

MARITAL SEPARATION AGREEMENT (MSA)

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GETTING STARTED

Generally, a Marital Separation Agreement is drawn up according to the law of the state in which at least one party lives. When executed and witnessed properly, it is an enforceable contract between the parties, but is not in itself an undertaking to become divorced. Most parties ultimately do file for divorce, at which time an Agreement may be "incorporated" into the eventual divorce judgment. "Incorporation" means that the Agreement also takes on the contempt power of the Court and can be enforced by the Court, just as the terms of the divorce judgment can be. Depending on which ground for divorce you will be filing under, you and your spouse may proceed to divorce and request that the Agreement be incorporated into the divorce judgment.

MARITAL SEPARATION AGREEMENTS IN GENERAL

A Marital Separation Agreement, also known as a Property Settlement Agreement or Marital Agreement, is simply a written contract dividing your property, spelling out your rights, and settling such issues as maintenance and child custody. A separation agreement is an agreement between the spouses that sets forth the terms and conditions by which the parties will live apart. As a contract, the Agreement will bind you over many years and determine your rights, obligations, and responsibilities from your marriage. You and your spouse can mutually amend the Agreement, or it can be modified by an order of the Court, provided the Agreement does not specifically state that the Agreement is not subject to any court modification. In addition, the Court can always modify provisions in an agreement regarding the care and custody of any minor children.

The typical separation agreement, or a stipulation of settlement, resolving a divorce should state whether the Agreement is to survive the judgment of divorce (also called a decree) as a separate contract, or whether it should be merged and incorporated into the judgment of divorce thus allowing for modification similar to a court order. Having the Agreement remaining a separate contract or being incorporated into the judgment will depend on which ground for divorce you will be filing under.

When incorporated, the Agreement becomes a court order and is enforceable by the Court's contempt powers. When remaining a contract between you and your spouse, enforcement of the terms may require a separate action under contract law to enforce the contract obligation. Any money damages to the violation of the Agreement may also be addressed in said action.

DIVIDING PROPERTY BY AGREEMENT

This product assumes that you and your spouse will be able to reach agreement on the division of marital assets and liabilities and that there will be no need for the Court to divide the marital property. The Agreement will also cover custody, visitation rights, and other issues that you want to deal with after the divorce. If you cannot agree on these issues, then you have a contested divorce, and you should consult an attorney.

In an uncontested divorce, the Court nearly always approves the Agreement of the parties if it is generally fair and the Court is convinced that the Agreement was entered into by both spouses with no fraud or coercion. Often the Court may want to review financial affidavits attached to the Agreement in order to determine their fairness.

How the Courts Divide Assets and Obligations: Equitable Distribution

New York is an "equitable distribution" state. This means that the Court "equitably divides" the marital property if you cannot reach agreement on your own. The Court normally considers the length of the marriage, the age, health, and conduct of the parties, and their occupations, skills, and employment potential. Equitable division does not mean equal division and seldom is property equally divided.

The Court will order an approximately equal division of the assets and liabilities when:

- It was a long marriage
- The spouses had nearly equal wealth before the marriage
- Both spouses have approximately equal earning ability
- There are no minor children

The Court will award more property (and fewer debts) to the spouse who has:

- Less earning ability
- Less financial contribution to the marriage if the marriage was short in duration
- Poor health or other adverse circumstances
- Custody of minor children

Marital and Non-Marital Property

In an "equitable distribution" state, all property acquired during the marriage is "marital property" and all property owned before the marriage is "non-marital" property. Gifts or inheritances to either spouse during the marriage are non-marital property.

In constructing this Agreement, you will be asked questions regarding your marriage, any children, you plans for child support and custody, maintenance, division of property and retirement benefits, continuing insurance coverage, your tax returns, and so forth. This product assumes that you and your spouse will be able to reach agreement on the division of marital assets and liabilities and there will be no need for the Court to divide the marital property. The Agreement will also cover custody, visitation rights, and other issues that you want to deal with after the divorce. If you cannot agree on these issues, then you have a contested divorce, and you should consult an attorney.

Again, the Court may want to review any financial affidavits attached to the Agreement in order to determine its fairness.

In negotiating your agreement, you should be guided by how a court is likely to divide your property, award custody and child support, and deal with other issues, if you cannot reach agreement.

Alimony

In New York, payments made by one spouse for the financial support of the other, during separation or divorce, is called "maintenance."

SIGNING THE MSA (EXECUTION)

You should print at least two (2) copies of your Agreement. Each party should sign (execute) the Agreement in front of a Notary. The documents do not need to be signed at the same time, nor in the presence of the same Notary. Each party should retain a fully executed original. Depending on the grounds of which you are filing your divorce action, a copy of the Agreement (with original

signatures, not a photocopy) may be filed in the office of the Clerk of the County where one of the parties resides (more details below).

LOOKING FORWARD TO DIVORCE

Legal Grounds for Divorce and Use of a Marital Settlement Agreement (MSA)

On August 15, 2010, the Governor of New York signed no-fault divorce into law for the state. This law took effect on October 12, 2010. The statute for the new ground of Irretrievable Breakdown states: “The relationship between husband and wife has broken down irretrievably for a period of at least six (6) months, provided that one party has so stated under oath. No judgment of divorce shall be granted under this subdivision unless and until the economic issues of equitable distribution of marital property, the payment or waiver of spousal support, the payment of child support, the payment of counsel and experts’ fees and expenses, as well as the custody and visitation with the infant children of the marriage have been resolved by the parties, or determined by the Court and incorporated into the judgment of divorce.” [Consolidated Laws of New York Annotated; Domestic Relations Law, Volume 8, Section 170.7]

Prior to this time, the closest concept to a no-fault divorce in New York was divorce by conversion of a separation agreement. The statute for said ground indicates: (1) living separate and apart for one (1) year under the terms of a separation agreement which is in writing and signed and notarized. (Proof of compliance with the terms of the settlement agreement must be submitted when the divorce is filed. In addition, a copy of the Agreement or a brief memorandum of the Agreement must be filed in the office of the Clerk of the County; or (2) living separate and apart for 1 year under the terms of a judicial separation decree. [Consolidated Laws of New York Annotated; Domestic Relations Law, Volume 8, Section 170.6]

IRRETRIEVABLE BREAKDOWN AND VOLUNTARY SEPARATION

Irretrievable Breakdown. New York’s Irretrievable Breakdown ground requires that you and your spouse have had an irretrievable breakdown of the marital relationship (to the point that the marriage is beyond repair) over a period of at least six (6) months at the time of the divorce action, and that one or both parties state such under oath to the Court. To obtain a divorce under this ground, all ancillary issues (as outlined above) must have been resolved by the parties. The Court will not grant a divorce unless a MSA or similar agreement has been reached between the parties.

When proceeding under this ground, filing the Agreement with the Court is not typically a requirement for the divorce to be granted. However, some courts and/or local jurisdictions may request or require that a copy of the MSA be filed with the Court. As court procedure may vary from County to County or even courthouse to courthouse in New York, contact your local Clerk for information as to the typical procedure when using a MSA as part of the divorce under said ground.

Voluntary Separation. New York’s Voluntary Separation ground requires that you and your spouse have lived apart from one another according to the terms and conditions of a properly executed separation agreement, for at least one (1) year before the filing of the divorce documents (also known as Conversion). When filing under Voluntary Separation, you cannot file New York divorce papers until one (1) year after your Marital Separation Agreement (MSA) is signed by both parties and notarized (properly executed).

Note: In New York, many counties require that a copy of the Agreement (with original signatures, not a photocopy) be filed in the office of the Clerk of the County where one (1) of the parties resides, at least one (1) year before you file divorce papers. The included Memorandum of Agreement form is used in these situations. At the time of filing, an Index Number (case number) will be purchased. It is important to check with your local Court to determine whether a one (1) year MSA filing requirement exists when filing under said ground.

Residency Requirements for Divorce and Where to File

If only one spouse resides in New York at the time of filing the divorce, the residency requirement is two (2) years. However, the requirement is reduced to one (1) year if: (1) the spouses were married in New York and either spouse is still a resident; or (2) they once resided in New York and either spouse is still a resident; or (3) the grounds for divorce arose in New York. In addition, there is no residency time limit requirement if both of the spouses were residents of New York at the time of filing the divorce and the grounds for divorce arose in New York. The divorce may be filed for in a County where either spouse resides. [Consolidated Laws of New York Annotated; Domestic Relations Law, Volume 8, Sections 230 and 231; and New York Civil Practice Laws and Rules, Rule 503].

Filing fees for a divorce in New York State may total \$200-500. Check with the County Clerk's Office regarding acceptable forms of payment and the exact fee values.