

Family Advocate



*A Legal
Resource
Guide*

Pull-Out & Save • November 2001

Family Advocate

A Legal Resource Guide

Dear WNY Family Reader,

Having been married to an attorney for almost 20 years before being widowed, I gained a special appreciation for the law and its relevance to our everyday lives.

That experience, combined with my work with WNY's young, growing families as the publisher of this magazine, has resulted in this brand new pull-out section which I hope will be of great use to you.

The "Family Advocate" provides sound basic information on some of the most common legal issues a growing family might encounter. During those times, consulting an attorney as your "advocate" — someone to plead your cause, according to the dictionary definition — would be a very wise thing to do, saving you many headaches in the long term.

Many of us hesitate to seek out advice when we are on unfamiliar ground, so the goal of this section is to give you some basic factual information to familiarize you with your rights and responsibilities in common legal situations.

Whether buying a home, writing a will, dealing with divorce, being prepared for an unexpected accident or injury, or making sure your child is getting the education he or she is entitled to, you'll find a wealth of information to smooth your way in this section.

Our thanks go to local attorney and freelance writer Brette McWhorter Sember who took on the task of writing all of the content for *Family Advocate*.

Be sure to pull it out from the center of your magazine and save it for future reference!

Michele Miller
Editor & Publisher



Brette McWhorter Sember

Brette McWhorter Sember is a talented Western New York writer and an attorney who has written all of the articles in this *Family Advocate* section. She is also the author of *Western New York Family's* monthly "TogetherTime" column and freelances for other publications across the country.

The mother of two children, Brette gave up her matrimonial and family law practice when her youngest child was born to have more "TogetherTime" with her family. In the meantime, she has developed a blossoming at-home career as a writer and is the author of a collection of self-help legal books.

She is the author of:

Repair Your Credit and Deal With Debt
How to File for Divorce in New York
Landlords' Rights and Duties in New York
How to Form a Corporation in New York
Tenants' Rights in New York

Coming in Spring 2002: The Visitation Handbook: A Practical Guide for Custodial and Non-Custodial Parents and Child Custody, Visitation and Support in New York

All are published by Sourcebooks and are available at local bookstores and through online bookstores, such as amazon.com and BarnesandNoble.com. The books can also be ordered directly from Sourcebooks by calling 1-800-432-7444.

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Choosing An Attorney

Tips To Help You Make This Important Decision

Choosing an attorney is the most important decision you make in a legal matter. It is important that you select an attorney you are comfortable with, can afford and that will handle the matter in a way that makes sense to

Finding An Attorney

Many people don't know where to go when they need to hire an attorney. The best way to find an attorney is through an attorney you have used in the past that you were happy with. If you had an attorney for your divorce, you really liked him or her and you would like to draw up a will or need help with an auto accident, that previous attorney and ask for a referral.

If you have never used an attorney and have not had one you were comfortable with, ask your friends and family members who they have used and if you still are unable to find an attorney based on these recommendations, you should contact a bar association lawyer referral program. These programs maintain lists of attorneys who are experienced in different areas of the law and can refer you to an attorney in your area.

The Bar Association of Erie County Lawyer Referral Program can be reached at 852-3100 and the New York State Bar Association Lawyer Referral Program can be reached at 342-3661.

Interviewing An Attorney

Most people feel as if they cannot interview professionals such as doctors and lawyers. Remember, these people work for you and you have the right to ask anything you want to before agreeing to let them work for you. Don't be intimidated.

Once you have found an attorney, call and set up a free consultation. Most attorneys will be glad to schedule a first meeting at no charge. When you go to the meeting, look around the office carefully. Does it seem frantic? Does it seem disorganized? Is the secretary or receptionist friendly to you?

When you meet the attorney, get a feel for his or her personality. You will need to determine if this is someone you feel you can trust and be comfortable with. Feel free to ask the attorney questions about his or her background and experience with these kinds of cases. Be aware that many attorneys are not used to being questioned or interviewed and may be a bit defensive. Simply explain that you will be spending a lot of money and want to make sure you can work together well. You have a right to know who you are hiring.

Ask the attorney some of the following questions:

How often will I hear from you?

How quickly are phone messages returned?

If you are unavailable and I need to speak to someone, who will be available?

What do I do if I have a problem after hours?

What kind of outcome do you expect in this case?

How long will it take to resolve the case?

Do you think this case can be settled?

How will you go about getting a settlement?

What will I need to do to assist with this case?

Some of these questions may be difficult for the attorney to answer without knowing a lot about your case, so understand that you may not get cut and dry answers for some things. You should, however, get honest and straightforward answers that make sense.

Fees

It is important that you find out exactly how your attorney will be compensated and how much it will cost you. The attorney should ask you to sign a retainer agreement. This is a contract for the attorney's services. Read it carefully and ask questions if it does not make sense. The retainer agreement should specify a retainer or down payment that you will have to pay up front and then the hourly rate the attorney will bill at. It should also provide an estimate of how much the attorney expects the total bill will come to. In the future, the law may change and require that attorneys provide clients with an engagement letter, which is essentially the same thing as a retainer agreement.

The attorney will keep track of the time spent on the case, deduct it from the retainer and then bill you once the retainer is used up. Make sure you understand what the hourly rate is and what kinds of things you will be billed for. Most attorneys do bill you for phone calls and travel time. Some attorneys charge a higher rate for the time spent in court.

It is also important to note that in certain types of cases, the attorney will not bill you on an hourly basis, but instead will collect one third of a judgment awarded to you. If this is the case, you need to be clear as to whether you will be responsible for any other fees or costs.

Certain types of matters such as real estate closings and will drafting are usually billed as a flat fee amount. The attorney will tell you how much the entire matter will cost and tell you when payment is expected.

If your attorney uses a paralegal, you will be billed for the paralegal's time as well, but this will be at a lower rate than the attorney's rate.

Make sure you also get a complete accounting of the anticipated expenses of the case. You will be responsible for paying for these as well. In some cases, the court costs and fees can be quite expensive, so make sure you understand what you will have to pay. You will also have to pay for other ex-

Continued: Choosing An Attorney

penses such as experts, appraisals and large copying expenses. When you pay an attorney for these anticipated expenses, the money must go into a separate bank account where it is held in trust.

This means the attorney cannot use this money for his or her own use and can only use it for authorized client expenses.

If there is money left over after the expenses are paid, you will get a refund or you can authorize the attorney to use this money towards the balance you owe for his or her time.

Cooperating With Your Attorney

Once you have signed a retainer, you will need to meet with your attorney to discuss the details of the case. You will be asked to provide certain documents.

It is important to understand that if you do not cooperate with your attorney, he or she cannot be effective on your behalf. If your attorney asks you to do something, do it. If he or she advises you against doing something, listen. If your attorney tells you to be at the courthouse at a certain time, be there. You are paying the attorney for his or her expertise and you are throwing your money down the drain if you do not take the advice you are paying for.



It is important to understand that if you do not cooperate with your attorney, he or she cannot be effective on your behalf.

Remember that you will be billed for each and every phone call you make to the attorney's office, so try not to call unless something important has come up. If you trust your attorney and believe he or she will keep you informed as things happen in the case, there is no reason to call the office every week for an update. Things do move slowly in the court system and you need to be patient.

Resolving the Case

You need to know that in every case that goes to trial, one person wins and one person loses. You could be in either position. Listen to your attorney's recommendations about settlement and carefully weigh his or her advice. If you end up with a resolution to your case that you are not happy with, you need to remember that the judge made the decision and your attorney did everything he or she could to get the outcome you wanted.

Changing Attorneys

If you are not satisfied with your attorney, the first thing you need to do is talk to him or her about it directly. If the attorney is not returning your calls, tell the secretary that you expect a call back within 48 hours or you will find a new attorney. Explain your concerns to the attorney and express why you are displeased. There may have been a misunderstanding that can easily be cleared up. If you still feel you are unhappy, find a new attorney. Ask for the balance of your retainer back and get a copy of your file. Be aware that if you are in the middle of a court case, it will be up to the judge whether you will be permitted to switch attorneys.

— Brette McWhorter Sember



If you have never used an attorney or have not had one you were comfortable with, ask your friends and family members who they have used and liked. If you still are unable to find an attorney based on these recommendations, you should contact a bar association lawyer referral program. These programs maintain lists of attorneys who are experienced in different areas of the law and can refer you to an attorney in your area.

Bar Association of Erie County Lawyer Referral Program
716-852-3100

New York State Bar Association Lawyer Referral Program
1-800-342-3661

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A Legal Resource Guide

Why A Parent Needs A Will

One Of The Most Important Things You Can Do For Your Child

It is easy to think of a will as something elderly people need to think about. However, as a parent, a will is one of the most important things you can do for your child.

What is a Will?

A will is a binding document that distributes all of your assets and belongings after your death. Your will directs who gets what. You can leave your possessions and assets to anyone you want or to any charity you want. Your will also names your executor. An executor is the person who will be in charge of making sure your assets are distributed and all of your bills are paid. The executor will hire an attorney to represent the estate. Even though an attorney will be involved, there is a lot of work involved in being an executor.

A will also contains your choice for a guardian for your children; should both parents die while the children are still minors. The guardian is the person with whom you want your children to live and be raised by. The guardian will also have financial control over the assets the children own.

How Do I Choose An Executor?

You should choose an executor whom you feel is trustworthy and reasonable. You can choose anyone you want, but be aware that the person is not obligated to accept, so it is wise to discuss this in advance.

You can also choose your attorney, but there are certain legal difficulties involved in this, so be sure to discuss it with him or her first.

What Happens If I Don't Have a Will?

If you do not have a will, your assets are distributed to your family according to New York law. There is a fairly complex order of distribution, but if you have a spouse and children, everything will go to them. If you and the other parent both predecease your children, it will be up to the court to name a guardian for your children.

Will I Pay Estate Tax?

The estate tax is in the process of being phased out. Should you die before it is phased out, estate tax is payable if your assets exceed a certain amount, which is being increased yearly until the phase out. For middle class, middle age families, the estate tax is not a concern.

Do I Need A Will If Everything Goes To My Spouse & Kids?

Most people have specific wishes they want carried out. Some people like to leave certain special possessions to certain people. Other people feel very strongly that they would like to give something to charity.

Some people feel very strongly that they do not want certain family members to inherit from them and wish to write them out. It is important to know that you cannot disinherit your spouse. Even if you leave him or her nothing in the will, New York law allows the spouse to inherit a certain amount from you.

The most important reason to have a will is to be able to name the guardian for your children.

What Does a Will Have to Have in It?

A will can be as simple or as complicated as you want it to be. It must state that you are of sound mind, that you know who the objects of your bounty are (the people you are giving to) and that you are signing it freely without duress. You must have two witnesses. You do not need a notary. The will must list how you wish to distribute your possessions.

How Do I Select A Guardian?

You should think about who you trust to raise your children and who has a good relationship with them already. Many people select a close family member or a very close friend. You can name two people, such as a married couple, as guardians for your children. It is important to discuss

your choice with the potential guardian in advance. The person or people you name are not obligated to accept the responsibility. If they decline, the court then selects a guardian. You can name an alternate guardian should the first be unable or unavailable to accept the responsibility.

Can I Write My Own Will?

While you can write your own will, you need to be careful. It is not wise to attempt to write your will without any legal advice at all. There are kits available that will help you write your own will, but if you use one, you need to be certain that it is specifically designed for New York, because different states have different requirements.

It is always best to have an attorney draft your will when you are naming a guardian. While some of the kits are perfectly adequate, when you are dealing with something as important as a guardian for your children, you should be extra careful to ensure that it is done exactly right. There are other reasons to use an attorney - if you want to set up a trust, if you want to have conditions on your bequests and if you are doing anything at all that is out of the ordinary.

How Much Does A Will Cost?

Rates vary based on the attorney's experience, but in general a will ranges from \$100 to \$500 for a basic will with guardianship. The price goes up if there are special circumstances or if there is complicated estate planning involved. Many attorneys also prepare other documents (described below) as part of the entire package.

Health Care Proxies

A health care proxy is a document that states your wishes about what kind of treatment and life sustaining equipment you authorize should you ever be in a coma or unable to communicate your wishes. The document also names the person you choose as your proxy, who can make decisions on your behalf if you should be unable to. If you check into a hospital, the

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The Legalities of Buying A Home

Do Your Homework When It Comes To Real Estate

Buying a home can be one of the most stressful and exciting times for a family. To make the process go smoothly, it is important to understand the legal process you have to follow and to be prepared for all the documents you will need to provide. When purchasing a home, it is important to hire an attorney to handle the closing. The paperwork involved in a closing is very complicated and you can make costly mistakes if you attempt to handle the closing on your own.

Mortgages

Buying a home is complicated by all the hoops you must jump through to obtain your mortgage. When you obtain a mortgage, the bank lends you a certain amount of cash to pay for the home and in return you give the bank the right to foreclose on the home should you fail to make your payments.

If you are shopping for a mortgage, there are many kinds available. An FHA mortgage is backed by the federal government and while the interest rates may be higher, it is helpful for people who are first time home buyers, have a smaller down payment and meet certain income requirements.

A SONYMA loan is another government backed loan to consider for first time buyers who meet certain income requirements. VA loans are a great idea for veterans.

You may also wish to consider using a mortgage broker, who will shop around for the best rate for you. You can do this yourself by comparing rates listed in the newspaper each week. There are several online mortgage companies that will give you a quote online. As always, it is important to be cautious when giving out financial information to companies you do not know.

Consider fixed rate as well as adjustable rates and points when deciding on a mortgage. Visit <http://homebuying.about.com/cs/calculators/> to find some mortgage calculators that will give you preliminary information about how much the mortgage is going to cost you.

Before you find the home of your dreams, it is important to make sure you have a good credit rating. If there are problems that come up on your credit



report, it is important to know about them and fix them before you apply for a mortgage.

Get pre-approved for your loan amount before you look at homes so you know how much you can spend. This will also move the approval process along more quickly.

Real Estate Agents

Understand that when you use a real estate agent, 7% of the purchase price is paid to the agent and his or her company as commission. If you use an agent and the seller has a different agent, the two agents split the commission.

When you use a traditional real estate agent, he or she works for the seller, even if you select your own agent. He or she is not working in your best interest.

You may wish to consider hiring a buyer's agent, who will work for you and your best interests.

The Purchase Process

Once you find a home you want to buy, your real estate agent will draw up the contract. Make sure that the contract being used is the standard bar association approved contract for the county you are buying in.

The seller may accept your offer or counter with a higher offer. You must pay a small down payment, known as earnest money. This is not the full amount of what your down payment is as listed in the contract.

Once you and the seller agree on a price, both of your attorneys need to approve the contract. Then the waiting begins.

You must wait for the bank to approve your mortgage amount. The bank will review all of the financial records

you provide and will appraise the home, to ensure it is worth at least as much as the mortgage.

If the home has a well or septic system, they will inspect the home and point out any problems, both major and minor. Often the problems found are small things that you may or may not ask the seller to fix.

Occasionally, a home inspection will uncover a major problem that you may wish to use as the basis for canceling the contract.

Closing

Your attorney completes a lot of paperwork in preparation for the purchase. You will have to purchase title insurance, which insures the bank against any problems with legal ownership of the property. You have the option of purchasing title insurance to protect yourself as well, though many people choose not to purchase it.

You will be responsible for obtaining homeowner's insurance effective on your closing date. Check with your bank for the wording they will need included on the binder the insurance company issues.

Your attorney prepares the deed, has the title inspected and updated, and does calculations to compute the property tax division (the seller is responsible for taxes up to the date of sale and you are responsible for taxes after the sale, but since the taxes may already have been paid, the amount is calculated out so you each pay your fair share). Your attorney will review all the paperwork provided by the bank and ensure it is correct.

You won't know the exact amount you need to bring to the closing until a day or two before when all the numbers are finalized. Remember that not only must you provide the down payment, but you are also responsible for transfer taxes, filing fees, bank fees and your attorney's fees.

Your attorney will come with you to the closing, have you sign many, many forms and then file the paperwork with the county so that the home legally becomes yours.

When you hold that key in your hand, you'll know you have finally come home!

— Brette McWhorter Sember

Accidents, Injuries & The Unexpected

Planning For The Worst Gives You Peace Of Mind

While it isn't pleasant to plan for accidents, injuries and catastrophes, planning for the worst gives you the most protection and peace of mind. Learn about your rights and responsibilities.

Waiving Liability

As a parent, you often sign permission slips and give consent for your children to participate in activities. It is important to understand exactly what you are agreeing to and what your rights are.

Permission slips are documents that state that you agree to allow the school, camp, organization, etc. to take your child to a location or participate in an activity. If the document contains this kind of statement and no more, you are agreeing only to the activity listed. You are not agreeing to refrain from holding the school or organization liable if your child is injured.

Informed Consent Forms are documents that are more complicated. These kinds of forms are the types of forms you might be asked to sign when signing your child up for something like a ski club or gymnastics class. The form describes and explains the risks involved in the activity that are inherent to it (a natural part of the activity).

For example, a consent form for skiing might include information about the risks of changing weather conditions, obstacles on the slopes and the risk of falling and becoming injured.

When you sign this kind of form you are indicating that you have read and understood the risks and that you are willing to accept them and will not hold the organization liable for injuries resulting from these specifically explained risks. *This kind of waiver does not waive your right to sue if the organization is negligent in some way.*

Liability waivers are forms that state that you agree to assume all risk and agree that you will not hold the organization liable for any injuries. While these forms are fairly common, they are usually not valid.

You may also see signs with this kind of statement posted at places like amusement parks and sports activity areas. No one can avoid liability for their own negligence simply by posting a sign. If you sign one of these waivers, you

generally will still have the right to sue if your child is injured.

One place where signs are posted informing you that you waive liability is at amusement parks. Be aware that there is very little governmental oversight of amusement parks. Permanent amusement parks are exempt from the Consumer Product Safety Act (rides that move from carnival to carnival are not exempt). There has been a lot of recent attention devoted to injuries on rides. Visit www.safeparks.com for information about rides that have caused injury and about steps you can take to lobby for closer governmental regulation of these parks.

"If your child injures someone or causes property damage, you can be financially responsible for it."

Your Responsibility For Your Child's Actions

As a parent, you are responsible for your minor child's actions. Parents are responsible for a child's malicious acts up to \$300, but this can be more if the parents fail to properly supervise a child. If your child injures someone or causes property damage, you can be financially responsible for it.

Preventing Injury & Liability

If you are a homeowner, it is important that you maintain your own property so that it is safe for visitors. This includes removing snow and ice and repairing dangerous conditions, such as broken steps. Failure to do so can make you liable if someone is injured on your property. You must also take safety precautions with regard to things on your property that are "attractive nuisances". An attractive nuisance is a dangerous condition that is so inviting that it might cause children or other people to come onto the property and become injured as a result. An example is an in-ground swimming pool that is not fenced. Natural conditions, such as a cliff or a natural pond are not included. Take precautions that will make it impossible for people to become injured on your property.

If you are a dog owner, you will be held responsible if your dog bites someone, so train your pets not to bite or take precautions to prevent this kind of accident.

Remember to obey laws about seatbelts and helmets. In New York, all front seat passengers must wear seatbelts. Children must wear seatbelts up to age 16 and children under age 4 must be in child safety seats. For specific information about the type of safety seats you should use, visit the New York State Department of Motor Vehicles web site <http://www.nydmv.state.ny.us/dmvfaqs.htm#car%20seat>.

Parents are responsible for making sure children up to age 15 follow this law. People 16 and over are responsible for following this law themselves.

Children 14 years old and younger must wear helmets when riding bikes and using inline skates. Parents are fined if these laws are violated. Helmets are also required for drivers and riders on snowmobiles.

If you are the parent of a teen, it is important that you understand that if you provide alcohol to your child and his or her underage friends, or even if it is consumed on your property and you do nothing to stop it, you can be held liable for any injuries or damage that results from the consumption of the alcohol, such as car accidents.

Insurance

New Yorkers are required to carry automobile insurance. Check with your insurance agent (or visit www.insure.com or www.insurance.com) to understand the different types of coverage and minimum amounts required. Be aware that if you give permission to someone to use your car, you will be responsible for any injury or damage caused while that person uses your vehicle. You are also responsible for any injury or damage your child causes while driving your car.

When your child gets his or her permit, it is important to notify your insurance agent that your child is beginning to drive. When you add your teen to your policy, he or she will be covered while driving any of your cars covered under the policy.

If your teen owns his or her own vehicle, it may be less expensive to pur-

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Family Advocate

A Legal Resource Guide

Dealing With Divorce

A Primer To Help You Cope

Divorce is one of the most stressful life events, on par with the death of a spouse or parent. To cope with divorce it is important that you gather as much information as you can, through reading or consulting attorneys. This little primer will get you started by defining the major issues and terms.

Ways To Get A Divorce

Divorcing in New York isn't as simple as it is in other states and there are hoops you will have to jump through. You will also be surprised at the sheer amount of paperwork and time - not to mention dollars - it takes to get a divorce. Lately, New York courts have tried to become more user friendly and have even issued a packet for do-it-yourselfers.

There are two main ways to get a divorce in New York. The least combative method is by way of a separation. A couple can sign a separation agreement (which details all the property and financial arrangements as well as custody and visitation), wait a year and then convert it to a divorce decree. This method avoids accusations of whose fault the divorce is and does not require painful courtroom testimony. The separation agreement can be negotiated by the parties' attorneys or can be created through mediation.

Many people do not wish to wait a year to be divorced. You can then file papers with the court seeking a divorce based on one of the following grounds (or reasons):

Imprisonment: Your spouse was imprisoned for three or more years during the marriage and this has occurred within the last five years.

Abandonment: Your spouse abandoned you (left you without any provocation from you) over a year ago and you asked him or her to return and he or she refused.

Adultery: Your spouse committed adultery during the marriage. You must have proof from a third person (your first hand knowledge or an admission by your spouse is not enough). This is generally very difficult to prove and is not commonly used.

Cruel and Inhuman Treatment: This is the most common reason for divorce. Your spouse treated you cruelly and inhumanly, either physically, emo-



tionally or mentally, so that it is no longer safe for you to live together. The language seems a little harsh but almost every divorcing person can probably think of an instance when his or her spouse called him or her a name, provoked an argument or withheld affection - these instances will fit the requirements.

In most divorces, you do not actually have to prove your grounds since most people do not contest the grounds for a divorce.

Residency

New York has stringent residency requirements in order to be eligible for a divorce in the state. There are four types of residency that are acceptable: one of you has lived in the state for two years, one of you has lived in the state for one year and the grounds for divorce happened here, you both live in New York and the grounds happened here or one of you has lived in New York for a year and you were married here, you lived here while married at some point.

It is important to note that all states recognize each other's divorce decrees, so

if you get a divorce in Arkansas, you're considered divorced wherever you go.

What's Decided in a Divorce

When a divorce is decided by the court or the parties reach a settlement or sign a separation agreement which is then converted to a divorce, the judgment of divorce will give a custody and visitation plan (if there are children) and order child support.

All of the marital property of the parties will be divided in a way that is equitable (which means fair, but not necessarily equal). This means that every belonging the couple owns together must be divided between them and includes not only possessions such as household items, cars and real estate, but also things like bank accounts, investments and other assets. Marital debts are also divided between the parties.

Maintenance (often referred to as alimony) can be ordered for the purpose of helping one of the spouses get back on his or her feet financially. The court can also order things such as Orders of Protection (directing one spouse to stay away from or refrain from harming the other) and name changes.

Supreme Court or Family Court

Divorces are handled only in Supreme Court. Family Court handles custody, support and orders of protection cases for couples who are married but have not yet filed for divorce, couples who have never been married and couples who are already divorced. If you are separated and have not yet begun the divorce process, you can go to Family Court to obtain custody, child support and an order of protection. Many people represent themselves in Family Court.

The Divorce Process

Unfortunately, the divorce process can be a long one in New York. The fastest way to get a divorce is to have an uncontested divorce. One spouse files for divorce and the other spouse does not respond or files papers agreeing to it. The divorce can then happen within a few months. A contested divorce takes much longer. Papers are filed to initiate the divorce and the other spouse responds. Months are spent in negotiations and the case will come to court for

The Merits of Mediation *continued*

Mediation also allows the couple complete control over the outcome. If the couple heads to court, their attorneys will attempt to negotiate a settlement. If that fails, a judge will decide all of the issues. In mediation, the people who understand the situation the best (the couple themselves) make all of the decisions themselves. The mediator lays out all of the issues that need to be worked out and provides guidance as to how to word certain things, but does not make any decisions.

Mediation is also a less expensive alternative than a contested divorce. Mediators charge by the hour and may request a small retainer to cover the paperwork that is completed.

Why A Parent Needs A Will *continued*

hospital can provide you with a very basic form. However, it is best to ask your attorney to draw one up so that you can very specifically state your wishes in a way that the medical personnel will have to abide by.

What is Estate Planning?

Estate planning includes having a will written, but is far more extensive. Estate planning involves analyzing all of your assets, planning for Medicaid and nursing home possibilities and assessing the estate tax and its impact.

Powers of Attorney

A Power of Attorney is a form that gives permission to someone else to handle your financial and business

When looking for a mediator, it is important to understand that there is no licensing by the state. Anyone can hang a shingle out as a mediator. Most mediators tend to be attorneys or therapists. If you choose an attorney mediator, he or she will be able to write your separation agreement, which can then be filed with the court. If you choose a non-attorney mediator, he or she will prepare a memorandum, which an attorney must then rewrite as a separation agreement. It is important to select a mediator you both feel comfortable with and one who has experience.

Contact the New York State Council on Divorce Mediation (1-800-894-2646) for a list of trained mediators.

affairs. Powers of attorney can take effect immediately or be drafted so that they take effect only upon the happening of a certain event, such as if you are in a coma.

Many attorneys recommend that you sign a power of attorney giving a close family member or friend the ability to act on your behalf if you are unable to.

For example, if you and your spouse were both in a car accident and hospitalized in critical condition, your power of attorney would allow the person you selected to pay your household bills, deposit your checks and make sure your children are provided for.

— Brette McWhorter Sember

Accidents, Injuries & The Unexpected *cont.*

chase a separate policy for him or her. Your liability is also limited if your child owns the vehicle and policy. Check with your agent about this.

If your child does not live primarily with you, such as if the other parent has residential custody, and you intend for your child to use your car when at your home, you would be wise to add the child to your policy.

If your child will be taking one of your vehicles away to college or if he or she owns the car, you need to list the child as one of the policy owners.

If you own a home, you probably have homeowner's insurance, which insures your belongings as well as the property itself. If you rent your residence, it is important to make sure you have renter's insurance. This kind

of policy will insure your family's belongings against theft or damage.

If your child goes away to college and lives in a dorm or university housing, his or her belongings will be covered under your homeowner's policy. If he or she will be living in off campus housing, you need to get a renter's policy for the child. Items like stereos and computers may not be completely covered under these policies without special riders.

College students are usually covered by parents' health insurance policies up to age 20 or 24. If you have an HMO, check to make sure that there is an approved provider in the area the child will be living in. If not, you can purchase a health insurance plan through the college or university.

Custody *continued*

Sole Custody is another type of arrangement. The child resides with one parent, who makes all the decisions about the child, and has visitation with the other parent. Often an argument over joint custody versus sole custody comes down to a power play between the parents. If the parents will be able to find a way to make decisions together and if both parents are fit parents, joint custody is the arrangement of choice.

The Law Guardian

When a case involves a custody dispute, the court appoints a Law Guardian to act as the child's lawyer. The Law Guardian generally meets with the child and parents and forms his or her own idea as to what will be best for the child. Law Guardians can sometimes be very helpful in negotiating settlements and bringing a voice of reason to the proceedings. Law Guardians can be a parent's best friend or worst enemy in a custody case, so it is wise to treat yours with deference and cooperation.

Some Words about Words

Increasingly, courts, attorneys and mediators are avoiding the use of the word "visitation." The word offers the wrong connotation.

Parents do not "visit" with their children. Parents spend time with their children, live with their children and have relationships with their children.

More often now, a custody and visitation plan is referred to as a "parenting plan" and each parent has "parenting time." This takes away the stigma associated with visitation and reminds everyone involved that both parents are equally important to the child.

Flexibility

Flexibility is the key to making any parenting plan work. Schedules cannot be set in stone and accommodations must be made. Almost every custody order issued by a court will contain the words "and at other times as agreed upon." This gives the parents the ability to change the schedule as they need and as the child grows. A parenting plan for a teenager needs to be very different from one for a preschooler.

Respect

The only way a parenting plan will work is if the parents learn to respect each other as parents and find a way to develop a new relationship together as parenting partners. Certainly it is not easy to continue to see and deal with a person who has hurt you, but because it will benefit your child, it is worth doing.

— Brette McWhorter Sember

A Look At Education Law

Making The Best Use Of The Resources Available

Your child's education is one of the most important building blocks in his or her life. Understanding the rights you are entitled to will help you make the best use of the resources available.

The Basics

Every child has the right to a free and appropriate education. You may be surprised to learn that "appropriate" doesn't mean the best education or one where all of your child's needs are met. The public school system is designed to provide this education and every child as the right to attend the local public school. Public schools are free to residents of the school district and may be attended by non-residents if they pay tuition.

A child is required to begin school in September of the year he or she turns six if the birthday is before December 1. If it, then he or she begins the following September. It is important to note that kindergarten is not mandatory. Children are required to attend school until age 16.

Recent changes have been made to diploma requirements in New York. Find out about the requirements at www.emsc.nysed.gov/part100/inner.html. Find out about how the schools in the state measure up by reading the yearly school report cards at www.emsc.nysed.gov/reprcd2001/.

Special Education

Special education is probably the most talked about area of education. Because all children have the right to appropriate education, children with disabilities, or special needs, are given specific rights and procedures to ensure that they receive an education appropriate for them. The basis for this is the Individuals with Disabilities Act, which gives a child the right to be assessed (or tested) to determine his or her special education needs and then to receive special education services if needed.

A child will be tested or assessed if a referral is made to the district's Committee on Special Education (CSE). A parent can make this referral as can a school teacher, other teacher or physician. Once a child is referred to the committee, the child is evaluated by the

school district. This is an important point. Many parents feel that the evaluation they receive is inaccurate or skewed and parents have the right to an independent educational evaluation.

To be eligible for special education services, a child must have a disability that affects his or her ability to learn. If a child meets this requirement, he or she is "classified" under a disability category. Many parents feel uncomfortable with this type of classification system.

Once a child is classified, the CSE prepares an IEP (individualized education program) for that child, which lists the goals for the child and what services the district will provide to help him or her meet them. This plan is supposed to provide the least restrictive environment for the child, in other words, place him or her in regular classrooms whenever possible (what used to be called mainstreaming). The schools board is responsible for arranging the necessary services to implement the IEP.

Parents are entitled to attend IEP meetings and have input at them. In practice, some parents find that they feel patronized, frightened and uninformed at these meetings. The parent is supposed to be there as one member of a team, but when a parent's viewpoint clashes with that of the school district, he or she can feel like one person against an army. Most school employees work hard to ensure that children receive the most appropriate education possible. Parents may hire attorneys or advocates to assist them in getting through the IEP maze.

If a child is determined not to be eligible for special education services or if the parent disagrees with the IEP, mediation is scheduled with an impartial mediator chosen by the school board. An impartial hearing can then be scheduled upon request if mediation has not resolved the issues. Parents have the right to have an attorney and their own experts and may present evidence and testimony and cross-examine any of the school's witnesses. The child is permitted to be present at the hearing if the parent wishes. Should the hearing not resolve the issues, the parent can appeal.

For detailed information and forms, visit www.nysed.gov, where a parent guide regarding special education can be found as well as many other publications that explain NYS special education law.

Private Education

Children have the right to attend a nonpublic school if they choose. School districts can choose to lend textbooks to nonpublic schools. Special education services must be provided by the district to children attending private schools. Visit the New York State Department of Education's page about nonpublic schools for details and information at http://www.emsc.nysed.gov/rscs/nonpub/nonpublic_home_page.htm.

Charter Schools

Charter Schools have been in the news in the past few years. A charter school is a school financed with public and private funds. The definition of a charter school is one that operates under a charter, which describes how the school will function and details its philosophy and funding plans. A charter school may not be run by a church or religious institution. These types of schools are not obliged to follow many state laws and regulations but are required to assess students according to state law. Charter school students must take Regents exams. Charter schools must have a school year at least as long as those of New York public schools. Charter schools must be open to all children, but can limit enrollment to one gender if they choose.

Visit the charter schools section of the NYS Department of Education's web site at www.emsc.nysed.gov/rscs/charter/charter_schools.html.

Gifted Education

Under Title VI of the New York State Education Law, gifted education is not required to be provided by school districts. The law does encourage these programs and offers state assistance with them, however, the bottom line remains that such programs are not required. Many schools do offer such programs and many are excellent, but there is a lack of uniformity and standards in these programs.

Home schooling

Home schooling has become more and more popular and accepted in recent years. For detailed requirements and information visit the New York State Department of Education's section about home schooling at http://www.emsc.nysed.gov/rscs/nonpub/home_instruction.html

pre-trial conferences. If an agreement cannot be worked out by the attorneys, then it is scheduled for a trial where evidence is presented and witnesses are called.



The items that are most contested in divorces are custody and the property distribution. Many times these disputes go hand in hand, with one spouse refusing to agree to let the children live with the other parent unless he or she gets a better financial deal. Contested divorces are very difficult for everyone involved and can be especially painful for children.

If you decide to handle your own divorce, make sure you have a book or other resources available to help you. There are specific papers that must be filed in a specific order within certain time limits.

Annulment

An annulment is a procedure that does a marriage and makes it as if it had never happened. There are two kinds of annulments - legal and religious. Religious annulments (or gets in the Jewish religion) are handled by your religious institution and can be obtained even after a legal divorce has occurred. A legal annulment can be obtained through the court. Legal annulments can be granted if one spouse was underage (you must be 18 to marry, or 16 with parental consent or 14 with both judicial and parental consent), one spouse was mentally ill, the marriage was unable to consummate, a spouse did not understand he or she was getting married, one person was already married or one person was forced into the marriage.

Getting Help

If you need a divorce or are considering one but cannot afford an attorney, do not feel comfortable handling your own divorce using a book, there are services for you to get help. Neighborhood Services (847-0650) and the Volunteer Lawyers Project (847-0662) offer attorneys for those who qualify. If you find you do not qualify, but feel you cannot afford an attorney, contact some attorneys and see if you can work out a payment plan. If your spouse is in a better financial position, it is also possible for an attorney to get the court to order your spouse to cover the cost of attorney.

— Brette McWhorter Sember

The Merits of Mediation A More Personalized Alternative

Mediation is an alternative to a traditional in court divorce. The mediation process is friendlier, more relaxed and more attuned to individual couple's needs.

A mediator is a neutral third party who helps you and your spouse make decisions together about how to divide your assets, deal with your debts, work out a parenting plan (or custody arrangement) and decide child support and all other matters a court would decide in a divorce. The mediator has no power to make decisions and acts as a facilitator to help the couple work things out together.

The mediation process can be emotionally draining and difficult at times, but in comparison to the stress people feel when they go through a traditional divorce, it is a much better alternative.

Mediation is a better option for many reasons. If the couple has children, the mediation process helps them learn to function as parents without being spouses anymore. This is a difficult transition to make as family relationships are all tied together. Parents learn to work together as lifelong parenting partners while ending their relationship as a couple. This kind of partnership is of the utmost benefit to the children, who need to have two parents who continue to parent together.

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Custody & Visitation Consider The Best Interests of The Child

Custody and visitation is often the most disputed portion of a divorce and is also the thing that causes the most bitter feelings between former spouses. When a court decides where a child will live and how much time he or she will spend with each parent, the decision is made by considering the best interest of the child.

Types of Custody

Joint Custody Many people misinterpret the meaning of these words. Joint custody can mean two things: Joint Physical Custody and Joint Custody with Residential Custody to One Parent. Joint physical custody is rare. This means that the parents spend an equal amount of the time with the child and that they make decisions together about the child. Joint physical custody, in the opinion of many mental health professionals, can be harmful for a child. The child does not have one home and is constantly shuffled back and forth from one household to another. There are some circumstances in which it works, but for the most part, it is done to satisfy the parents' competing needs and not to benefit the child.

Joint Custody with Physical Residence is the most common type of custody arrangement. The parents are given equal decision-making authority with regard to the child and must work together to decide things. The child mainly resides with one of the parents and has visitation with the other. One of the most common visitation schedules is every other weekend as well as one evening each week. Each family is different though and the visitation plan should be tailored to take into consideration the child's needs and the parents' schedules.

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