

3. Divorce

3.1 Ending the marriage

What is a divorce?

A divorce is the process to legally end a marriage. Once you are divorced, you can legally re-marry.

Divorcing does not sort out arrangements for children or how the property will be divided. You have to make separate **applications** for orders about children and property/spousal maintenance if you need them.

How can I get a divorce?

To legally end a marriage, you need to apply to the **Family Law Court** for a divorce.

Australia has a 'no fault divorce' system. This means that when granting a divorce, the court does not consider the reason/s why the marriage has ended and neither spouse has to prove that the other did (or did not) do something which caused the breakdown of the marriage.

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;
- ▶ 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, that there are proper arrangements in place for their care (the court wants to know information like who they live with, time spent and communication with both parents, their health and wellbeing, educational arrangements, financial support). The court does not require you to have formal orders about your children.

If the court is satisfied that you have proved these things, the court will grant the divorce.

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 and 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 even though you still live (or lived for part of the 12 months) in the same house. 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 two years, you usually 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 your divorce.

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 the document is not in English, you also need to provide an English translation of the document. If you cannot produce an official document proving your marriage, you can file an affidavit explaining your marriage and the reason why you can't produce an official document.

How much will it cost me to get a divorce?

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

- ▶ the 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 3.4** below)
- ▶ if you use one, a process server to serve your divorce application on your spouse – on average costs between \$70–\$140 (depending on location of spouse)
- ▶ if you use one, your lawyer's fees.

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

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

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 a divorce application 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.

Can I get legal aid for a divorce?

You may be eligible for a grant of legal aid for your divorce application if you:

- ▶ meet the means test (the income test);
- ▶ meet the merits test (is it fair and reasonableness to use public money for your case);
- ▶ meet the complexity test (e.g. language barriers, difficulties in proving the marriage, need for substituted or dispensed service, forced marriage); and
- ▶ meet the personal circumstances test (is experiencing, or at risk of, domestic or family violence, or ongoing health condition or disability or is currently experiencing significant financial hardship.)

Your grant of legal aid will usually mean you have a solicitor to represent you in preparing your application and appearing for you at the hearing and it will usually cover your costs such as filing fees, service and translation of a marriage certificate etc.

3.2 How do I apply for a divorce?

What are the steps involved in getting a divorce?

Doing your own divorce application is not too difficult and you can get legal advice and assistance with forms from Legal Aid or some community legal centres.

The *Application for Divorce Kit* on the Family Law Court website (fco.gov.au) provides a step-by-step guide to doing your own divorce. You will need to eFile (file documents over the internet) your divorce application via the Commonwealth Courts Portal (**the Portal**) (comcourts.gov.au).

If you are filing an application for divorce, you are called the Applicant and your spouse is called the Respondent.

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 or with your spouse (this is known as a joint application).

You need to complete and print your application. You must sign the divorce application in front of a **solicitor** or **Justice of the Peace**. Once signed and witnessed, you need to upload the following onto the portal:

- ▶ the signed divorce application;
- ▶ your marriage certificate;
- ▶ any affidavits; and
- ▶ any other documents e.g. evidence of your citizenship by way of your Medicare card and any documents to support an application for a filing fee reduction.

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. You will need to print the sealed (stamped) documents and **serve** them on your spouse.

2 What you need to serve on your spouse

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.

The following documents need to be served on your spouse:

- ▶ the application for divorce;
- ▶ a copy of the *Marriage, Families and Separation* brochure (available on fcfcoa.gov.au); and
- ▶ any other sealed documents you eFiled on the Portal, like an affidavit.

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

3 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. You can download a Divorce Service Kit (do it yourself kit) from the Family Law Court website. If your spouse is in prison, please see below for further information about how to serve a person who is in prison.

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

- ▶ Service by post;
- ▶ Service in person (by hand).

Service by post

If you are confident that your spouse will sign and return an Acknowledgement of Service form, you can serve by post. The Acknowledgement of Service shows the court that you have given a copy of the divorce application to your spouse.

To serve your spouse or their lawyer by post, you should:

- ▶ send your documents by pre-paid post in a sealed envelope to their last known address – remember to record the date you sent your documents;
- ▶ ask your spouse or their lawyer to sign Part C of the Acknowledgement of Service (Divorce) and return it to you;
- ▶ provide a stamped, self-addressed envelope for your spouse or their lawyer to return the signed Acknowledgement of Service (Divorce) to you.

If your spouse or their lawyer does not sign and return the Acknowledgment of Service (Divorce), you will have to serve them by hand.

Service in person (by hand)

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

To serve your spouse or their lawyer by hand, the server must:

- ▶ hand your spouse or their lawyer your Application for Divorce and supporting documents, or put the Application for Divorce and supporting documents down in your spouse's presence and explain what the documents are;
- ▶ ask your spouse or their lawyer to sign Part C of the Acknowledgment of Service (Divorce);
- ▶ sign and have witnessed by an authorised person (a Justice of the Peace or lawyer) the Affidavit of Service by Hand (Divorce).

It is helpful to partially complete the Affidavit of Service by Hand (Divorce) to give to the server when you ask them to serve your Application for Divorce and supporting documents.

You may also want to give the server a photo of your spouse to make it easier for them to identify them. If you do, you must make sure that a copy of this photo is attached to the Affidavit of Service by Hand (Divorce) when it is filed.

What if my spouse is overseas?

You can serve your spouse by post or in person. The court can order some other type of service, for example, substituted service (service on someone else, such as a relative, or by email). See below for more information about substituted service.

Service where your spouse is in prison

If your spouse is in prison, there are different rules you must follow to serve them with your Application for Divorce. You can find a step by step guide here: [Serving your spouse in prison](#).

4 File the service documents

You must prove to the court that your spouse has been served. You do this by going to the Portal and eFiling:

- ▶ if you served your spouse by post, the *Acknowledgement of Service (Divorce)* form signed by your spouse; or
- ▶ 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.

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 does not need to sign, and you do not need to eFile, the *Acknowledgement of Service (Divorce)*.

If your spouse signed the *Acknowledgement of Service (Divorce)* and the server does not know your spouse, you will need to complete and eFile an *Affidavit* proving signature and attach the *Acknowledgement of Service (Divorce)* to it. The person who witnesses your signature on the *Affidavit proving signature (divorce)* must also sign the Annexure Note on the *Acknowledgement of Service (Divorce)*.

5 The court hearing

If you have made a joint application or there are no children aged under 18, then generally, the court will not hold a divorce hearing.

There are some exceptions to this, for example, if you are asking the court to make other orders about service (see below), or if you have been living separately under the same roof or you have been married for less than two years.

If any of the above circumstances apply or if you have children aged under 18, the court will hold a divorce hearing. This will usually be over the phone.

The Portal will give you the information about your court hearing including the date and time of your hearing, what telephone number you need to call and the code you need to enter. It's a good idea to log into the Portal a few days before your hearing to get this information.

A court officer will come onto the phone when the court is ready for your hearing. You can let the court officer know 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.

6 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**.

3.3 What if my spouse serves me with an application for divorce?

If you are served with an application for divorce, you are called the Respondent and your spouse is the Applicant.

What if my spouse serves me with an application for divorce and I do not want to divorce?

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.

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 there will be a hearing. It is best to have the record set straight, as the divorce application will remain in the court file.

3.4 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: bdm.nsw.gov.au.

If you were married overseas and you don't have a copy of your marriage certificate, you will need to apply for a copy from the country where you were married. If you can not obtain a copy of your foreign marriage certificate, you must file 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.homeaffairs.gov.au for more information. Otherwise, you can attend your local Service NSW Centre and pay to have your marriage certificate translated into English.

3.5 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. See ► *Chapter 7* for information on property settlement and spouse maintenance.