

THE GUIDE TO DIVORCE IN NEW YORK STATE

*Answering Your Questions about Assets, Custody,
Support, and Life After Divorce*

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DIVORCE IN NEW YORK STATE

In 2010, New York became the last state to recognize **no-fault** grounds for divorce. If you wish to file for divorce in New York, you may cite an irretrievable breakdown of marriage as your reason. That means that neither spouse has to make allegations – like abandonment, extreme cruelty, or adultery – against the other. This is good for many obvious reasons: it reduces the chance of acrimony between spouses, which reduces the time and cost of a divorce, and makes the process easier for any children involved. There are two grounds for a no-fault divorce:

- » An irreparable breakdown of the marriage for six months before filing.
- » Living separately for one year before filing.

Some parties enter the divorce process hoping to punish their spouse, but the “fault” grounds for a divorce, even if proved, won’t affect the division of assets, except in the most extreme situations. In other words, one spouse’s adultery won’t “cost” him or her anything in the terms of the divorce itself, but it will cost *both* parties incalculable sums in attorney’s fees.

Seeking to dissolve a marriage through no-fault grounds makes it easier for spouses to achieve an **uncontested divorce**. In an uncontested divorce, spouses agree on issues like spousal maintenance, child custody, child support, and property division, and therefore do not require the assistance of the court to determine these issues. That leaves more control in the hands of the divorcing parties, and avoids the expense of litigation.

Unfortunately, not all couples agree on how to handle child custody, spousal maintenance, child support, and property division issues. Spouses who cannot resolve these issues must rely on the court system. A **contested divorce** can last several weeks, or months, and in some cases a year or more.

No matter how amicable your relationship with your spouse is, it is in your best interests to seek the informed advice of an experienced attorney.

COMMON QUESTIONS ABOUT DIVORCE

If you're considering a divorce, your head is probably swimming with questions. You shouldn't hesitate to talk to an attorney, because the answers, in most cases, will depend on the details of your situation. However, it may give you some peace of mind to start working through these questions now.

>> *How do I choose a divorce attorney?*

Before you start the divorce process you need to find an attorney you can trust. A phone call probably won't be enough. You're going to be spending a long time with this person (though hopefully he or she can help complete the process in as little time as possible). You want someone with whom you feel comfortable. You *don't* want a bullish attorney who intimidates you, because it's important that *you* lead the divorce process. You shouldn't hesitate to ask your attorney about his or her experience, nor to dive right in to a discussion of how you might carry your case forward successfully and efficiently. Lastly, you'll want an attorney who's upfront about fees, payments plans, and ways for you to keep expenses down.

>> *How long will the divorce process take?*

An "easy," or uncontentious divorce could be over in two to three months. A difficult, contentious, and litigated divorce could take over a year. It's not possible for an attorney to predict the length of your case until well into the process, but you can sit down with your attorney, go over the details of your case, including assets, children, and the condition of your relationship with your spouse, and make educated guesses as to issues that could make yours a longer process.

In general, the length of your divorce case will depend on your ability to come to an agreement with your spouse.

>> *How expensive is a divorce?*

Aside from the eventual division of assets, the cost of your divorce will be your attorney's retainer. This will vary, and is determined by the complexity of the case. You could incur additional costs if your case drags on, and if you have to involve other professionals like paralegals, doctors, psychologists, or forensic accountants.

If you aren't the moneyed party, you might be able to get your spouse to contribute toward your attorney's fees through a court order. A judge might order direct payments, or might take a shared asset, liquidate it, and reserve that for attorney's fees.

There are other ways to keep costs down. Attorneys bill by the hour, so the more work you can do for your attorney, the less you'll have to pay. Secure important financial documents before your first consultation. Provide other documentation before you file for divorce, including documentation of your spouse's finances. This will save you money during the "discovery" phase when both parties exchange information.

>> *Do I need a separation agreement?*

You don't need a separation agreement to get a divorce. If you have very few assets and no children, you might be able to draw up a short stipulation and have that entered into the judgment of divorce. If you anticipate significant wrangling over assets, however, you will need to reach an agreement, or else turn all decisions over to a judge.

>> *Do I have to go to court?*

Most divorcing spouses manage to settle the terms of their divorce in mediation, and do not need to go to litigation before a judge. In fact, in some situations it isn't necessary for either party to go to court. The parties could negotiate a property settlement agreement outside of court and have their attorneys submit the necessary documentation.

However, a judge must hear custody and visitation issues. This puts your case onto a trial calendar, involves a law guardian for the child, and will lengthen any divorce proceedings.

>> *Can I file a joint tax return the same year I'm divorced?*

You and your spouse can file a joint tax return during divorce proceedings. You will need to agree upon an equitable distribution of the returns.

>> *Can I open my own bank account during a divorce?*

It's generally not a good idea to open up a new bank account during a divorce. Usually a summons includes a **status quo order**, meaning that parties must maintain their current financial situation. You cannot sell major assets, make major investments, change healthcare or life insurance policies, open new bank accounts, or even radically change household expenses.

>> *Can I post about my divorce on social media?*

Sure, you can. But you shouldn't. It doesn't help you at all to vent in public especially not in a way that's "permanent" and subject to shares and screenshots – no matter how many "likes" you get. The things you post on social media could exacerbate the situation with your spouse, damaging negotiations and making your divorce longer and more expensive. Your posts could even work against you in a court room. The worst cost could be to your children. Any negative information about a parent is damaging to a child, even if that information is coming from the other parent; and your social media posts make *your children's* personal affairs a matter of public gossip.

Just keep it to yourself, or confide to a trusted friend.

STARTING THE PROCESS

>> *How can I start the divorce process?*

After contacting an attorney, the law obligates you to notify your spouse that you are filing for divorce. You will present your spouse with a **Summons with Notice**. How you do so depends upon your relationship with your spouse. If you can have a frank, in-person discussion, you should do so. It's probably best to avoid a "surprise" situation. If you think a face-to-face discussion would be acrimonious or even dangerous, let your attorney send a notice in the mail, including an affidavit, or have a process server deliver the summons in person, and provide your spouse with an affidavit to file with the county clerk. You could even have your spouse sign an affidavit in your attorney's office.

>> *Can I get divorced if my spouse lives in another state?*

If your spouse no longer resides in New York State a New York court will still have jurisdiction to hear your divorce case so long as you have resided here for two years, or for one year if you and your spouse were married here.



>> *What if I can't locate my spouse?*

New York State law requires you to make a "good faith effort" to locate your spouse. If you separated – unofficially – from your spouse and have lost track of that person, you will have to contact friends, relatives, and other associates. If you are still unable to locate the person, you can provide an affidavit of your effort to the

court. The court might give you an **order of publication**, allowing you to "serve" your spouse by publishing a notification in a local law journal.

>> *How do I respond if I've been served divorce papers?*

The first step is to determine what type of documents you now have in front of you.

A **Summons with Notice** requires you to put in a notice of appearance and retain an attorney within 20 days.

An **Order to Show Cause** has a different time frame; in this case, you'll have to file certain documents before you appear in court.

A notice from **Family Court** also will have a different time frame – and, of course, require you to show up at a different location.

If you've been served with any kind of divorce papers, set up an appointment with an attorney, get into his or her office as quickly as possible, and prepare to respond within the specified time frame.

>> *What should I bring to my first meeting with my attorney?*

Don't worry too much about what to bring to an initial consultation with your attorney. You could bring **tax returns, pay stubs**, other **income information**, quotes on **assets and investments**, so that your attorney can start to make calculations about the equitable distribution of property, spousal support, and child support.

If you don't want to make a full disclosure of all that information, that's fine too. *You* get to set the pace of your divorce at this point. It would be fine to come in to your first meeting with nothing at all, and simply hold a discussion before you move forward with an attorney.

DIVISION OF ASSETS

According to New York State law, marital assets are divided in a manner that is **equitable**, but not necessarily equal. Typically, any property acquired before the marriage is considered separate property, and any property acquired during the marriage is subject to equitable distribution unless it can be show to have be acquired by use of assets that existed prior to the marriage, or are a result of a gift or inheritance during the marriage.

Below are the types of properties that are exempt from the distribution process:

- » Property you receive from a spouse after a judgment of legal separation.
- » Anything received by gift, legacy or descent.
- » Property owned by you or your spouse before the marriage.
- » Any judgment or property awarded to a spouse from the other spouse.
- » Property specifically excluded by a prenuptial or post nuptial agreement by you and your spouse.
- » Personal injury awards and workman compensation/disability settlements may not be subject to equitable distribution.

However, non-marital property can become subject to equitable distribution if it is co-mingled with marital property. Because of the many nuances involved in determining equitable distribution in New York, it is imperative you retain a skilled divorce attorney.

>> *How does the court determine the division of marital property?*

If your divorce is contested, and you and your spouse cannot agree on how to divide your property, the court will decide for you. Factors include:

- » The duration of the marriage.
- » The age, health, occupation, amount and sources of income, vocational skills, marketable skills, estate, liabilities and needs of each spouse.
- » Whether either spouse has contributed to the property or family unit as a homemaker.
- » How each spouse contributed to the acquisition, preservation, or increase or decrease in value of the marital or non-marital property.
- » Whether either spouse has squandered marital assets.
- » The value of the property assigned to each spouse.
- » The financial circumstances of each spouse.
- » Any obligation and rights arising from a prior marriage of either spouse.
- » The tax consequences to each spouse.
- » Whether there are children and what their custodial needs may be.
- » The reasonable opportunity of each spouse for future acquisition of capital assets and income.

>> *What is a property settlement agreement?*

When divorcing parties can agree on the distribution of debts and assets, they set this down in a property settlement agreement. This can avoid the courts entirely – but a judge must hear any cases involving child custody, visitation, and support.

>> *What is a mediator?*

You and your spouse can choose to use a mediator, an impartial third-party attorney, to help you resolve your disagreements. That mediator cannot represent either party and cannot give legal advice during mediation or at any other time in the divorce process; both parties still need their own attorneys. The mediator does not make any binding decisions; he or she simply tries to help parties come to an agreement. After the process, the mediator will present both parties with a summary of their discussion and the conclusions the parties reached. You have an opportunity, then, to review that document with your attorney, and move toward a settlement agreement.

>> *I suspect my spouse has voluntarily reduced his or her income. What can I do?*

If you suspect your spouse has voluntarily reduced his or her income to get a more favorable result in your divorce, reducing spousal support payments and lost assets, your attorney can help. This kind of misrepresentation is harder to prove in small businesses and easier to prove in large corporations. In some cases you'll have to hire a forensic accountant to look into your spouse's finances, and even the minutiae of a business's compensation structures, expenses, debts, assets, and profits. You can also take depositions from employers or business partners, and subpoena information.

>> *Does life insurance count as marital property?*

Life insurance is a marital asset; it may be distributed to either party. If there are children involved, attorneys often can negotiate revisions in the settlement allowing for the continuation of a policy. If you are the party receiving child support and spousal support, you should consider inserting a provision that requires the moneyed and non-custodial spouse (if this is the same person) to take out a life insurance policy as a security for spousal and child support payments, at least for as long as those payments are to last. The court, however, cannot require a party to take out a life insurance policy; it must be negotiated.

CHILD CUSTODY

Married parents who wish to divorce must decide who should have custody of their children. If you and your spouse cannot agree on who should have custody, the court must decide for you. When awarding custody, the court always considers the best interests of the child. Factors include:

- » The mental and physical health of both parents.
- » Any history of domestic violence by either parent.
- » The child's preference, depending upon his or her age and maturity.
- » Work schedules of each parent.

- » Whether one parent has been the primary caregiver or nurturer of the child.
- » The child's relationship with siblings and members of the rest of the family.
- » Each parent's ability to encourage and foster the child's relationship with the other parent.

Types of Child Custody In New York State

In New York, there are several different types of child custody. A judge will make an informed decision based on what he or she thinks is best for the child.

Legal Custody

If one parent has legal custody, he or she is responsible for making major decisions pertaining to the child's life, including those regarding education, religion, and health. However, courts will almost always award joint legal custody, except in cases where one parent poses a danger to the child.

Physical Custody

Physical custody means that the parent has the right to have his or her child reside with him or her. The court recognizes that it is in the best interests of a child's development and emotional wellbeing to have a relationship with both parents. Fifty-fifty custody is not often possible, however. The proximity of one residence to a school, or one parent's available time for taking care of a child, and even the differences in the relationship between the child and each of his or her parents, can determine who gets primary custody. So, in most cases, one parent will be the custodial parent and the other will be the non-custodial parent, or parent of alternate residence, enjoying visitation rights according to a schedule set down in the divorce agreement or court order.

>> What is a law guardian?

The court appoints a law guardian when divorcing parents cannot agree about child custody or visitation. The law guardian is also called an "attorney for the

children,” and acts in exactly that capacity. This attorney will sit down with the child, examine and investigate both households, then come back to the courthouse with recommendations. If old enough to express a coherent, reasoned opinion about custody and visitation, the child’s desires will carry significant weight.

>> *Can I move out of state during a divorce if I’m pregnant?*

Technically, there aren’t any restrictions that would prevent a pregnant woman from moving out of state during a divorce. Note, though, that it will be harder and more expensive for you to continue the divorce proceedings from out of state. Filing for child support will be more complicated and involve additional expenses if the father’s name isn’t on the birth certificate.

On the other hand, you have the freedom to leave the state *now*, but you wouldn’t have the ability to leave with your child after that child is born. Leaving after the child is born would affect the father’s visitation rights, and any move would have to be court-approved.

>> *Who receives the tax exemptions for children after a divorce?*

According to the IRS, the residential parent gets to claim any children and take the bigger tax return. However, you may be able to negotiate this issue with your spouse, particularly if you have multiple children.



VISITATION RIGHTS

Whenever possible, the court seeks a decision wherein both parents can remain involved in a child's life. Thus, it is often possible for the non-custodial parent to gain visitation to his or her child. However, if the court determines that the non-custodial parent poses a danger to the child, or that visiting the child is not in his or her best interests, a judge may deny visitation.

>> *Do grandparents have visitation rights?*

New York State recognizes the importance of the grandparent-grandchild relationship, but grandparents have limited rights of access to their grandchildren, especially while the parents are divorcing. The court is unlikely to grant maternal or paternal grandparents their own visitation rights, preferring them to work it out with their daughter or son, respectively.

>> *Can I relocate to another state if I have sole custody of the children?*

Even if you have sole physical custody of your child, you can't unilaterally decide to move far away from your former spouse. Regardless of your custody arrangement, your child's parent still has visitation rights.

The first step should be to sit down with your former spouse and try to come to an agreement. You might discuss an amendment to the custody arrangement, who pays for transportation, etc.

If you can't come to an agreement, you'll need to appear before a court. As before, the court will consider only the child's best interests. The fact that you have a once-in-a-lifetime career opportunity will not be enough. You must demonstrate that it will be to the *child's* benefit for you to move. Your success, then, will depend on the way you package your argument for the court. That once-in-a-lifetime job opportunity *could* result in a substantial increase in income, which would allow you to provide more comforts and opportunities for your child. You should discuss your plans with an attorney, who will frame your case for a judge.

CHILD SUPPORT

Child support is a court-ordered payment made by the non-custodial parent to the custodial parent to help with the financial responsibility of raising a child. These payments could include:

- » Cash payments determined by the parent's income and the needs of the child.
- » Health insurance for the child.
- » Child care payments.
- » Payments for reasonable medical expenses not covered by health insurance.

>> *How do courts determine the amount of child support?*

The New York State Child Support Standards Act regulates child support payments. Generally the custodial parent will be entitled to 17% of the non-custodial parent's income (minus FICA) for one child, 25% for two children, 29% for three children, and so on.

When calculating how much child support the non-custodial parent must pay in New York, the court looks at how many children there are and the combined parental income. Other factors include:

- » The age of the child or children.
- » The physical and emotional health and needs of the child or children.
- » The financial resources and earnings of each parent.
- » The tax consequences for each party.
- » Any non-monetary contributions each parent can and/or will make to the upbringing of the child or children.

- » The educational needs of each parent.
- » Whether one parent earns substantially more than the other.

>> *When can I stop paying child support?*

Child support usually ends when a child turns 21. Other events could trigger a child's "emancipation" before that age, however, ending the child support obligation. If your child has graduated from high school and is self-supportive (lives on his or her own with a steady job, joins the military, or starts a family), this could trigger "emancipation" before the child reaches 21.

However, there can be gray areas. If a child has moved into an apartment with a boyfriend or girlfriend, the custodial parent may still be making some contributions toward the child's welfare. You cannot simply stop paying child support; you should go to court and file to have the obligation lifted officially, to avoid arrears or other complications.

>> *Can I stop paying child support if my child refuses to see me?*

No. Your child has an unconditional right to court-ordered support in the case of a divorce.

In rare cases, an extraordinarily severe falling out may occur during the divorce proceedings. In this situation, the court may abate the child support obligation.

>> *Are child and spousal support taxable?*

Child support is not taxable income at the federal or state level. Spousal maintenance, however, is. If parties are settling their marriage outside of a trial, they might come to a mutually beneficial agreement to lower spousal support payments and raise child support payments, avoiding taxes.

>> *Can I file for child support if my spouse lives in another state?*

If your spouse lives in another state, you will have to file in the county of your residence. Your Family Court will send notice to the other parent and arrange for that party to “appear” – often by video.

>> *Who pays for a child’s non-reimbursed medical bills?*

Regular child support payments will not account for unexpected expenses like non-reimbursed medical bills. That means that you have to anticipate these expenses and incorporate them into your settlement agreement. Generally attorneys will try to divide uninsured medical expenses in proportion to the incomes of the parties.

>> *Are extracurricular activities included in child support?*

For the most part, the court considers extracurricular activities to fall under child support. There may be some unusually expensive activities – like a travel hockey team – that could put a strain on the custodial parent. If you foresee significant expenses for extracurriculars, bring this up when drafting your settlement agreement.

>> *What if my former spouse has stopped paying child or spousal support?*

Don’t wait. Get into court and file an enforcement proceeding as soon as possible. The court can order a wage garnishing or send the Spousal Support/Child Support Collection Unit to retrieve the arrears.

>> *Who pays for a child’s college expenses?*

Especially if the children in a divorce are quite young, it’s easy to let significant expenses – like a first car, car insurance, and college – slip by.

New York State doesn't have hard-and-fast rules about paying for a child's college costs. A judge will make an assessment based on the particulars of your family life. If, for example, you've had two older children and paid for their college tuition, and a third is in high school, the judge would expect both parents to contribute to that third child's college expenses. Judges are more likely to impose educational expenses when both parents have advanced degrees.

Generally, though, this isn't a contentious issue. Most parents agree to share expenses and, often, limit them – for example, they'll agree to share the costs of a state school. This is good: it keeps both parents invested in and connected with the child.

SPOUSAL MAINTENANCE

The term alimony is no longer current in New York State – the term now is **spousal maintenance**. Spousal maintenance is a court-ordered payment from one spouse to another, granted in those instances where there is a disparity between the respective incomes of the parties during a divorce or separation. The purpose of spousal maintenance is to help the receiving spouse become financially independent and move on with his or her life post-divorce. There are two types of spousal maintenance in New York:

Rehabilitative Spousal Maintenance

This type of support is durational (temporary) and designed to help the receiving spouse obtain educational training so he or she can pursue a career or livelihood.

Lifetime Spousal Maintenance

This is permanent support that goes on indefinitely. However, it can be changed if the circumstances change and the receiving spouse becomes self-sufficient.

>> *How do the courts decide the amount and duration of spousal maintenance?*

Judges have great discretion in determining spousal maintenance. These include but are not limited to:

- » Age and health of each spouse.
- » Length of the marriage.
- » Income, property and assets of each spouse.
- » Present and future earning capacities of each spouse.
- » Whether the spouse seeking alimony has the ability to become self-sufficient.
- » Whether the spouse seeking support has reduced his or her earning capacity as a result of delaying educational training or employment during the marriage.
- » Whether either spouse has child custody.
- » Tax consequences to both parties.
- » If either spouse is responsible for wasteful dissipation of marital assets.
- » Anything else the court considers relevant.

DOMESTIC ABUSE

Domestic violence changes the landscape of any divorce case. If you've been the victim of domestic abuse or fear domestic abuse, your priority has to be your safety. Call the police, remove the abuser, and take the necessary steps to ensure that the abuser stays away. *Then* work with your attorney to initiate the divorce proceedings.

In domestic abuse cases, recidivism – an offender's tendency to return to the offensive behavior – is between 70 and 80 percent. Also, if you have suffered domestic abuse, others in your family are likely to become victims, too.

You do have options. You can go to the police and file a complaint, which could turn into criminal charges. You could also go to Family Court, which will demand that the abuser appear before a judge and answer to the charges. Once you've removed yourself to a place of physical safety, consult with an attorney who can help you decide what steps to take.

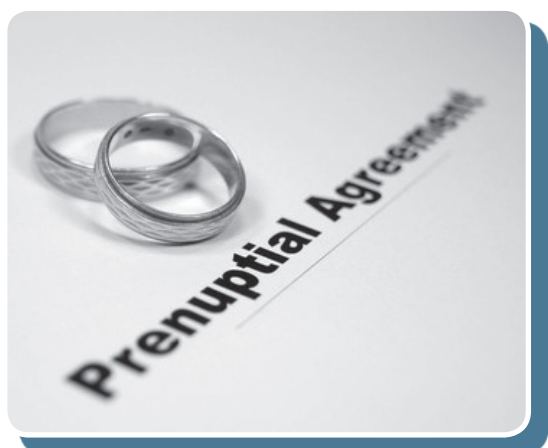
>> *What "counts" as domestic abuse?*

Domestic abuse doesn't have to be physical violence. It could be emotional or verbal abuse, harassment, or terroristic threats, and depending upon the degree, any of these could be a violation, a misdemeanor, or a felony. If you've been the victim of domestic abuse, get yourself to safety and call the police before contacting your attorney.

>> *What can I do to stop domestic abuse?*

The first thing you should do is call the police. You can't risk being around an abuser any longer. The police can order that person out of your home or take further action – including arrest – if necessary.

Then you'll need to contact your attorney to get an **Order of Protection** from the court. This could be a "Stay Away Order," barring the individual from coming near you, your home, your place of employment, your school, or any other place you frequent. Another type of Order of Protection only prohibits any further abuse – including verbal abuse, harassment, and financial threats. Violation of such an order would have serious consequences for the abuser, up to and including jail time.



PRENUPTIAL AND POST-NUPTIAL AGREEMENTS

No one who gets married expects to get divorced, yet given the divorce rate and current economy, many couples seek prenuptial and

post-nuptial agreements. These aren't the most romantic topics for fiancé(e)s and spouses to discuss, but both *are* commonsense protections of what you love.

>> *What is a prenuptial agreement?*

A prenuptial agreement, or prenup, is an agreement made prior to marriage that establishes the property of each party and how it will be divided in the event of a divorce. Hiring an attorney before creating a prenup is important because a poorly written or prepared document can be challenged in a court of law.

Some of the benefits of a prenuptial agreement include:

- » **Establishing Separate Property:** One of the primary functions of a prenuptial agreement is to establish certain property as separate property — meaning it cannot be distributed in the event of a divorce.
- » **Protecting Beneficiaries:** A prenuptial agreement can ensure that your property goes to your children or intended recipient after your death or divorce.
- » **Clarifying Responsibilities:** Prenuptial agreements are also useful in establishing the marital roles and responsibilities of each spouse.

>> *What is a post-nuptial agreement?*

A post-nuptial agreement is similar to a prenuptial agreement. The difference between them is that a post-nuptial agreement is created after you are married, rather than prior to the marriage. Common reasons for wanting to draft a post-nuptial agreement include establishing separate property, or protecting your assets.

LIFE AFTER DIVORCE

>> *Can I modify my divorce agreement?*

A separation agreement filed in the County Clerk's office is a binding contract between both parties in a divorce. That means contract law applies, so it will be very hard for one party to change the agreement. (This is a reminder, then, that

it's important for you to go over the agreement with your attorney and make sure you understand all the terms before you sign it.)

You might be able to change the agreement if you can demonstrate **fraud, misrepresentation, or failure of disclosure** on the part of the other party.

You also might be able to modify the agreement by demonstrating a **change of circumstances**. A change in your career might necessitate a change in a visitation schedule. Losing your job, however, wouldn't likely lighten your child or spousal support obligations, at least not right away.

If you would like to modify a child custody or support agreement, you will have to do so through Family Court (generally less costly than Supreme Court, though Supreme Court still has jurisdiction).

>> Does child support reverse if a child changes residence?

If a child changes residence, the court will entertain a petition to amend (or reverse) child support payments, even if there hasn't been a formal change of custody.

>> What should I do to protect myself and my loved ones after my divorce?

There are a few steps you should take immediately after your divorce:

- » Update your will.
- » Pick a new healthcare proxy.
- » Designate a new individual with power of attorney.
- » Change the beneficiaries for your investments and life insurance.
- » Take your former spouse's name off any bank, credit card, or corporate rewards accounts.