

## NY/NJ METRO FAMILY LAW PRACTICE INSIGHTS June 2023

### **New York and New Jersey - Key Differences in Marital Law You Need To Know**

A divorce formally dissolves a legal marriage. While married couples do not possess a constitutional or legal right to divorce, states permit divorces because doing so serves public policy. Every state has different rules about divorce. A valid and legal divorce can only be granted if a party meets the state's residency requirement for divorce. Whether you're looking for answers to questions about how to divide property, how to create a parenting plan, or how much child support or alimony you might get, you need to understand the domestic relations laws of the state where you live.

Interestingly, and notwithstanding their status as neighbors, New York's and New Jersey's divorce laws, statutes, and legal precedents often keep litigants questioning, whether it is more advantageous to file for divorce in New York or New Jersey. Especially during the COVID-19 pandemic and continuing to the present time we have fielded calls from potential clients questioning whether commencing an action in New York or New Jersey would be more advantageous.

One noticeable difference between New Jersey and New York is each state's formula for the calculation of child support. Both New York and New Jersey use the husband's and the

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wife's incomes and the number of children born of the marriage as variables in the formula. However, New Jersey, unlike New York, uses two additional variables: the number of overnights the payee will spend with the children and the ages of the children. Moreover, New Jersey uses the parties' net incomes to calculate Basic Child Support. All local, state and federal taxes are credited. New York support is calculated on approximate gross income, with a credit only given for local NYC / Yonkers taxes (as well as FICA). The difference between using net and gross dollars will also affect the calculation of each party's proportional share of additional child support expenses, commonly referred to as Add-On Expenses in New York and Supplemental Child Support Expenses in New Jersey. While both states allocate these additional child expenses based on pro rata share of income, using gross versus net income will lead to a different pro rata share. The differing amounts could be significant, especially if the additional expenses include private school and summer camp costs.

Another noticeable difference between New York and New Jersey is how the amount and duration of spousal support are determined. New York uses the term "spousal maintenance" when referring to spousal support. Under New York law, the amount and duration of spousal maintenance are initially calculated using a mathematical formula referred to as the "maintenance guidelines." This formula considers the gross income of both parties as well as the length of the marriage. For the purposes of this calculation, the payor of spousal maintenance has their income capped at a statutory amount. The statutory cap is currently set at \$203,000. A court may deviate from the "maintenance guideline amount" based on statutory factors, which include: the age and health of the parties, the parties' present and future earning capacity, and any other factor the court finds just and proper.

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New Jersey uses the term “alimony” when referring to spousal support. Unlike New York, there is no initial mathematical formula for calculating alimony. Instead, the amount and duration of alimony is set after the consideration of statutory factors, which include: the actual need and ability of the parties to pay, the standard of living established in the marriage, and any other factors which the court may deem relevant. New Jersey law also provides that for any marriage less than 20 years in duration, the total length of alimony may not exceed the length of the marriage, except in exceptional circumstances.

There are also some differences with respect to equitable distribution in both states. Both states have equitable distribution, meaning a couple's assets and earnings accumulated during the marriage will be divided equitably (fairly)—but not necessarily equally.

For example, when it comes to purchasing real property together, buyer beware! In New York, even if you place a residence in joint name, and assuming you meet the burden of proof, you generally have a continued claim for any separate property contributed to the residence. In New Jersey, however, if you contribute separate property into a jointly titled residence, you generally lose your separate property claim. Notwithstanding, you can make an argument for a greater “equitable share” of the home because of the inequities created by your contribution of separate property assets.

In New York with respect to deferred income as unvested options, restricted stock, RSUs, and/or REUs, whether granted before or during the marriage, or even shortly after the date of complaint, generally, courts will look at the time the options were granted / vest and then apply a coverture fraction to determine equitable distributions. In its basic form, the denominator of the coverture fraction is the total earning period, and the numerator is the

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married years while earning the options. In New Jersey the distribution of these types of assets in some instances fall under more of an all or nothing test, meaning, the issue is whether stock options obtained either after the divorce complaint was filed or not yet vested at the time of the divorce were awarded for past performance or for future performance. If the titled party can prove it is for future performance, then the argument could be made that no portion of the options are to be considered marital and subject to equitable distribution.

One final example of the difference is with respect to business valuations and the concept of “double dipping” into the same income stream. The idea behind “double dipping” stems from the notion that some business valuation methodologies can create inequities when addressing the issues of alimony / maintenance and child support i.e., double counting of the business income and again with respect to income available for support. In New York, the case law is clear that double dipping is not permitted, meaning once a court converts a specific stream of income to an asset, that income may no longer be calculated into the support formula and payout. Alternatively, in New Jersey, the New Jersey Supreme Court specifically rejected the concept of “double-dipping” in the context of business valuation for divorce purposes. The Court reasoned that albeit interrelated, the two concepts are separate, distinct, and not entirely compatible financial exercises, and because asset valuation methodologies applied in the equitable distribution setting are not congruent with the factors relevant to alimony considerations.

An experienced and knowledgeable family law attorney can help navigate the difficult issue of whether to commence an action in New York or New Jersey. If you need legal help for this or any other family law issue, please contact the New York/New Jersey Metro law team at

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Phillips Nizer, LLP. We have offices in both New York and New Jersey and each partner in this group is licensed to practice in both states.

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