certainly not limited to each parent's reasons for seeking or opposing the move, the quality of the relationships between the child and the custodial and noncustodial parents, the impact of the move on the quantity and quality of the child's future contact with the noncustodial parent, the degree to which the custodial parent's and child's life may be enhanced economically, emotionally and educationally by the move, and the feasibility of preserving the relationship between the noncustodial parent and child through suitable visitation arrangements. In the end, it is for the court to determine, based on all of the proof, whether it has been established by a preponderance of the evidence that a proposed relocation would serve the child's best interests”. 87 N.Y.2d 727 (1996).

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**7.3 In practice, how rare is it for the custodial parent to be allowed to relocate internationally/interstate?**

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While not uncommon, these cases often present complexities and are highly fact-specific. The burden may be high.

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**7.4 How does your jurisdiction deal with abduction cases? For example, is your jurisdiction a party to the Hague Convention?**

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Yes, the jurisdiction is a party to the Hague Convention. Domestically, the Parental Kidnapping Prevention Act and the Uniform Child Custody Jurisdiction and Enforcement Act would apply.



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Gretchen Beall Schumann is a partner of the firm. An experienced attorney with regard to domestic and international matters, she has lectured for the New York State Bar Association on aspects of the Uniform Interstate Family Support Act, for the Women's Bar Association of the State of New York with regard to matrimonial law and electronic privacy, and for the French American Bar Association with respect to distribution of New York business interests. In 2016, Ms. Schumann was listed in *Super Lawyers New York-Metro* as one of the Top 50 Women Attorneys.

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## Firm Logo

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