

DIVORCE MAG INTERVIEW QUESTIONS

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Divorce:

Q: How do I start the divorce process? Will I have to serve my spouse with papers? How does that work?

A: My style is talk first, file with the court later, because divorce is painful and filing with the court tends to make the experience even more unpleasant. Divorce is painful when you're sure it's necessary and can be even more painful if you're the party who believes it's not necessary. Because I'm sensitive to this, my philosophy always has been to make the process as pain free as possible. Unless there are circumstances requiring that we seek legal intervention as soon as possible, the first step is for me to make contact with your spouse, hopefully hear soon from their attorney, and then use every effort to achieve a comprehensive settlement before filing anything with the court. If your spouse's attorney believes in filing with the court first and talking later, then we deal with that - no problem. Either way, your spouse would be served with court papers, preferably through counsel or through the mail. In rare cases, where a spouse has refused to cooperate, we have had to have them served by the Sheriff.

Q: What are the grounds for divorce in New Jersey? I've been told we are a no-fault state. What does this mean? My spouse had an affair, so isn't s/he at fault for breaking up our marriage?

A: Although there are several different legal grounds for divorce in New Jersey, we are a no-fault state, meaning that no matter who is at fault for the marriage ending, everyone - with rare exceptions - will get their fair share of equitable distribution of assets and reasonable amounts of alimony and child support. A now-retired judge used to announce to a courtroom packed with litigants and their counsel, "I don't care who did what to whom when. I just want to know about the children and the money, and what you plan to do with them." The exceptions to the "fair share" rules are cases where one spouse embezzled assets from a family business or dissipated marital assets because of gambling or substance abuse.

Q: Do we both file for divorce? What is the difference between a contested divorce and an uncontested divorce?

A: When it is time to go to court, one party files a Complaint for Divorce and other party has an opportunity to respond. Because we are a no-fault state, by far the most common grounds for divorce are “irreconcilable differences.” If we are successful in settling the case before filing anything with the court, it is an uncontested or undisputed case, meaning that the only thing the judge has to do is finalize the divorce. This also happens frequently even after a Complaint for Divorce has been filed, by settling through negotiation while the case is pending. In fact, the statistics show that only four percent of cases actually go to trial and half of those cases settle at some point prior to the end of a full trial.

Q: What are the differences between mediation, arbitration and collaborative divorce?

A: Mediation: A mediator is an impartial third party who hears and analyzes the parties' positions on resolving their differences and then works with them to attempt to reach settlement, which generally requires that they both make compromises. The parties can attend mediation either with or without attorneys, but when our clients go to private mediation before going to court, we prefer to work with them first to determine what assets, income, and other issues, such as custody and parenting time, are at play. We then devise various scenarios for settlement based on the particular facts of their case and the applicable law. This is what we call The Game Plan, and it prepares our clients for the negotiations that occur during mediation.

Arbitration: This essentially consists of hiring a private judge. There are many skilled arbitrators in New Jersey, a number of whom are retired judges. The parties' attorneys present their cases to the arbitrator as if they were in court and the arbitrator makes a decision. Arbitration can be particularly effective in cases where the parties prefer that the facts of their case not be on the public record. It can also be an effective method for parties who do not wish to deal with the backlogs in the court system.

Collaborative Divorce: This is a relatively new method of alternate dispute resolution that requires the parties and their attorneys to enter into a participation agreement where they pledge not to file anything with the court, but instead work together to achieve settlement by assembling a team of professionals, all of whom - including counsel - are collaboratively trained. The collaborative team will vary from case to case and can consist of simply the parties and their

attorneys. The first step is often a four-way conference of the parties and their attorneys to identify needs, goals, and objectives, as well as what (if any) other collaborative professionals may be necessary to achieve them. They can be financial professionals, mental health professionals, and even real estate and mortgage banking professionals. Cases can also begin with other collaborative professionals referring the case to collaboratively trained attorneys. This method allows the parties to work at their own pace without having to worry about arbitrary court deadlines or delays. If settlement is reached, the attorneys file the necessary court paperwork to finalize the divorce. If not, the parties have “fallen out” of the process and must begin again with new attorneys. The attorneys who worked collaboratively on the case are prohibited from representing their clients in contested court proceedings. We consider collaborative divorce to be a kinder, gentler process, but it can work in even the most highly contested situations.

Q: How do I determine how much alimony / spousal support I need?

A: New Jersey law specifies several factors a court must consider to rule on this issue, such as the parties’ incomes and assets, their ages, the length of the marriage, etc. Essentially, as a now-retired judge told me, it boils down to these magic words: coverture-acquired economic dependence. In plain English, this means that if a party were economically dependent on the other during the marriage, the dependent spouse would likely be entitled to receive alimony. The issue then becomes what type of alimony. New Jersey alimony law changed recently, abolishing permanent alimony and replacing it with open durational alimony, which can be ordered or agreed to in long-term marriages. In

addition, limited duration alimony, rehabilitative alimony, and reimbursement alimony can be ordered or agreed to based on the facts of the case and the statutory factors. The new law also specifies how long alimony is to be paid based on the length of shorter-term marriages and how to handle cohabitation and retirement issues. All of these provisions are subject to proof of unusual circumstances in any case that would require adjusting these standards. We believe the new law will prove helpful in negotiating and litigating the amount and duration of alimony in our cases.

Q: How is child support determined?

A: By federal law, all states must have numerical child support guidelines. The result in New Jersey in most cases is driven primarily by the parents' incomes and how many overnights the children stay with each. All the relevant information is put into a grid and the calculations are made. Although the results are presumed to be correct, they are modified where the parents' combined incomes net of tax exceed a certain set amount, and also for children with special needs or incomes of their own, such as child actors. New Jersey law differs from many other states because there is no set age for a child to be deemed emancipated and, therefore, no child support obligation is due. It can occur at any age, particularly after a child is 18 years old or older and has "moved beyond the sphere of parental influence".

Q: What is equitable distribution?

A: New Jersey law states the standards by which marital assets and debts are to be divided between the parties. Non-marital or exempt assets are what either of both parties owned prior to the marriage and gifts to a party from a third party during the marriage. They remain the separate property of the owner. There is no automatic 50/50 rule for equitable distribution, although we frequently use it as a starting place to determine who gets what. Sometimes a party will want to buy out the other party's interest in an asset - for example, the marital home - and offset other assets to do so. In that case, the tax consequences must be taken into consideration. Equitable distribution can be a complex and sophisticated area of the law, so it must be analyzed thoroughly and with knowledge in order to ensure the property division is in fact equitable.

Division of Non-Retirement Assets and Debts: The first step in this process is to determine what the marital and non-marital assets and liabilities consist of and value them. This is true regardless of whether the case is litigated in court, mediated, arbitrated, or resolved collaboratively. We counsel our clients at the very beginning to visualize where they want to be at the end and to let us know if any particular asset is something of such importance that they're willing to buyout the other party's interest. We then work with our clients to develop various scenarios for settlement based on the particular facts of their case and the applicable law. It helps to have reasonable expectations, which prepares our clients for the negotiations that occur during whatever process is chosen – whether it is litigation, mediation, arbitration, or collaboration.

Division of Retirement Assets: There are generally three types of retirement assets, one or more of which may be “in the pot” for equitable distribution: individual retirement accounts (IRAs), defined benefit plans (pensions), and defined contribution plans (savings plans). What ordinarily happens is that the marital portions of any of these plans are divided between the parties, although sometimes they are valued net of tax to use as an offset against another asset the non-participant in the plan wishes to keep. IRAs can be divided with a letter of instruction to the bank or other financial institution holding that asset. Pension and savings plans can be divided via a Qualified Domestic Relations Order (QDRO) if they are qualified under ERISA, the federal law governing these types of plans. Non-qualified plans, such as those from government employment, can be divided via a Domestic Relations Order (DRO). Essentially, both are court orders directing the plan administrator how that particular plan is to be divided between the parties. I am proud to have been one of the first attorneys in New Jersey to use QDROs and DROs, and to lecture on this topic for the New Jersey Institute for Continuing Legal Education. I have been retained by other attorneys as an expert to help resolve these issues.

Q: What do my fiancé and I need to do to create a prenuptial agreement?

A: The New Jersey law on these agreements provides that they are enforceable if there has been full disclosure by both parties, the parties have been represented by counsel or had the opportunity to retain counsel, and it was fair and equitable at the time the agreement was made. Previously, a court could find that a prenuptial agreement would not be enforced if it were unconscionable at the time enforcement was sought, but the law has changed. We have done a number of these agreements and are aware of the requirements

to make them fair and equitable, and therefore enforceable, particularly now that same-sex couples can get married in New Jersey.