

# Guide to Court Remedies for Domestic Violence

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### **Purpose of This Guide:**

It may be that this is the first time in your life that you will be dealing with the court system. Our legal system consists of different courts that have jurisdiction (the authority) over different matters. In most domestic violence cases you may be dealing with the Family Court, Criminal Court, Support Court, Supreme Court (or Divorce Court). This guide is designed to give you a basic understanding of each court's function and procedure to aid in making this experience less confusing. This guide will also discuss some of the etiquette and practicalities involved with going to court.

### **Family Court:**

First we will examine Family Court. This court deals with matters involving children and families. Cases heard in this court can include family offenses, custody and visitation, paternity, foster care and cases that involve Child Protective Services. One of the big differences between this court and criminal court is in the burden of proof. In a Criminal Court guilt is determined by evidence that is proven "beyond a reasonable doubt." In Family Court the burden of proof is what is referred to as a "preponderance of evidence". In other words, are the allegations more likely than not to have occurred?

### **How Does a Family Court Case get started?**

The process starts with one party filing a petition with the Court. That party will be then referred to as the Petitioner. If the petition filed is brought against you, then you will be referred to as the Respondent. Petitions are available online at [www.nycourts.org](http://www.nycourts.org) or you can get paper copies from the local Family Court Clerk's Office. Each county in New York has a Family Court. Your advocate may also have copies available for you. Legal counsel is not required to complete these forms. You can complete them yourself or your advocate can assist you in completing them. If you are already working with an attorney you should consult them before filing a petition.

In domestic violence cases the most common and usually first petitions filed are those for family offenses (orders of protection) and custody and visitation. A family offense petition is filed to request the court intervene on behalf of the Petitioner to provide relief from the Respondent's abusive behavior. When the Petitioner and Respondent have children in common a petition for custody is usually filed simultaneously. This petition can request that child(ren) in common be in the custody of the Petitioner temporarily until the case can be decided in Family Court.

After the petition is filed it is reviewed by the Family Court Judge who will decide to either grant or decline the request of the Petitioner. You may be asked to appear before the judge after you file the petition. If your petition is granted you will then be informed of an upcoming court date. Petitions for family offenses are considered to be requesting "immediate relief" and will be reviewed as quickly as the Judge's schedule permits, usually within a few days. Unless requested as immediate relief, custody and visitation petitions may take longer for the Judge to consider. Other issues will be decided through settlement or a hearing.

### **What happens after my petition has been filed?**

You will be then given a court date to appear in Family Court. If you cannot afford an attorney you can complete a financial affidavit with the Court to request one be appointed to you. Your

advocate can also refer you to the Legal Aid Society that covers your county. They may be able to represent you in your case or give you legal advice free of charge. After obtaining an attorney it will be important to review the facts of your case with them and also to inform them of your desired outcome. Most Family Court cases are resolved through mutual agreement of the parties (also known as a “settlement”). The attorneys involved will attempt to negotiate a solution agreeable to both parties. If this cannot be achieved the case will go to trial where you or your attorney can take testimony of the witnesses and present documentary evidence that support your case. If there is more than one petition filed in your case the court will make every effort to address all issues at one time.

### **My Family Offense petition was granted, what does this mean?**

Family offense petitions can either be granted as what is commonly referred to as a “**stay away**” order or a “**refrain from**” Order of Protection.

“**Stay Away**” is just what it sounds like; the Respondent is ordered by the court to stay away from the Petitioner. The Petitioner can also request that the Respondent stay away from the family members and pets as well. In some cases a Respondent may be ordered to stay away from the Petitioner but still have the ability to communicate with them. This is usually in cases with children in common, many times for the purpose of visitation. This communication can be allowed by phone, text or email. In many cases it is recommended by attorneys that the communication be by email only to limit the ability of the Respondent to be harassing towards the Petitioner. In other cases the Respondent may be ordered to not communicate with the Petitioner.

“**Refrain from**” means that the Respondent is not ordered to stay away from the Petitioner and other family members, but the Respondent is ordered to refrain from harassing or committing any family offenses such as assault, disorderly conduct, stalking, menacing, reckless endangerment, identity theft, etc., directed towards the Petitioner.

When an Order of Protection is granted the Respondent is also required by the court to surrender any firearms in their possession to the local Sheriff’s Department until the order is vacated. It will be at the Judge’s discretion to decide the length of time the order is valid. However, if there is a sufficient reason a new order can be petitioned for.

### **How do I know when the Respondent has been given a copy of the Order?**

If the judge has granted a temporary order of protection based on your request for immediate relief, the police will serve the order on the Respondent. There is an online service that you can utilize to be informed of service of the Order of Protection. (<https://oop.nyalert.gov>)

This program is a part of the SAVIN-NY initiative funded by the Bureau of Justice Administration (BJA) and coordinated by the NYS Sheriffs’ Institute. Additional information can be found at [www.sheriffsinstitute.org](http://www.sheriffsinstitute.org)

### **Benefits and Consequences**

As with any decision made in life there are benefits and consequences for applying for this type of remedy. Taking this legal step is to be considered carefully. An Order of Protection is intended to be an extra layer of protection and safety for the Petitioner as the Respondent is

ordered by the court to refrain from committing any other criminal acts towards the Petitioner. However, many abusers will violate this order in some manner. An escalation of their abusive behavior may even occur when they are served this order. It is important to discuss safety concerns with your advocate when considering this option; your advocate will assist you in developing a safety plan.

There are legal options available to you if your Order of Protection is violated by the Respondent in your case. If the Respondent violates the order, you may be able to file a petition for Enforcement of an Order of Protection to make the judge aware that the Respondent is not following the order. A violation of an Order of Protection is considered contempt of court which can in some cases result in criminal prosecution.

If you feel that your order may have been violated, discuss the matter with your advocate and/or your attorney. In circumstances that have immediate safety concerns always contact law enforcement first. (Call 911)

### **What happens next?**

The Family Court may schedule additional court dates if there are issues that need to be dealt with before going to a trial. For example, in some cases where alcohol or drug abuse is alleged, the judge may order a drug and alcohol evaluation. If you have not made arrangements to obtain a lawyer and desire to have one, you are encouraged to do so before your next court date to give ample time to prepare. If you have not been able to do so before your court date the Judge will advise you of your right to an attorney and may delay proceedings for you to obtain an attorney.

If you have an attorney it is important to discuss the details of your case with them before the court date. It is important to remember that your time with your attorney will not be extensive. It is encouraged that you meet with your advocate to discuss your case and also your desired outcome. This will give you an opportunity to organize your thoughts and prepare to present information to your attorney in a clear, concise way.

In cases involving children the Court will assign an Attorney for the Child to represent the best interest of the children involved. It is important to remember that this attorney has been assigned to represent the children. This attorney does not represent you or the Respondent. This attorney may have discussions with all parties involved in the case but represents the children involved to protect their best interests.

### **Initial Court Proceeding**

When it is time for your initial court appearance it's best to be prepared. It is important to always attend any court date, arrive early and be dressed appropriately. If there are any safety concerns or other issues in attending your court proceeding you can petition the court to appear electronically, usually by phone. To do so you will need to provide the court with a request in writing to do so as soon as possible, at least three days before your court date. You will need to provide the court with a compelling reason explaining why you cannot attend.

All Courthouses have extensive security to protect all involved. You will need to pass through all the security checkpoints before your proceeding. It is recommended that you bring only items vital to the court proceeding.

Once you have passed through security you will wait in the waiting room for your time in court. Most Courthouses have more than one waiting room; pick a place that you feel safe and comfortable. If time permits you may have an opportunity to meet with your attorney. Be clear and concise with the information you wish to convey to your attorney, as your time may be limited. Your attorney may meet with the attorney of the Respondent, as well as the attorney for the children, if one is assigned prior to court appearance.

It is important to remember that Family Court proceedings are open to the public; however the Judge may exclude any person from their courtroom for various reasons.

The Court deputy will announce the case by the last names of the parties involved when it is your time. All parties will walk into the courtroom together. You will sit with your attorney, and if accompanied by your advocate, they will sit close by.

Once the proceeding begins the Judge will begin by having all present stand and give their name. If you have an attorney the Judge will then ask the attorney how they will proceed, either by presenting the issues of the case or possibly a resolution.

If you have a question, concern, or an item you feel is vital to the proceeding it is strongly encouraged that you communicate this to your attorney and allow them to present it to the Judge. This will most likely be a very emotional time for all parties involved and there are times that proceedings can become very heated. An overly emotional response to the proceeding may cause a negative consequence just based on the participant's behavior. It is important to remember that everything said in the court room at that time will be "on the record", so it is advisable to do your best to control your emotions and direct responses to any allegations or questions through your attorney. It is important to listen carefully to all that is being said and if you do not understand what is being asked, or have any questions, ask your attorney at that time. Do not wait until after the conclusion of the proceeding.

### **Fact Finding Hearing (Trial)**

Most of the time, Family Court cases are resolved by negotiation of a settlement agreement (an arrangement that both parties agree to) through their lawyers. If you cannot settle your case in this manner your case will go to trial (Fact-Finding Hearing) and the Judge will make the final decision in the case. Matters of custody, visitation and child support are usually decided in one step with a fact-finding hearing. Cases involving a family offense, PINS, juvenile delinquency, abuse, neglect or permanent neglect are usually decided in two steps; a fact finding hearing and a dispositional hearing. There is never a jury in Family Court. The Judge makes all decisions about the facts and the law.

You are entitled to a hearing.

At a fact finding hearing (trial) the Judge hears evidence from both parties involved. Evidence includes the testimony of both parties, testimony of witnesses, documents, and other physical

evidence. After hearing all of the evidence the judge decides what facts have been proven. If the facts alleged in the petition are not proven, the case may be dismissed or the judge will decline to grant the relief (the outcome) that the petitioner was seeking. When the Judge finds that the facts are proven in cases involving custody, visitation, paternity or support cases, the Judge will also decide what relief to grant as part of this hearing.

When the facts are proven in family offense, PINS, juvenile delinquency, abuse neglect or permanent neglect, the case moves to the second step of the process, the dispositional hearing. A case may be withdrawn, which means the Petitioner decides to not go forward. Early in the proceeding, the Petitioner may make the choice to withdraw.

### **Dispositional Hearing**

A dispositional hearing may begin immediately after the fact finding hearing ends or may be scheduled for another day. At this hearing the Judge decides what should be done, based on what was proved in the fact finding hearing.

### **Appeals**

If you believe the court's final decision and order is incorrect, you may decide to appeal. This means that a higher court reviews the decision of the Family Court, except in appeals in child support cases, for which the Family Court Judge will hear your appeal. Discuss this right with your attorney and be sure to ask their advice about what you should do.

If you decide to appeal, your attorney must file a Notice of Appeal within thirty days after the Judge's decision on your case is served to you and your attorney. If this notice is not filed within the time limit, you lose your right to appeal. The attorney that represented you at the trial may represent you during the appeal. You may have an assigned lawyer for this if you qualify but you will need to submit a new application.

### **Criminal Court**

In many domestic violence cases the abuser may have been arrested and now faces criminal charges. These cases are heard in the jurisdiction of where the crime occurred. In some instances the Judge will issue a temporary Order of Protection at time of the arrest. Criminal Court cases differ from those of the Family Court. In Criminal Court cases the plaintiff will be the People of the State of NY vs. the Defendant. You may have to be interviewed by the District Attorney's Office, law enforcement, or both as a part of their investigations. As many Family Court cases are settled by negotiation before trial, many criminal cases are settled through plea agreements. This means that the District Attorney's Office may make an offer to the defendant that they admit guilt to a lesser charge to avoid trial. In some cases testimony can be given electronically as in Family Court cases, but it is the Judge's discretion to grant the request.

### **How do I find out information regarding the status of a criminal case?**

The District Attorney's Office is the prosecutor in criminal cases. Victims can contact their office with inquiries. If you are looking for information regarding whether the defendant is still in custody you can inquire online through [www.vinelink.com](http://www.vinelink.com) for status updates. This service may be used to inquire about a convicted defendant's status while incarcerated (even after the court case is over). Information included will be possible release dates, length of sentence and

facility where they are currently incarcerated. In addition Vinelink will notify a victim, who has registered, every time the inmate is moved from the facility.

### **Victim Impact Statements, What are they?**

If you are a victim of a crime and the perpetrator has been convicted, you have the right to make a victim impact statement at the sentencing hearing. The District Attorney's office will send you information about making this statement at the sentencing hearing. The District Attorney's office will send you information about making this statement. The statement will need to be submitted before the sentencing hearing. In Schoharie County the statement is submitted to the Probation Department. You may discuss the crime, the effect it has had on you and your family, and any other information you would like to disclose. The purpose of the statement is for you to be able to inform the court and the defendant the impact the crime has had on you. It is not a forum to simply make derogatory or profane statements about the court or defendant. You will have the option of making the statement yourself or it can be read for you by the District Attorney.

### **How do I get restitution for the crime?**

When you receive the information about making the Victim Impact Statement, you should receive information on requesting restitution for the crime. You will need to provide a detailed list of items damaged or stolen. You may also request restitution for medical expenses, transportation expenses for medical and court appointments, and lost wages. If you are not able to receive restitution through the court you may be able to get reimbursement through the New York State Office of Victim's Services. The OVS program can also provide funding for yourself or your children for future counseling related to the crime. An application to OVS must be completed within one year of the crime being committed. Your advocate can assist you in this process.

### **What is IDV Court?**

In some domestic violence cases that involve criminal charges, Family Court issues, as well as Supreme Court issues (such as divorce), your case may be referred to IDV (Integrated Domestic Violence) Court. This is a "one family/one Judge" court designed to respond to the unique nature of domestic violence with one Judge handling all the criminal domestic violence cases and related family issues such as custody, visitation, family offenses and matrimonial actions.

### **Support Court**

Support Court is different from both Family and Criminal Courts as the case is heard by a Support Magistrate. The Magistrate will hear cases regarding child support, temporary maintenance and spousal support (formerly referred to as alimony). Spousal support is paid while you are still married, temporary maintenance could be ordered after your divorce is final. In IDV cases child support issues can be heard by that court.

Both parties will be required to submit a financial affidavit before the court proceeding, which will include a copy of your previous year's tax returns. This information is used by the Magistrate to determine the amount of any support obligation by using state guidelines.

Child support orders may be appealed and/or reviewed. If there is a significant change in circumstances either party can petition the Support Court for a review of the order. Usually this applies when the party ordered to pay support has lost their job, received a significant pay raise or changed jobs and has a different rate of pay. You have the right to have the order reviewed every three years if there has not been an updated order during that time or you are unaware of any significant changes.

Payments are usually received and distributed through the County's Support Collection Unit. If the party ordered to pay support is not doing so, you have the right to file a petition for enforcement of the Support Order to the Court.

### **Supreme Court or Divorce Court**

In New York, Supreme Courts are the only Courts that hear divorce cases. Either the wife or the husband can ask a Court for a divorce. A divorce case can be fairly simple if both the husband and the wife want to get divorced and they do not have any disagreements about their finances or children. If they have children together, the parents may already have a Family Court order(s) that decided who has the custody and/ or visitation and who pays child support. If they also do not have money, property, or debt to divide, they may be able to get divorced in less than a year's time and without hiring lawyers. This kind of case is called an "uncontested" divorce.

However, a divorce case can also be very complicated. Complications arise if the husband and the wife disagree about financial issues and/or what happens with their children after the divorce is final. These divorces take a much longer time. People call this kind of case a "contested" divorce.

**It is usually not a good Idea to try to get a divorce without a lawyer.**

This is because you must provide a lot of information to the Court on many different forms and because there are many things involved in ending most marriages. However, if you believe your case will be simple and uncontested, you may be able to represent yourself, since the law does not say you must have a lawyer.

### **What Court do I go to for a divorce?**

The Supreme Court of the State of New York is the only court that handles divorce cases. You should go to the Supreme Court in the county where you now live or in the county where your husband now lives.

Each Supreme Court has a matrimonial clerk. The Matrimonial Clerk's Office has uncontested divorce packets available for free. The uncontested divorce packets include all the papers and forms you will need. There are also instructions for how to fill out the forms.

**Your divorce will be uncontested if your spouse does not argue with (contest) anything you are asking the Judge to decide.**

You can download and print the packet for free from the internet. The internet address is <http://nycourts.gov/divorce/forms.shtml>.

### **What is Residency?**

Before a New York Court can give you a divorce, you need to show that you and/or your spouse have lived in New York State a certain amount of time continuously. Continuously means without interruption.

#### **Any one of these situations will apply:**

- You and your husband got married in New York, and either you or your husband still lives in NY, and have lived here continuously for one year before the divorce case starts.
- You and your husband lived in New York as a married couple at some point during your marriage, and either you or your husband still live in New York, and have lived, there continuously for one year before divorce case starts.
- The reason for getting divorced happened in New York, and either you or your husband live in New York, and have lived here continuously for one year before the divorce case starts.
- The reason for getting divorced happened in New York, and both you and your husband still live in New York when the divorce case starts.
- Either you or your husband is living in New York and has lived in New York continuously for two years before the divorce case starts.

### **What are grounds for divorce in New York State?**

Grounds are the legal reason for getting a divorce.

#### **If you can show the Judge one of these legal reasons, you should be able to get your divorce:**

- Irretrievable breakdown of the relationship (“No fault”)
- Cruel and inhuman treatment
- Abandonment
- Imprisonment
- Adultery (rarely used and not recommended)
- Living apart with a legal separation agreement

If you want a divorce and are having trouble figuring out your legal grounds, it will help to talk to a lawyer about what has been going on in your marriage.

### **What is ‘irretrievable breakdown of the relationship’ (“No Fault”)?**

You may get a divorce if you state to the Court that in your divorce papers that the relationship between you and your spouse had been broken for at least six months and cannot be fixed. This is known as “No Fault”. If you file your divorce papers using “No Fault” grounds you do not have to prove that your spouse has done anything wrong or anyone is at fault for the breakup. You do not have to give reasons why the relationship failed, just that it has been broken for the last six months and cannot be fixed. You can chose “no fault” even if you have other grounds for divorce. If your divorce is uncontested you will need to use “no fault” grounds.

### **What is cruel and inhumane treatment?**

If your spouse behaves towards you in a manner that makes it unsafe or improper to continue to live with them, this is considered cruel and inhumane treatment. This includes physical, mental, verbal, financial, and sexual abuse. It can also include threats of these abuses towards you and/ or your child, family member or a friend.

In the divorce papers you file in Court you will need to describe your spouse’s behavior, and say why this behavior is cruel and inhumane, and how it affects you. You must say how each of your spouse’s actions affected you physically, mentally or emotionally.

Did you fear for your life? Did you need to run away from home? Did you require medical treatment as a result of abuse? Did you need to obtain an order of protection? Were you made to feel ashamed or humiliated by their actions?

You must also say when and where each act of cruelty happened in as much detail as possible. You do not need exact dates and times, but general time frames. For example, a particular month or season or during a particular holiday. You may remember that this event happened in the morning or after dinner.

If your spouse is not helping with household bills, does not allow you access to resources needed for survival, or is preventing you from going to school or getting a job, this can be financial abuse.

### **What is abandonment?**

If your spouse abandons you this means they have left for good. If you say you have been abandoned, you need to prove three things. First, you must prove that your spouse walked out on you, leaving the home you lived in together, planning not to return. Second, you must prove that your spouse has been gone for at least one continuous year. And third, you must prove that you did not agree that your spouse should leave you.

It is not abandonment if you asked your spouse to leave, your spouse told you they were leaving and you agreed, both of you agreed to separate, you locked your spouse out of the home, or if you treated your spouse so badly they had to leave.

### **What is adultery?**

If your spouse has sex with someone else without your consent while you and your spouse are married, this is adultery.

**Adultery is very difficult to prove in court, so it is very rarely used unless there are no other grounds available. In the age of “irreconcilable differences” it is unusual to get divorced on the grounds of adultery.** This is because the law says someone other than you needs to actually see your husband committing adultery with another person and be willing to come to court to tell the judge what they saw. People usually do not commit adultery in public, so finding a witness is difficult.

However, if your spouse has committed adultery, especially if you saw it or they brag about it, you can describe their adultery as cruel and inhuman treatment to the Judge, because this is a kind of emotional abuse. So in that case your grounds could be cruel and inhuman treatment rather than adultery.

### **Imprisonment**

#### **What if my spouse is in prison?**

If your spouse has been in prison for three or more continuous years after the date of your marriage, a Judge can give you a divorce for this reason. Your spouse will have to be in prison for at least three years before you start the divorce case, and cannot have been released more than five years ago. You will need to get a letter from the warden of the prison where your spouse is, which says how long they have been or had been in prison. If you married your spouse while they were in prison you cannot use this reason to get a divorce. If your spouse has been in and out of prison over the last three years, but not continuously, you cannot use this reason to get a divorce.

#### **What is a legal separation?**

A legal separation is a written agreement (contract) between both spouses that they have agreed to separate at this time and outlines the responsibilities of both parties. A legal separation is not something that is granted by the Court, it is something that both spouses agree to outside of court, usually with the assistance of an attorney. If you do not know where your spouse is, or if they won't agree, you cannot create a Separation Agreement.

A Separation Agreement is a contract between both spouses where you both agree to the following:

- to live separate and apart
- who is responsible for paying what bills
- whom the children will live with
- if child support will be paid
- what visitation arrangements will be
- what happens to marital property
- anything else you may want to include.

It is recommended that you have an attorney prepare the agreement for you as in some cases specific wording is needed in order for your Separation Agreement to be the basis for divorce. A poorly worded agreement can have serious unexpected consequences especially in complicated cases. It is important to note that if your spouse hires an attorney and they draft the agreement, you should not assume that the agreement is in your best interest. Your spouse's attorney is

NOT looking out for you or your interests but that of their client (your spouse). So you should still have your own attorney review the agreement, if possible.

Both spouses must agree to the entire Separation Agreement and their signatures must be acknowledged in the presence of a notary public. You both don't have to appear before the notary at the same time, or even use the same notary. The Separation Agreement becomes legally binding when signed by both parties in front of a notary public. If you wish, you may file it with the County Clerk's office in the county in which you live.

An agreement cannot be back dated to take into consideration the time you were separated before the agreement. You are legally separated **after** the agreement is signed and notarized by both parties.

One year after signing and notarizing the agreement, you or your spouse may file for a divorce based on your Separation Agreement. This is called a "conversion" divorce in which no grounds based on default or legal reasons to grant a divorce are necessary. In some instances you may want to ask the judge to include or incorporate some or all of the terms of your agreement into the divorce judgement. Some Judges permit or require this while others do not. Incorporation of the terms usually makes it easier to enforce the terms later, but the Judge may require that the agreement have specific wording. "Incorporation" or "merger" of a separation with a judgement of divorce can be complicated, so you should seek the advice of an attorney if this situation applies to you.

Domestic abuse does not discriminate, and neither does Catholic Charities. We will provide shelter and other appropriate services for all victimized by domestic violence, regardless of race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, marital status, or disability.