

3. Divorce

3.1 Ending the marriage

How can I get a divorce?

To legally end a marriage you need to apply to the **Federal Circuit Court** for a divorce. Orders about property and children are not dealt with as part of a divorce application. You have to make separate **applications** for these orders if you need them.

To get a divorce, you need to prove to the Court that:

- ▶ you have a valid marriage (e.g. by providing your marriage certificate or equivalent documentation); and
- ▶ your marriage has broken down and there is no chance that you will get back together. This is called an **irretrievable breakdown** of your relationship; and
- ▶ you have been separated for 12 months before you applied for divorce; and
- ▶ you are an Australian citizen, a permanent resident or have been living in Australia for at least 12 months before applying for the divorce; and
- ▶ if you have children under the age of 18, there are proper arrangements in place for their care or there are circumstances that warrant making the divorce order, even though the Court is not satisfied that such arrangements have been made.

What does 'separated' mean?

You are considered to be separated from the day either you or your **spouse** decide the marriage is over and communicate this to the other person.

You can get back together for up to three months without re-starting the 12-month **separation** period. However, the time you spend back together does not count as part of the separation. For example: If you separate for two months, get back together for one month and then separate again, the Court will consider that you have been separated for two months not three months.

You may be able to get a divorce if you and your spouse have separated but still live in the same house for financial or other reasons. This is called *separation under one roof*. When you apply for a divorce you will need to prove that your marriage has ended and you and your spouse live separate lives. You do this by providing the Court with two **affidavits**, one from you and one from a friend or family member, telling the Court about your separate lives. For example, you sleep in separate rooms, do not cook each other dinner or do each other's laundry, do not go out as a family, or eat and entertain together. Children over 18 can make this affidavit.

What if I was married for less than two years?

If you have been married for less than 2 years, you need to see a family counsellor to discuss the possibility of reconciliation before you can apply for a divorce. If your spouse is violent and you are afraid to see him or her, discuss this with the counsellor when you make an appointment. The counsellor should arrange separate appointments. If your spouse will not attend counselling, you may still get your divorce by applying for permission (called special leave) from the Court. Unless you urgently need a divorce, it is easier to wait for two years from the date of marriage to apply for divorce.

3.2 Legal process and procedures

What are the steps involved in getting a divorce?

Doing your own divorce application is not too difficult and there are many ways to find help with it if you have any problems or questions.

The *Application for Divorce Kit* on the Federal Circuit Court website (federalcircuitcourt.gov.au) provides a step-by-step guide to doing your own divorce. Most people will need to eFile (file documents over the

internet) their divorce application via the Commonwealth Courts Portal (**the Portal**) (comcourts.gov.au). The Portal is not currently available to same-sex couples wanting to divorce. They will need to contact the National Enquiry Centre (**1300 352 000**) for information about applying for divorce.

A summary of the steps involved in getting a divorce is set out below:

1 Complete an application for divorce online

You will need an email address to register to use the Portal. You will also need access to a printer, scanner and a Visa or a Mastercard to pay for the filing fee. See ► *Chapter 9: Family Law Fees* for more details. A reduced fee may apply in some circumstances. You can apply on your own (this is known as a sole application) or together with your spouse (this is known as a joint application).

You need to complete and print your application. You need to sign the *Affidavit for eFiling Application (Divorce)* in front of a solicitor or **Justice of the Peace**. Once signed and witnessed, you need to upload:

- ▶ the signed *Affidavit for eFiling Application (Divorce)*;
- ▶ your marriage certificate;
- ▶ any affidavits and any other documents for example, evidence of your citizenship, such as your Medicare card;

onto the Portal.

After you pay the filing fee, you will need to choose the location of the court and the date you would like your divorce application to be heard.

The Portal will stamp the documents you uploaded with a court seal. If you have made a sole application, you will need to print the sealed documents and **serve** them on your spouse.

If you have made a joint application, you do not have to serve your spouse with any documents.

2 Serve the application on your spouse

It is very important that you follow the strict rules for serving (formally giving) your spouse with a divorce application. Further information on how to serve is below.

The following documents need to be served on your spouse:

- ▶ the application for divorce;

- ▶ *Affidavit for eFiling Application (Divorce)*;
- ▶ a copy of the *Marriage, Families and Separation* brochure (available on familycourt.gov.au); and
- ▶ any other documents you eFiled on the Portal, except the copy of your marriage certificate.

Your spouse must be served **at least 28 days** before the hearing date if they are in Australia or **42 days** before the hearing date if they are overseas.

You can serve the documents on your spouse in two ways:

▶ **service by post**

If you are confident that your spouse will sign and return an Acknowledgement of Service form, you can try service by post. Without a signed Acknowledgement of Service form, the Court cannot be sure that your spouse received the documents.

▶ **service in person**

You cannot serve the documents on your spouse yourself. You can get a friend or relative aged over 18 to deliver the documents, or use a professional process server.

3 File the service documents

You must prove to the Court that your spouse has been served. You do this by eFiling:

- ▶ if you served your spouse in person, an *Affidavit of Service by Hand (Divorce)*, made by the person who served your spouse with the divorce; and
- ▶ if you served your spouse by post, the *Acknowledgement of Service (Divorce)* form signed by your spouse.

This proves to the Court that your spouse received a copy of your application and the date they received it.

If your spouse was served in person, your spouse can, but does not need to, sign the *Acknowledgement of Service (Divorce)*.

4 The court hearing

If you have made a joint application or there are no children aged under 18 then you do not have to go to court, unless you are asking the court to make other orders about service (see below), or you have been living

separately under the same roof or have been married for less than two years.

If you are asking for the divorce and you have children aged under 18, you need to go to court for the hearing. When you arrive, there will be a list of cases displayed in the court building and a court attendant to direct you to the right courtroom. A court officer will call your name when the Court is ready for your case. Tell the Court you are the **applicant** and that you want the Court to grant your application for divorce. If you have a solicitor, she or he will talk for you.

5 The Court makes its decision

The Court can:

- ▶ grant your divorce;
- ▶ grant your divorce but refuse to make it final until proper arrangements are made about your children;
- ▶ adjourn your case. This means the hearing is postponed to another day so you can give the Court better evidence that your spouse was served or for another reason; or
- ▶ refuse or dismiss your application.

If the Court is satisfied there are grounds for divorce and proper arrangements have been made for your children, it will make a divorce order. The divorce order usually becomes final one calendar month later and is called a final divorce order. The Court can decide to shorten the time after which the divorce order becomes final. A sealed (stamped) copy of the final divorce order will be available on the Portal, which is proof that you are divorced.

What if I cannot find my spouse?

The Court will require proof that your spouse has been served with (formally given) the divorce application. If it is impossible to send a copy of the divorce application to your spouse, the Court can agree to **dispense with service** (i.e. the Court can say that you do not need to serve your spouse). Before doing this, the Court will need to see proof of the ways you have tried to find them by, for example, checking with their family or friends or their last place of work. You will need to eFile an affidavit setting out the attempts you have made to find them.

If you know where one of your spouse's relatives is, the Court can order that you serve that person instead of your spouse. This is called **substituted service**.

What if my spouse is overseas?

You can serve your spouse by post or in person with the assistance of a process server. The Court can order some other type of service, for example, substituted service (service on someone else, such as a relative, or by email).

If I was married overseas, can I still apply for a divorce in Australia?

If you were married overseas you can apply for a divorce in Australia. The test for a divorce is the same as the test applied to marriages made within Australia. That is, you can apply for a divorce as long as you can show the Court that you have a valid marriage, that your marriage has irretrievably broken down, you have been separated for 12 months and that you or your spouse is an Australian citizen, a permanent resident or have been living in Australia for at least 12 months before applying for a divorce.

You will need to provide evidence of your overseas marriage by way of a certificate or official document from the registry of marriages in the country where you got married. If this document is not in English, you also need to provide an English translation of the document. If you can not produce an official document proving your marriage, you can file an affidavit describing your marriage and the reason why you can't produce an official document.

What if I do not want to divorce my spouse?

You cannot legally stop a person applying for a divorce as long as the requirements for a divorce have been met. See ➤ *section 3.1* above for the legal requirements.

However, the law provides for fair **property settlement, maintenance** and **child support** so you should get advice about these matters if they have not already been sorted out.

What if my spouse files for divorce and makes untruthful statements in their application?

You can eFile a Response, putting your version of events in a statement. If you eFile a Response you must then go to court for the hearing. It is best

to have the record set straight, as the divorce application will remain in the court file.

How much will it cost me to get a divorce?

When you apply for a divorce you need to pay for:

- ▶ court filing fee
- ▶ a certified copy of your marriage certificate if you do not have the original
- ▶ translation of marriage certificate (if not in English – see ▶ *What if I need my marriage certificate translated?* in section 3.3 below)
- ▶ a process server to serve your divorce application on your spouse – on average costs between \$70–\$140 (depending on location of spouse)
- ▶ your lawyer's fees if you have used a lawyer to help with your divorce application.

See ▶ *Chapter 9: Family Law Fees* for current fees.

If you and your spouse have a child under 18 years old, you will also need to attend a hearing at court. This could mean taking a day off work.

If your spouse starts the divorce proceedings then you will not have to pay for the divorce.

Lawyers' costs are set by the Family Law Rules and Federal Circuit Court Rules and change each year. Your lawyer can choose to charge more than the set amount as long as they tell you up front, and you sign a costs agreement.

What if I need to apply for a divorce but can't afford the court filing fee?

You may be eligible for a reduced filing fee for divorce applications if you are:

- ▶ entitled to Commonwealth health concessions (see below);
- ▶ receiving Legal Aid, Youth Allowance, Austudy payments or Abstudy or are represented by an approved legal aid scheme or service, including an approved community legal centre;
- ▶ under 18 years old; and/or
- ▶ an inmate of a prison or detained by law in a public institution.

Reduced filing fees for divorce are granted to primary cardholders (but not dependants of the primary cardholder) of a Health Care Card, Health

Benefit Card, Pensioner Concession Card, Commonwealth Seniors Health Card, or any other card issued by Centrelink or the Department of Veterans' Affairs that entitles you to Commonwealth health concessions.

If you do not fall within the categories above but cannot afford court fees, you can still apply for a reduced fee by filing a Reduction of Fees (Financial Hardship) application. The court will consider whether a reduced fee is appropriate, based on your personal circumstances.

3.3 Marriage certificates

What if I can't find my marriage certificate?

If you do not have your marriage certificate, you can order a certified copy from the Registry of Births, Deaths & Marriages. There is a standard fee for a marriage certificate. A certificate can be provided urgently for an extra charge. See ► *Chapter 9: Family Law Fees* for current fees or contact the Registry of Births, Deaths & Marriages: www.bdm.nsw.gov.au

If your foreign marriage certificate is not available, you must eFile an affidavit with your divorce application explaining why the certificate is not available.

What if I need my marriage certificate translated?

If your marriage certificate is not in English, you will need to have your marriage certificate translated into English by a certified translator. The translated version of your marriage certificate must be eFiled, with an affidavit by the translator stating they are competent to make official translations.

You may be able to get your marriage certificate translated for free. Visit translating.dss.gov.au for more information. Otherwise, you can attend your local Service NSW Centre and pay to have your marriage certificate translated into English.

3.4 Life after the divorce

When can I get married again?

One month after your divorce hearing, your divorce order becomes final. Once your divorce order becomes final, your marriage is legally ended and you can remarry. The Court can shorten the one-month period.

What about my will?

It is a good idea to make a new will when something big changes in your life like marriage, divorce or the birth of a child. When you get married, your will is automatically revoked unless it was stated in your will that it was made in contemplation of the marriage. A divorce does not automatically revoke a will. However, if you have a will leaving anything to your spouse, when your divorce becomes final, that gift to your former spouse will be revoked unless your spouse can prove that it was not your intention to revoke their gift.

Most couples own their family home as *joint tenants* (each person owns 100% of the property) rather than *tenants in common* (each person owns a share e.g. 50% of the property). If you own property as joint tenants with your spouse, that property will go directly to your spouse as the surviving tenant and will not become part of your estate when you die (the reverse is also true). Marriage or divorce or a will does not have any effect on a joint tenancy. If you do not want your share of the property to go to your spouse should something happen to you, it is important to pursue a property settlement as soon as possible. You may also want to get legal advice on ending the joint tenancy and then owning the property as tenants in common.

When can I get a property settlement?

You can make a property settlement any time after you separate. Once a divorce becomes final, you must apply to court **within 12 months** if you need a property settlement or **spousal maintenance**. Generally, it is better to do a property settlement first or at the same time as applying for a divorce. If your spouse applies for divorce, seek legal advice to get a property settlement if you have not already done so.