



APPLYING FOR A DIVORCE: Information Sheet

Throughout the year we assist dozens of clients in applying for divorce through the *Federal Circuit and Family Court of Australia*. Whilst the *Family Law Act 1975* introduced 'no fault' based divorce in Australia, the process of obtaining a Divorce Order remains a long way removed from a simple exercise in box ticking. The combination of legal and procedural requirements that exist, often lead people to seek our advice either prior to or during the divorce application process. This Information Sheet is designed to address some of the more common issues seen in practice to better assist you in deciding when and how to go about seeking a divorce.

What is an application for divorce?

An *Application for Divorce* is made through the *Federal Circuit and Family Court of Australia* via the *Commonwealth Courts Portal* (www.comcourts.gov.au). Subject to various preconditions discussed below, a divorce application is made to finalise the end of a marriage when it has broken down irretrievably with no possibility of reconciliation.

Who can apply for a divorce?

An *Application for Divorce* can be made by you (or your spouse) as an individual (sole application) **or** both of you together (joint application).

Do you need to engage a lawyer for a divorce?

No. If you are competent with computers and have access to the internet, have an email address and have access to a printer and quality scanner then you have the necessary tools. The process is however highly procedural whereby there are a number of steps to follow that can become confusing. A lawyer can assist or represent you in that process.

What is the cost of a divorce application?

At the time of writing, the Court filing fee for an *Application for Divorce* is \$940.00 which is payable at the time of lodgement.

If you have a pension or concession card or are experiencing significant financial hardship, you may be eligible for a reduced fee which is currently \$310.00.

Please note, if you are filing a joint application, both parties must be eligible for the reduced fee in order to obtain that discount.

Who pays for the filing fee?

The party making the *Application for Divorce* is required to pay the filing fee at the time of lodgement.

If you wish to share the cost of the filing fee with your spouse, you should raise this with them prior to filing your *Application for Divorce* and reach your own agreement in that regard. There is no legal requirement for the filing fee to be shared between the parties.

What is the ground for obtaining a divorce?

Before 1975 obtaining a divorce was not easy. The party wanting a divorce was required to prove that their spouse was 'at fault' in some capacity in order for the Court to grant a Divorce Order. This included reasons such as: adultery, insanity, drunkenness, abuse, abandonment amongst many others. Since the introduction of 'no fault' divorce via the *Family Law Act 1975*, a party has to do no more than satisfy the Court that the marriage has broken down irretrievably with no reasonable likelihood of reconciliation.

Are there time limits for applying for a divorce?

Before you can apply for a divorce, you and your spouse must have been separated for a minimum period of 12 months with the no reasonable likelihood of cohabitation resuming. Separation is most easily established when you and your spouse have been living in separate homes.

What if you and your spouse are separated but still living in the same home?

It is possible to establish you have been separated for 12 months or more despite living under the same roof for some or all of that period. There are however additional steps required to satisfy the Court that you were genuinely 'separated' for that period. To prove separation in this circumstance, you must:

- (a) File an affidavit from an independent third party addressing various factors evidencing 'separation' derived from both the *Family Law Act 1975* and case law;
- (b) File an affidavit made by you (the applicant) addressing the factors evidencing 'separation'; and
- (c) File an affidavit made by your spouse addressing the various factors evidencing 'separation' (if it is a joint application for divorce).

The evidence addressed in those affidavits may include:

- ✓ Having ceased intimacy and sexual relations.
- ✓ Maintaining separate bedrooms
- ✓ Maintaining separate bank accounts
- ✓ Holding yourselves out as separated to friends and family.
- ✓ Not attending social gatherings together.
- ✓ Attending to your own household work/chores.

If you and your spouse separate, then reconcile, then separate, can that initial period of separation be taken into account for the purposes of the 12 month separation threshold?

Yes, in certain circumstances.

In summary, where cohabitation has resumed on a single occasion but within a period of 3 months after the resumption of cohabitation the parties separate again and remain separated, then the periods of separation before and after the period of resumed cohabitation can be added together to make up one total period of separation.

What if I have been married less than 2 years?

An *Application for Divorce* shall not be filed within 2 years after the date of marriage without first obtaining the permission of the Court.

In the circumstance where you have been married less than 2 years but still wish to obtain a divorce, you must attend marriage counselling with your spouse to discuss whether reconciliation is a possibility. The Court needs a certificate filed with your *Application for Divorce* evidencing the professional counselling obtained and that reconciliation is not possible.

The exceptions to the requirement to undergo marriage counselling with an approved family counsellor include where you have experienced family violence or cannot locate your spouse to arrange for counselling to occur.

What if there are children of the relationship under the age of 18 years?

All children of the marriage whether biological or not, must be disclosed in the *Application for Divorce*. The Court must be satisfied that there are proper arrangements in place for their care, welfare and development or that there are circumstances by reason of which the divorce order should be made even though the Court is not satisfied that such arrangements have been made.

This requires full disclosure of details of each child, including: their name, date of birth, their health, the year of schooling they are attending, the name of the school they attend, how they are performing at school, how they spend time between their parents and child support being provided amongst other matters.

What documents are initially required to be submitted with a divorce application?

All divorce applications must include a completed *Application for Divorce*, Marriage Certificate, health care/concession/pension card (if applying for the concessional filing fee) and *Affidavit for e-filing Application*.

How do you serve your spouse with an *Application for Divorce*?

Once you have filed your *Application for Divorce*, you are required to serve certain documents on your spouse and provide proof of service to the Court. This can be done by post or by personal service.

The minimum documents required to be served are:

- (a) Sealed ('court stamped') copy of the *Application for Divorce*;
- (b) *Marriage, Families & Separation* brochure; and
- (c) *Acknowledgment of Service* (for your spouse to sign and return to you).

There is a separate DIY "Divorce Service Kit" available on the *Federal Circuit and Family Court of Australia* website (www.fcfcga.gov.au) which contains all necessary forms and instructions to enable you to comply with the service requirements.

What if I cannot locate my spouse in order to serve them?

If you have made all reasonable attempts to locate your spouse in order to affect service upon them but still cannot locate them, then you will need to file an *Application in a Proceeding* seeking either:

- (a) An order for substituted service; or
- (b) An order dispensing with service of the *Application for Divorce*.

Your *Application in a Proceeding* must be accompanied by an affidavit evidencing the attempts you have made to locate your spouse and justifying why you say the particular order you seek is appropriate in the circumstances.

What if you and your spouse are making a joint application?

If you and your spouse are jointly applying for divorce, then service is not required as you and your spouse must lodge a sworn *Affidavit for e-filing Application* together. This requires you and your spouse either at the same time or separately, attending upon a Justice of the Peace or Commissioner for Declarations to swear that all information provided in your electronically filed *Application for Divorce* is true and correct.

Can your spouse object to you seeking a divorce?

Your spouse can file a *Response to Divorce* if they take issue with your *Application for Divorce*. Typically however there are only two grounds that can be raised to formally object to a divorce taking place, namely:

- (a) That you have not been separated 12 months; or
- (b) That the Court does not have jurisdiction to grant a divorce.

If your spouse has concerns regarding the care arrangements in place for the child or children of the marriage, then this should be dealt with by way of either commencing *Family Dispute Resolution* mediation or filing an *Initiating Application* seeking parenting orders, not by way of objecting to the *Application for Divorce*.

Do you have to attend Court?

Unless the Court notifies you otherwise, you only have to attend Court for your divorce hearing if:

- (a) There are children of the marriage under 18 years of age; or
- (b) You are making an application for divorce having lived under the same roof after separation.

In all other circumstances you can elect whether you wish to appear before the Court when your *Application for Divorce* is considered by the Registrar.

If you are required to appear before the Court at the hearing, you may be able to appear via telephone or audio/visual link.

What will happen at the Divorce Hearing?

If you appear at your divorce hearing, you should have with you a copy of each and every document you have filed. The Court may ask you some further questions in relation to your *Application for Divorce* in order to clarify any matters of concern or matters where there is a lack of detail. If the Court is satisfied you have met the legal requirements for the granting of a divorce, then the Court will grant you a Divorce Order.

If the Court is not satisfied that all requirements have been met to grant a divorce, then the Court may adjourn the hearing to allow you an opportunity to rectify any shortcomings which may include the filing of further affidavits.

In the circumstance where you were not aware you needed to attend your divorce hearing, you do not attend the hearing and the Court requires more information from you, then the Court will write to you and alert you to a new date you are required to attend Court.

When will your divorce become final?

Your Divorce Order takes effect one month and one day after the Court makes the order granting the divorce. A copy of the Divorce Order and Certificate that the Divorce Order has taken effect will be uploaded to your *Commonwealth Courts Portal* to enable you to print off for your own records. It is only once the Divorce Order has taken effect that you are free to remarry.

How can the North West Community Legal Centre help?

We can assist any person seeking a divorce, wishing to respond to an *Application for Divorce* or having difficulty at any point in the process by way of one off advice or assistance. Depending on your personal circumstances, you may be eligible for ongoing legal assistance whereby we draft and file the necessary documents to enable you to obtain a Divorce Order.

If you have any queries, please make an appointment to speak with one of our lawyers free of charge.

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