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The Personal Law Firm

APPLYING FOR DIVORCE

Since the major amendments to the Family Law Act in 1975, the only ground now available for divorce is *irretrievable breakdown of marriage*.

What is required for me to apply for a divorce?

The Family Law Act sets certain criteria which must be satisfied before a divorce is granted:

1. you must be separated for a continuous period of 12 months and you must have decided that your marriage is at an end;
2. you must be either domiciled in Australia, hold Australian citizenship or be resident in Australia for a minimum of 12 months before the Application is filed. It is not necessary for you to have been married in Australia, or for either of you to be in Australia at the time you apply for your divorce, or at the time your divorce is dealt with by the Court.

Do I need to file anything with my Application?

Yes, you will need to file:-

1. the original or a certified copy of your marriage certificate; and
2. a filing fee of \$405, which is possible to waive if substantial financial hardship can be shown or you are in receipt of a pension or Commonwealth benefit.

Is it necessary for one of us to move out of the house when we separate?

If you and your spouse have lived under the same roof at any time during the period of 12 months prior to applying for a divorce it will be necessary to provide to the Court additional evidence to show:-

1. that all normal marital activities have ceased, including performing household duties for each other such as shopping, cooking meals, washing and ironing, as well as sleeping in separate bedrooms; and
2. that family, friends and the general public no longer view you as a "couple".

If sufficient evidence cannot be provided to the Court, the Court may rule that cohabitation did not cease, thereby requiring you to formally separate for a further 12 month period.

What if my spouse and I separate, and then decide to reconcile?

You may attempt to reconcile during the 12 month period for a maximum period of three months. If your attempt at reconciliation fails, then the separation period continues on from prior to the attempted reconciliation. For example, if you separate

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for four months, then reconcile for two months, and then separate again, you need only wait another eight months before you can file your Application.

Is it necessary for either of us to attend marriage counselling?

It is a requirement of the Court that you attend counselling with an approved family and child counsellor, if separation occurs within a two year period of being married.

What is the difference between a sole Application and a joint Application for divorce and what happens after I file it in the Court?

A sole Application is an Application filed solely by yourself and a joint Application is filed by both you and your spouse. When you file your Application it will be given a hearing date. This is the date that the Magistrate will decide whether all the evidence required by the Court has been provided, and if so, grants your divorce. This date is normally about two to three months from the date of filing a sole Application and about two months from the date of filing a joint Application.

If a sole Application is filed, it is necessary that the Application is “served” on your spouse at least 28 days prior to the hearing date. Your spouse will then need to sign an *Acknowledgment of Service* form, which acknowledges that they have received the Application. You must then sign an *Affidavit of Proof of Signature* which verifies that the signature on the *Acknowledgment of Service* is that of your spouse. The person who served your spouse is to then sign an *Affidavit of Service*, which states how and when service was carried out. All these documents must be filed in the Court prior to the hearing date. An important point to remember is that the Application must be served on your spouse by a person other than yourself.

What if my spouse refuses to accept service, or cannot be located?

If your spouse refuses to sign an *Acknowledgment of Service*, it is then necessary to provide a photograph of your spouse, and for the person serving the Application to confirm in their *Affidavit of Service* this was the person who was served. If you do not know the whereabouts of your spouse, you can still apply for a divorce, but the Court will require evidence that you have attempted to locate them by:-

1. attempting service at their last known address;
2. making enquiries with any family and friends of their whereabouts or place of employment;
3. placing notices in newspapers.

All of the above attempts will have to be evidenced by *Affidavits*, receipts for registered post and cuttings from newspapers.

What happens about the children?

If there are children of your marriage, or children who were ordinarily part of your household while you were married, under 18 years of age, the Court will sometimes require evidence from the parent with whom the children live in relation to the arrangements for these children. This evidence can be in the form of an *Affidavit* or oral evidence given to the Court at the hearing. The evidence must set out arrangements for their supervision, education, health, financial arrangements (eg any maintenance or pensions received) and any contact arrangements which have been put in place with your spouse. The Court is required to either make a declaration that it is satisfied that proper arrangements have been made for the children, or to make a declaration that there are special circumstances and the divorce should proceed. The

Court will only grant a divorce if this evidence has not been provided, in exceptional circumstances.

What happens in Court?

On the date that the Application is listed for hearing, and provided that the Court has all of the evidence it requires, the Court will pronounce a *decree nisi of dissolution of marriage* (this is the Court Order which provisionally ends your marriage). The divorce will automatically become absolute (or final) one month and one day later and the Court will send a *decree nisi and decree absolute*, which is stamped with the Court seal, to each of the parties. Once the divorce becomes final, you are free to remarry if you wish to do so.

Is it necessary for me to attend Court?

It is necessary for you, or a solicitor appointed to represent you, to attend Court for the hearing if there are children of the marriage. If there are no children of the marriage, it is not necessary for you to attend at the hearing.

Is there anything else I need to know?

One very important point to note is that if you have not already started proceedings in the Family Court in relation to the property of the marriage, you have a period of 12 months from the date your divorce becomes final to commence proceedings in the Court to finalise your property settlement.

Butlers

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