

Divorce – the basic facts

When you end a marriage, it is important to seek legal advice, especially if you have children and joint property.

In Queensland, all applications for divorce must be made in the Federal Circuit Court of Australia. Either spouse can apply, by lodging the application form, plus the marriage certificate, with the Court, but only after a minimum 12 month period of separation.

If you've been married for less than two years (calculated from the date of the marriage to the date of applying to the Court for a divorce), you will also need a certificate from a counsellor stating that you've considered reconciliation.

The application can be prepared without a lawyer, and if there are no children of the marriage under 18 years old the couple don't have to be in Court. Otherwise, if you have made a sole application and there is a child of the marriage under 18 years you must attend the Court hearing. It is recommended that you engage legal assistance in this case.

You should allow several months from the time you file for divorce to the actual date of divorce. If there are problems with your application it may take longer.

Separation

Separation must be proven if it is disputed by the other party at a later time. Therefore, it is a good idea to confirm the separation in writing, even if this is via text message or email, close to the date of separation.

In the case of a divorce, the date of separation is recorded on the Application for Divorce and is sworn to be true and correct by the Applicant. If there is a challenge to the date of separation by the Respondent, the Court will not grant your divorce until that issue is determined at a Hearing.

Separation can take place under one roof and it can also be a gradual process, as long as you can prove you live separate lives.

You can get back together for up to three months without restarting the 12 month separation period. For example, if you are separated for four months, get back together for almost three months and then separate again for eight months, this will be considered a total of 12 months' separation. However, if you were back together for four months only the most recent eight months would count towards the 12 months separation.

If there is a dispute about your date of separation, the Court will examine a number of factors to determine when and if a separation has taken place, such as:

- did you sleep in separate rooms or together after the alleged date of separation;
- did either of you perform domestic duties such as cooking and washing for each other after your agreed date of separation;
- did you lodge or sign any documents informing government agencies of the separation, such as Applications for Centrelink or ATO documents as a single person;
- did you continue to be intimate with your spouse after the date of separation, and
- was it publicly known (did you tell friends or family), that you had separated.



Children, property and maintenance decisions

The granting of a divorce does not decide issues about children, property and maintenance.

If there are children aged under 18 years, a Court can grant a divorce only if it is satisfied that proper arrangements have been made for their welfare.

An application for property settlement or maintenance can be made at any time after separation, up to 12 months after the divorce is finalised. You will need the Court's permission to apply after the 12 months, but please note, this is not automatically granted.

Overseas marriages

People married overseas can apply for a divorce if one or both of them is an Australian citizen or resident or regards Australia as their permanent home. The Court will need a copy of the marriage certificate.

If your marriage certificate is not in English, you will need to get an English translation. You will also need an affidavit from the translator, which must state his or her qualifications to translate, and affirm that the translation is accurate, and that "the attached copy of the marriage certificate is a true copy of the translated marriage certificate".

Opposing a divorce

You may not want a divorce for religious reasons, or because you feel that the marriage is not over. However, not wanting a divorce is not sufficient grounds for opposing a divorce application.

Under the law, the only ground is 'irretrievable breakdown of the marriage'. If your spouse wants a divorce and you have been separated for a year or more, the Court will grant the divorce. You do not have to agree to the divorce or sign anything. The divorce order will still be made.

You can suggest relationship counselling but your spouse does not have to agree. If you need help finding a counsellor, visit www.familyrelationships.gov.au, or call 1800 050 32.

Annulment

A marriage can be annulled by Order of the Court if the law does not recognise it as a valid marriage. (This is different from religious procedures for annulment).

A marriage is not legally valid when:

- either person was already married at the time of the marriage
- the relationship between the people prohibits marriage (e.g. blood related)
- either person is not of marriageable age (i.e. 18 years, unless you have a Court order)
- the ceremony was not valid (e.g. unqualified celebrant or incorrect paperwork)
- either person did not give their real consent (e.g. not mentally capable of giving consent)
- they were tricked or mistaken (e.g. the true identity of the other party was not disclosed)
- there was duress (e.g., using threats or force to get consent).



Partner consent

You are required to provide a copy of the divorce application to your spouse. If you are unable to locate your spouse, you can apply to the Court for the divorce to go ahead, however you must show the Court that you have tried to contact your spouse.

Under the law, the only ground is 'irretrievable breakdown of the marriage'. If your spouse is opposing the divorce and you have been separated for a year or more, the Court will grant the divorce. You do not need their agreement to divorce.

Court Attendance

Court attendance is required only if:

- you have filed a sole application and there are children under the age of 18 years of age or
- you have indicated that you wish to attend the application.

If it is difficult for you to attend in person you can ask the Court for permission to appear by telephone.

Do-it-yourself divorce kits

The Federal Circuit Court has a divorce kit which includes an application form and a guide to completing it. Applications for Divorce attract a filing fee.

If you don't have your ex-partner's agreement to divorce, there is a dispute about your separation, you have children under 18 or any other complicating factor (such as you live overseas) we recommend you seek help from a family lawyer.

Cost of a Divorce

You are required to pay a filing fee (currently \$845) to the Court when you apply for a divorce. You may be eligible for a fee exemption or waiver.

In addition to this, you may have to take into account any legal fees that you incur along the way.

More information

For more information on divorce or other family matters, and to understand your rights and responsibilities before applying for a divorce, contact our experienced family lawyer, Mark Orchard, for a free initial consultation.

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