

WAYS TO DIVORCE IN NEW YORK STATE

By Carolyn Zenk, Attorney at Law/Certified Mediator Touro Law School
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This article represents my opinion. It is not to be construed as legal advice. Each couple's divorce presents a case of first impression. Different outcomes may be expected in the courts depending on your facts. You are advised to seek an attorney's advice.



Mediation helps parents remain friends so they can Successfully raise their children in a loving way.

SUMMARY OF WAYS TO DIVORCE IN NEW YORK. There are several ways to obtain a divorce in New York State. These include: divorce mediation using an attorney/mediator for both of you without each spouse consulting his or her own attorney, divorce mediation using one attorney for both of you with an outside review by your own personal counsel, divorce litigation, collaborative divorce, mediation using a lay mediator without a law degree, “do it yourself” divorce, and negotiation of a separation agreement using two individual attorneys.

This article discusses the pros and cons of several approaches. It is advised that you consult an individual divorce attorney regarding the specific circumstances of your case to obtain the advice that is the best for you. This article should be used for general guidance only. Consult your own attorney before you divorce to protect your rights.

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Let me begin with what I consider the two most desirable approaches to a divorce and follow with what I consider the least desirable approaches. The manner in which you approach your divorce, can affect you and your children for decades to come. Take the time to consider the right approach for you.

MEDIATED SEPARATION AGREEMENT WITH ATTORNEY/MEDIATOR WITHOUT THE USE OF PERSONAL COUNSEL.

If your focus is to protect your legal rights, while saving as much money as you can, a husband and wife may jointly hire an attorney-mediator, who is willing to acquaint you with the Domestic Relations Law, and who answers to both of you, without an outside independent review by an attorney of your own. The professional mediator- lawyer, has an ethical duty to act competently with respect to your rights and is prohibited by law to draft an unconscionable (unfair) agreement. Make sure that your attorney-mediator is willing to go over the law with you.

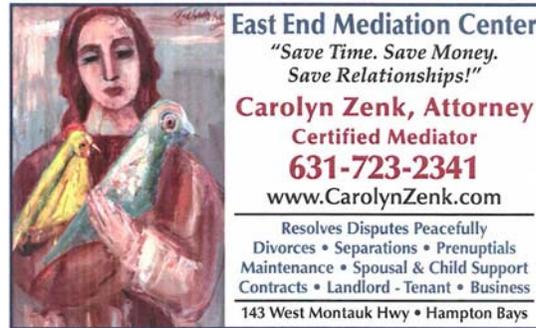
In this approach, the Attorney/Mediator advises the couple on the law, mediates the issues involved between the couple, and writes up the separation agreement. Neither spouse uses their own personal counsel.

The Mediator will probably advise the couple to seek outside legal advice before they sign the agreement. Why does the Mediator do this? It may further protect each spouse's rights. It also protects the Mediator. Currently, there is a tension between litigators and mediators in the profession. Litigators claim that there is an inherent conflict of interest when a couple uses the same Mediator/Lawyer. Mediators counter that litigators may only be saying this because mediation saves couples tens of thousands of dollars that litigators may never earn. If you have sought a worthwhile professional, and not a Mediator without a law degree without the legal expertise necessary to guide through the process, this process should cost the couple from **\$3,000 to \$8,000** depending on the complexity of your finances and custody/visitation arrangements. The couple splits this cost.

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Be careful not to hire mediators without law degrees. They are deceptively inexpensive because they are not allowed to practice law in New York State without a license and cannot advise you on the law.

MEDIATED DIVORCE USING ATTORNEY/MEDIATOR WITH SEPARATE LAWYERS REVIEWING THE FINAL SEPARATION AGREEMENT.

In 90% of cases, this approach is probably the optimal approach from a legal point of view. There is a down side with respect to expense because you must involve three lawyers who must be paid. Under this approach, the couple engages a Mediator/Attorney to negotiate and prepare a separation agreement for them. This individual answers to both spouses. Once the document is prepared, each member of the couple goes over it with his own attorney before he/she signs it. Each spouse can also seek independent legal advice from his/her own counsel while the mediation is being conducted.

This approach has several distinct advantages. The cost savings is still significant compared with a litigated divorce. Tens of thousands of dollars can be saved by using this approach. The couple has the advantage of having a professional who knows the law at his/her service and who can advise them accordingly. The couple splits the Mediator's bill, cutting his or her costs in half. The Mediator must be neutral and cannot take sides. Therefore the separation agreement cannot be biased toward one partner, unless the spouses themselves wish to favor one spouse over the other. Inequitable separation agreements can be stricken down by the courts. If the couple opts to litigate, instead of mediate, the Mediator cannot represent either party in the litigation against the other. This would be unethical.

The mediation itself usually takes from two to eight hours, depending on the complexity of the estates involved and the complexity of the legal issues. (Sometimes it takes longer if an unusual issue presents itself.) Writing the separation agreement can take from two to eight hours.

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Unlike litigation, which can be decided by a judge, the couple has power over every aspect of the mediated separation agreement, including custody, child support, and visitation rights. A judge does not hand down a judgment against the couple's will. More novel approaches to custody and visitation arrangements can be undertaken than might be taken by a judge. For example, rather than a "winner take all" approach to custody and visitation, each spouse can agree to spend equal time with their child(ren). Either spouse can withdraw from mediation at any time. They simply have to pay their bill for the work accomplished before they informed the mediator they have chosen to litigate instead.

The mediation process is much more amicable than litigation. The couple meets together at the Mediator's office outside of the courtroom in private. They try to work out their differences with the help of the Mediator. They set a peaceful groundwork for their future partnership, which is necessary to raise their children. If the Mediator is a good one, the Mediator will recognize that it is in the couple's long-term interest to preserve their relationship as people, family, and friends even though they will no longer be romantic partners. The mediation process is much better for children than the litigation process, which by its nature, sets husband against wife and wife against husband as plaintiff and defendant. Let's face it; suing your partner does not engender good will.

The time saved by mediation is significant. A divorce may drag out in the courts six months to two years or more. Grounds are necessary to obtain a divorce. A separation agreement can be drafted in three months or a few weeks. A couple with a separation agreement will have virtually all of the benefits of a divorced couple, except that neither spouse cannot remarry during the one year period that New York requires to convert the separation agreement into a divorce. NY policy requires one year to encourage reconciliation. Couples can often take advantage of medical benefits during this separation period. There is confusion regarding mediation services being offered to couples. Lay mediators (those without a law degree) cannot "practice law." They advertise cheap divorces, which are "too good to be true."

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Attorney mediators must practice competent law. This process takes longer, involves considerable expertise, and is therefore more expensive. Make sure that your lawyer/mediator does not subscribe to the point of view which holds they are not to advise you. What is the point of hiring an attorney as a Mediator if they cannot inform you about the applicable law and handle a divorce competently?

There are lawyers (often litigators who stand to make a great deal of money from contentious divorces) who strenuously object that lawyer/mediators have an inherent conflict of interest when they prepare separation agreements for a couple, given the spouse's divergent interests. For this reason, many lawyer/mediators always advise that each spouse has their own lawyer look over a separation agreement before signing it.

Once a separation agreement is drafted, each party can bring it to his own attorney for review. He or she can advise him/her whether or not to sign it. The advantage of this process is that the second lawyer is hired to look out *only* for a given spouse's interests, *not* the interests of your partner. Thus, you get a double check upon whether or not signing the mediated separation agreement is in your best interest. This is usually a worthwhile expenditure.

However, there are a few precautions one should consider. Some lawyers are notoriously litigious. They think they can get you a "better deal." They try to "stir the pot" and advise against signing *any* mediated separation agreement. The cost of the "better" deal can be considerable. There may be tens of thousands of additional attorney fees to pay. There may be an equally ambitious lawyer trying to get a "better deal" for your spouse, whose efforts will cancel out your attorney's efforts. The "better" deal may ultimately not be worth the cost of paying to get it. If the Mediator is worth her salt, she will generally give the couple a good idea of how things would generally turn out in courtroom anyway. While most of these litigation attorneys are trying to act ethically, it needs to be borne in mind that they only make several hundred dollars going over a separation agreement v tens of thousands of dollars in a hotly contested divorce.

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A legal memo on a controversial point of law may be a good investment for you in some cases. An attorney can research couples who had similar fact patterns to your own and tell you what would probably happen in your case. This can help guide you.

The review of the separation agreement should take only several hours and cost an additional **\$500 to 1,500** each. Your counsel may wish to write the Mediator a letter or call the Mediator to bring legal or factual matters to her attention.

LITIGATED DIVORCE.

Generally, I would advise against a litigated divorce in 90% of cases. There are exceptions where litigation may be the only way to go.

Generally, litigated divorces begin with a **\$5,000 to \$10,000** retainer being paid apiece. Litigated divorces cost anywhere from **\$10,000 apiece** (if the couple is lucky) upward to **\$80,000 apiece** where there are complex custody and estate issues at stake. A single motion may cost **from \$3,000 to \$8,000**. During the course of a litigated divorce, several motions may be made. The spouses are rarely told the exact amount a divorce will cost because it is difficult to know how the "battle" will go. A couple can lose their home or end up spending their child's college education upon a divorce. Wealthy individuals often spend a lot more than this.

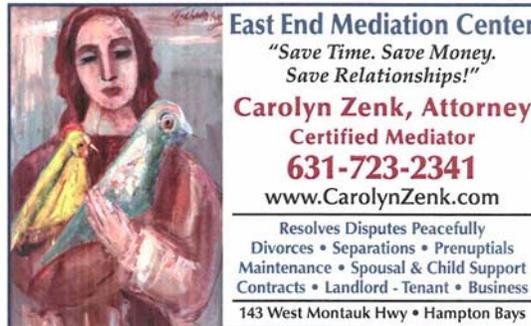
Some litigants try to convince a court that one spouse has done the other spouse wrong, which can get ugly. (Ex. Adultery, cruel and inhuman treatment, abandonment, sexual abandonment). Others try to prove that one parent is abusive, negligent, or unfit as a parent in order to obtain custody of the children. This can destroy a relationship forever.

Litigated divorces are extremely contentious. One partner must literally sue the other partner. One becomes the plaintiff. The other becomes the defendant. Each partner's attorney must represent his client "zealously within the bounds of the law". This

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generally means that each attorney is struggling hard for an advantage over the other guy's attorney. This usually translates into a lot of legal bills.

There is an ugly little secret in the legal profession-namely that a litigation attorney has a direct, inherent conflict of interest when he/she takes a divorce between the couple's interests and his or her own financial interests. If he/she settles early and spends less of his client's money, he earns less. Contention breeds attorney dollars! While many practitioners will put the interests of their clients over their interest in their wallet, some will not. Many unnecessarily force issues to the courthouse steps in an out-and out war to bring the other party to his/her knees. Hundreds of thousands of dollars have been wasted this way.

In my opinion, there are only a few situations where litigation is worthwhile and necessary. Those situations are as follows. If a couple cannot come to an agreement with respect to which parent will have "residential" custody of the children, litigation may be necessary. In other words, Dad wants the kids to live with him. Mom wants the kids to live with her. Neither is willing to compromise. In that case, the New York rule is that the judge will place the children with the parent based on the "best interest of the child." A "winner take all approach" is the general rule in the courts.

When one member of a couple is hiding significant assets, a litigated divorce may be advantageous to mediation. A litigated divorce makes several handy legal tools available. These are called the "discovery devices." A lawyer involved in litigation can require the other side to answer written or verbal questions under oath (depositions) and/or produce critical documents, including bank account records, stock records etc. (notices to produce). Spouses can demand that written questions be answered under oath by their spouses. These are called interrogatories. These discovery devices can be extremely helpful. Judges can hold litigants in "contempt of court" when they lie or do not answer discovery requests. Forensic experts can be hired to determine the wealth of a given litigant. Of course, these devices add considerable time and expense to the proceedings. It bears emphasis that a professional lawyer/mediator can require these same documents and can add a clause to a separation agreement that the agreement is void if significant

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assets have been hidden by either spouse. Thus, a savvy Mediator can invoke many safeguards similar to those found in litigation.

When it is clear that a woman or a man is entitled to maintenance (support), once called alimony, and the other partner refuses to give it to them, litigation may also necessary. At the same time, it would probably be best for the partner attempting to resist maintenance to get a legal opinion regarding whether he will likely be required to pay it, rather than spending needless dollars “duking it out” when he is likely to lose the issue anyway.

When the law makes it clear that certain property is separate property and does not have to be shared or that one partner is entitled to an equitable share or fair share in marital property, and the other partner refuses to believe this, litigation may be necessary. However, if each party has hired an attorney worth his/her salt, he/she could obtain a legal memo on any matter of concern to determine the likely outcome in a court of law and litigation would be unnecessary. Written material is far more reliable than verbal advice. It is unwise for lay persons to attempt to outguess their attorneys, although independent research is always a good idea.

When one party will not agree to a separation agreement (“no fault divorce”) a litigated divorce may be the only way to obtain a divorce. Grounds in New York State must still be proved although New York State has liberalized its divorce laws in the last few years. It is now far easier to get out of a marriage in New York if the marriage has been "irretrievably broken" for at least six months.

DO-IT-YOURSELF DIVORCE WITH LEGAL COUNSELING .

I would advise against a do-it-yourself divorce in all cases, but especially for longer marriages, marriages involving children, and marriages with considerable assets. If you insist upon going this route to save money, do yourself a favor and at least consult an attorney for two hours or so to determine what your rights are. Huge blunders are often made in do-it-yourself situations. For example, you may share an inheritance believing that it is marital property. (It is separate property and does not have to be shared.) You

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may have a right to spousal support and waive it by mistake. You may agree to less child support than you are entitled to under New York State law.

An individual seeking to divorce would be well-served to pay for at least a two hour legal counseling session with a competent divorce attorney to obtain an idea of the rules of law that the courts will apply. Attorney rates currently range between about \$250/hr. to \$450/hr. in New York. One should make sure that the attorney consulted deals regularly in the field of divorces and separation agreements and that he/she is acquainted with the Domestic Relations Law, equitable distribution, child support, and maintenance ("spousal support" once known as alimony). The attorney can also check over the paperwork prepared by the couple and handle filing etc. This could take the attorney another two to three hours.

Couples often wrongly assume that their divorce is a "simple matter." Later, once the rules of divorce are explained to them, they are shocked to learn how the rules differ from their assumptions. That is why it is a good idea to seek the counsel of a qualified attorney in nearly every case, even if you believe your case is simple.

If one can get an attorney to agree to a limited representation arrangement, the cost would likely be under \$2,000. Many lawyers may not be willing to half handle a divorce in this manner due to the liabilities involved and the fact that it can be nearly as much work to review a client's work as to do it oneself.

NON-PROFESSIONAL MEDIATED DIVORCE USING LAYPERSON

Using a lay mediator, without the requisite knowledge of divorce law, is a bad idea. The price tag will be enticing, but "you get what you pay for." Expensive mistakes can easily be made. In this approach, a "mediator" without a law degree "handles" the couple's divorce. I do not really know why this approach is allowed in New York at all. Given the complexities of divorce, custody, and related laws, the services of a professional attorney are critical. Lay mediators are essentially attempting to "practice law" without a license. This relatively new profession defends itself by explaining that its representatives do not

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give legal advice. If this is the case, how can a competent job be done when the rules of divorce are needed to properly divorce a couple? Lay mediators are trained to simply help the couple "resolve their differences," without informing them of the law, which is a bad idea, which can lead to regrettable mistakes. NY gives couples the "freedom to contract."

There are complicated questions involved with divorcing couples, such as: "Which property can be considered my separate property and is not subject to the divorce laws?" "Which property is subject to division, i.e. equitable distribution?" "How much child support must I legally pay?" "Am I entitled to maintenance/alimony in light of my circumstances?" "Can I receive compensation for putting my wife through medical school during our marriage?" "Can I keep my pension?" Some of these questions are worth tens of thousands of dollars. A qualified professional should answer them.

With a lay mediator you may never be informed that you are entitled to several hundred dollars in spousal support every month. You might inadvertently give away half a house you did not have to share because it is your separate property, which you acquired before the marriage took place or fail to take half the value of a house, purchased during the marriage because you incorrectly assumed it was your partner's because it was put in his name alone because you were not informed that New York is not a "title state."

Obviously, lay people dealing frequently with divorces may learn a thing or two about the law. This can actually make them more dangerous. They will sound like they know what they are talking about, but they will not be fully versed in the law. If one were getting a heart operation, would one ask a lay person to do it? Would one feel comforted when that lay person exclaimed, "Not to worry, I don't really practice medicine, but I'll perform this operation anyway." To that I say, "Yikes!"

"You get what you pay for." Be careful. One may see lay people offering mediated divorces for less than one thousand dollars. It is tempting to get a "cheap divorce." But you may be stuck with the consequences for years to come. Lay mediators can make hundreds of thousands of dollars of mistakes. This approach may be a step up from doing it yourself, but it's generally a bad idea.

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DO-IT-YOURSELF DIVORCE WITHOUT AN ATTORNEY.

Some couples opt to do it themselves. The Courts offer a do-it-yourself divorce kit, complete with forms. It is generally not a good idea to do-it yourself when it comes to divorce. The laws of divorce in New York are complex and often surprising. A man or a woman can overlook important legal considerations and put themselves at a significant disadvantage when they file their own papers. For example, a man or woman may not realize that even though the marital home is in his/her spouse's name, he/she has an equitable interest in it worth tens of thousands of dollars if it was obtained during the marriage.

It is inadvisable to do it yourself when you have children, significant assets, or one partner has considerably less education, earning capacity, or desirable living conditions than another. Indeed, I would generally advise against a do-it-yourself divorce in every case.

Obviously, the big advantage of a do-it yourself divorce is the cost. The kit can be obtained for next to nothing. The couple would be subject to filing fees for the separation agreement, which would be minimal. However, I'll say it again. "you get what you pay for."

CONCLUSION

In my opinion, the best way to divorce or separate in New York in 90% of cases is for the couple to jointly hire an Attorney-Mediator, who is willing to thoroughly discuss and research, if necessary, the law applicable to their case, help them determine separate property (property which is not shared), marital property (shared), custody, visitation, health insurance coverage, child support, and spousal support, where applicable. The draft separation agreement should be brought to each individual's separate counsel for review to ensure that each spouse's rights are protected before the document is signed.

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Litigation is the recommended option where the couple can no longer deal reasonably or fairly with each other, one parent is actually abusive, negligent, or unfit to be the custody parent, and custody cannot be worked out, or where a spouse is dishonest about his or her income or is hiding assets and/or income. In this case, you likely need the discovery devices and protections the courtroom affords.

In 90% of cases, the mediate divorce, using competent counsel, who takes the time to look at the paperwork involved with your assets, is vastly superior to the litigated divorce because it is much less expensive, contentious, time-consuming, and emotionally damaging- both to the spouses who have loved and often still love one another- and to their children.

Carolyn Zenk, Attorney at Law, is a Certified Mediator, and Director of the East end Mediation Center. She has handled dozens of separation agreements and several litigated divorces. She prefers to mediate when possible because she believes it is usually in the clients' best interest. She practices in Hampton Bays, New York. You can call her for a free fifteen minutes phone consultation at 631-723-2341.

Carolyn Zenk-Certified Mediator



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