

Michael Dikman Podcast

A New York City family lawyer discusses the most frequent issues facing divorcing couples in New York.

How is an annulment different from a divorce and under what grounds can a marriage be annulled in New York State?

Dikman: An annulment is different from a divorce in that it vacates the marriage from its inception. A divorce acknowledges that there is a valid marriage, but that it's ending for various reasons. A person who has been granted an annulment can say they've never been married because it's as if the marriage never happened. The grounds for annulment in New York are an incurable mental illness for five years, a prior marriage that is still in force, a significant physical incapacity, a marriage contracted by an underage person, or a marriage obtained by fraud, duress, or force. Those are the basic grounds for annulment in New York State.

If one spouse won't agree to a divorce, how can the other spouse proceed?

Dikman: New York became a no-fault state in 2010, which means it's not much use for one spouse to fail to agree to a divorce because all the other spouse has to do is to allege that the marriage has irretrievably broken down for six months. There is not going to be any defence to that action. If your spouse does not agree to a divorce, you can sue for a divorce anyway and you're going to get it.

What is the difference between a separation agreement and a divorce agreement?

Dikman: A separation agreement is an agreement to be separated. You are still legally married, you can still be insured on a family plan, and you can still file joint tax returns even though you are living separate and apart. It may lead to a divorce. In fact, one of the grounds for divorce in New York is having been separated pursuant to a legal separation agreement for at least a year. It's rarely used anymore, however, because the six-month irretrievable breakdown period is easier to complete.

A divorce agreement or stipulation is an agreement within a divorce action that is going to lead to a divorce and provide all of the terms and conditions as well as the rights and responsibilities of the parties. In a typical separation agreement there is always a clause that says if a party to that agreement goes after a divorce at some time in the future, the agreement is going to be presented to the court and utilized. The deal under the separation agreement will be the deal under the divorce.

If one spouse violates the terms of a separation agreement, can he or she be held in contempt of court?

Dikman: If the agreement has been utilized or approved by a court in a court order, then contempt of court can be utilized – but not if it's only a separation agreement. Contempt of court means violation of a court order, so most divorce judgements state that the parties are directed to comply with their agreement – which then has the force of a court order and can be enforced by the contempt of court remedy.

Is a judge bound by the terms of a separation agreement?

Dikman: The judge is required to adhere to the terms of a separation agreement if asked to do so and to enforce it unless very difficult grounds are proven. If the agreement is claimed to be unconscionable at the time it's presented for enforcement or is the result of fraud or duress, a court can refuse to enforce it. Otherwise, the court is bound to enforce it except in situations that involve children, because the judge never loses jurisdiction of the right to do what is found to be in the best interest of the children.

What is the difference between spousal support and alimony or maintenance?

Dikman: In New York, alimony was the term utilized for spousal support up until July 1980 when they passed the equitable distribution law. They changed the nomenclature at that point, so we now use the term maintenance instead of alimony. Spousal support is a synonym for maintenance in the Supreme Court or support in Family Court, but alimony is not used anymore – except by the IRS, so it will still say on your tax returns that there's an alimony deduction.

Would someone have to pay spousal support before the divorce is final?

Dikman: They only have to pay spousal support if someone makes a motion or an application to the court for such an order. If the parties do not have their own agreement that each of them can live with, either party can make a motion to the court asking for a maintenance amount that must be paid as a temporary measure until there is an agreement or a trial.

How does a judge determine the amount and duration of spousal support?

Dikman: It makes a big difference whether you're talking about temporary support or permanent support at the end of a case. New York has a temporary support law that sets out specific guidelines for how to compute what maintenance should be unless it's found to be unfair or improper. Right now, New York doesn't have a law for determining spousal support at the end of the case, so the judge is not bound by a statute – although there have been legislative attempts for the last two or three years to come to that result.

Unless you're talking about temporary maintenance where they use a specific formula, spousal support is decided by the court in its discretion of various statutory factors, such as need and ability to pay. Deciding spousal support duration is even more open to the discretion of the courts at the end of a case. Many cases continue to the age of Social Security and if there's an injury or illness, there could be permanent maintenance that lasts until death or remarriage. More often than not, the judge picks a number of years that it should continue until the spouse who's receiving maintenance can be expected to become reasonably self-supporting at the pre-separation standard of living.

How does the court determine how much child support the non-custodial parent has to pay to the custodial parent?

Dikman: In New York, the court doesn't use the statutory formula for determining temporary child support, but at the end of the case it does. The formula for fixing the amount of child support is based on the payor's gross income and the only things

deducted are FICA, Medicare, and New York City tax. State and federal taxes are not deducted, so the larger portion of the gross income is the basis. The rate if there's one child is 17%; two children is 25%; three children is 29%; four is 31%; and five or more children is 35%. All of these formulas are subject to the judge deviating from them if they are found unfair or inappropriate.

The formula for child support accounts for almost all child-related costs, but there are exceptions. The basic monthly or weekly child support amount does not include certain additional healthcare expenses, such as co-pays. Childcare is usually paid on a pro rata basis if both parents have an income, but it does not include any education expenses.

Can a non-custodial parent reduce or eliminate a child support payment when the child is staying with them for an extended period of time, perhaps a summer or winter vacation?

Dikman: Not normally. Many people try to get that kind of deduction, but the judge will normally follow whatever agreement you have in place. Absent an agreement, I have yet to see a case where a person has been allowed a deduction because of extended visitation or parenting time period.

Can child support or spousal support be increased or reduced if one or both parties' circumstances change?

Dikman: An agreement is generally sacrosanct in terms of the amount. Nevertheless, things change and there can be increases or reductions by an agreement. You can agree to increase for inflation or on a time period basis. Absent that kind of agreement, the law specifies that if there is a significant change of circumstances, the court can consider a change in child support.

The burden of proof for maintenance is a little different. To modify a maintenance amount that has been formed by an agreement, you need to show extreme financial hardship, which is hard to prove. Regarding child support, there's a relatively new law which indicates that your agreements and orders must include in large print that there will be a right to seek a modification in the event of a significant change of circumstances, such as a 15% deviation in income for either a parent; or the statute provides a three-year passage of time. A three-year passage of time doesn't necessarily mean that you're going to get the modification, because you still have to prove undoubtedly a significant change in either need or income.

If there are no changes in circumstances and the agreement does not specify that child support will increase annually, can child support still be increased as the costs associated with the child go up?

Dikman: As a general rule, the answer is no; however, you have to qualify that based upon how much the costs are increasing. Very rarely are you going to receive a modification just because the children are getting older and your costs are going up a bit. However, when it graduates to the extent that it becomes a significant change of circumstances – for instance, if your expenses increased substantially because of an unexpected health problem or injury – then that's a different situation. Otherwise, you

must show not only a significant increase in costs, but also some significant change in the income that was in place at the time the original amount was specified.

At what age can a child choose which parent he or she wishes to live with post-divorce?

Dikman: Instead of letting the child decide, the court allows them to have a voice in the decision. Most of the time in a contested custody case, there's an attorney for the child. As the children get older, the judges start to listen to them more because they're less apt to be influenced by the promise of an ice cream cone. At age 18, the child has every right to make the choice without any additional discretion because there are no custody awards or orders after age 18.

What is the difference between marital property and separate property?

Dikman: Marital property is divided on an equitable basis in New York, whereas separate property is not divided, with certain exceptions. Marital property is defined as any property acquired during the marriage, unless it qualifies as one of the specific types of property that are designated in the law as separate. Premarital property will remain separate property.

For example, if I have \$10,000 before the marriage that I use to buy a \$10,000 stock, the stock is still separate property. Premarital property is separate even if it is exchanged for something else. A personal injury recovery or anything else received because of an accident is also separate property, as is a gift from a third party. If anybody other than your spouse were to give you a gift that remains in a separate account or asset, it would be separate property.

There is a very difficult area in the law where claims can be made to the appreciation or growth of separate property during the marriage. You have to prove active appreciation is at play, rather than market forces or inflation. If there is growth in the value of a piece of separate property because of something active – either you've put in money to improve it or you're working at the business everyday – that's considered active appreciation. If the non-owner spouse can show some contribution toward the active appreciation, then that limited portion of the separate property is considered marital property and is available for distribution. Active appreciation does not include passive interest earned on a bank account or stock portfolio, so those would remain separate property.

If somebody had \$10,000 in a premarital bank account and they spent half on a trip around the world with their family, can they still claim \$10,000 of separate property when they're getting divorced?

Dikman: No. The courts are not going to re-examine the decisions that were made during the marriage for how you spent your money, whether it's marital money or separate money. In a divorce, you're dividing what's left. If they had a honeymoon that was paid for by separate property or by marital property – wedding gifts, for instance – it's not going to make a difference. Once the money is gone, it's gone, and you're not going to get credit for something that was used for marital expenditure.

What would happen if marital property were used for non-marital expenditure, such as buying a gift or a condo for the girlfriend or boyfriend?

Dikman: It would be recoverable. When you use marital property for a non-marital purpose, whether it's the example you made or whether it involves pre-marital debt, half of the amount will go back into the marital pot. In other words, if one spouse spends \$10,000 on a non-marital expenditure, it can be classified as marital waste and the other spouse will get a credit for \$5,000 because the other half would have gone to the spouse who spent it.

If one spouse received annual bonuses during the marriage that were put into a savings account in his or her name only, are those funds considered marital or separate property during a divorce?

Dikman: It falls into the definition of marital property as being any property that was acquired during the marriage. One of the huge differences made by the equitable distribution law that passed in 1980 is that New York is no longer a title state. It doesn't matter if I buy something during the marriage with money that I've earned during the marriage; it's still marital property if I put it in joint names, my wife's name, or my name.

Does equitable distribution mean property is divided 50/50?

Dikman: No. Community property normally means 50/50, but New York is not a community property state. New York is an equitable distribution state, which means the court has the discretion to decide what is equitable and what is not with various types of assets in various situations.

In a situation where the husband is an inveterate gambler or a womanizer or a drunk and has seriously affected the marriage, he may wind up getting none of the marital property. It's very discretionary and very difficult to figure out what a court will do. In a normal situation involving a lengthy marriage, most of the marital property will be equally divided. However, if there is any reason to divide it differently, the court has the power to do so and often does divide property by different percentages.

Are premarital agreements always enforceable and what affect do they have on a divorce?

Dikman: No. Sometimes prenuptial agreements are set aside for various reasons, such as fraud, duress, or unconscionability. However, if the prenuptial agreement is done properly with a lawyer on both sides, it will simplify or eliminate what could otherwise be very costly matters to litigate. For example, you could identify a particular house in an agreement and state that it will remain your separate property, including all appreciation. This removes the entire problem of determining whether there is any appreciation, whether it is active, and whether the other spouse did anything to contribute. If a prenuptial agreement says your house is going to remain yours, including all the appreciation, the court will be bound by that. Prenuptial agreements can also establish maintenance divisions as long as the recipient is not going to be a public charge. A prenuptial agreement can substantially reduce the litigation.

If a prenuptial agreement is sprung on the bride or groom at the last minute, could that be a reason why it might not be enforceable?

Dikman: That's one of the main reasons why some prenuptial agreements are thrown out. Not if it's presented a week or two in advance and the person has a chance to do something about it, but if it's sprung at the last minute and there are all sorts of plans afoot, then that could be a strong indication of duress.

Is there such a thing as a postnuptial agreement?

Dikman: Yes. You can have an agreement that is equally enforceable before the marriage and during the marriage or as a separation agreement or divorce stipulation. There is no difference as to what can and cannot be provided in any of those agreements.

Does a postnuptial agreement deal with the same issues as a prenuptial agreement?

Dikman: There might be additional issues, because a postnuptial agreement might involve something to do with children, while a prenuptial would probably not. You could have a postnuptial agreement that only exists for one minor purpose, such as to state that a specific stock will remain one spouse's asset in the event that the marriage goes south. Sometimes postnuptial agreements are made for just one or two little issues to keep the marriage together because one person was concerned about a particular item. Otherwise, postnuptial agreements can run the gamut that prenuptials do and determine what will happen in the event of a divorce with regards to support or any property that could be distributed. They can even deal with custody issues, which will not be binding on the court but will be very persuasive. If a postnuptial agreement states that a couple will have a joint custody arrangement in the event the marriage doesn't work out, the court will undoubtedly go along with it.

Can separation agreements, divorce agreements, postnuptial agreements, and prenuptial agreements be voided if it's later discovered that one of the parties lied?

Dikman: The lie must be sufficient that a court will determine the agreement was based upon fraud. For example, it's not going to make a difference if a person claims to have a \$10,000 bank account and it turns out they have \$10,001; however, it might very well make a difference if they actually have \$100,000. If the other party could claim they were defrauded into signing by a material misrepresentation, then yes, a lie could have a bearing on the agreement's validity – but it has to be significant.