

Applying for Divorce

The Australasian Lawyers Group Pty Ltd trading as Butlers, Barristers & Solicitors

Since the introduction of 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 out certain criteria which must be satisfied before a divorce is granted:

1. you must be separated for a period of 12 months and you must have decided that your marriage is at an end; and
2. you must be either domiciled in Australia (ie. you regard Australia as your home and intend to live in Australia indefinitely); or 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 copy of your marriage certificate; and
2. a filing fee of \$550.00, which may be waived 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?

No but if you and your spouse have lived under the same roof at any time during the 12 month period prior to applying for a divorce, it will be necessary file 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 be physically separated for a 12 month period.



All mail to:

PO Box 460
NEDLANDS WA 6009

Nedlands (Head Office)
83-85 Stirling Hwy
NEDLANDS WA 6009

Fremantle
3/18 Parry Street
FREMANTLE WA 6160

Bunbury
119 Beach Road
BUNBURY WA 6230

Associated Firm
Malaysia
Jerald Gomez & Associates
KUALA LUMPUR
MALAYSIA

Telephone calls
Answered 24 hours

Telephone:
(08) 9386 5200

Country Calls:
1800 675 200

Facsimile:
(08) 9386 4650

Email:
legal@butlers.com.au

Website:
www.butlers.com.au

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What if we separate, and then decide to reconcile?

You may attempt to reconcile during the 12 month period for a maximum period of 3 months. If your attempt at reconciliation fails, then the separation period continues on from prior to the attempted reconciliation. For example, if you separate for 4 months, then reconcile for 2 months, and then separate again, you need only wait another 8 months before you can file your divorce 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 2 years of marriage.

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 an Application is filed, it will be given a hearing date. This is the date that the Court will decide whether all the evidence required has been provided, and if so, grant the divorce. This date is normally about 2 to 3 months from the date of filing a sole Application and about 2 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* that 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;

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3. placing notices in newspapers.

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

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 normally require evidence regarding arrangements for the children from the parent with whom the children live as to the arrangements for the 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 agreed with the other parent. 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 and when does the divorce take effect?

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

Is it necessary for me to attend Court?

You or your solicitor will need to attend the Court hearing where there are children of the marriage, or the parties have separated under the one roof. For all other matters, it is not necessary for you to attend the hearing unless the Court specifies otherwise.

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 to resolve the financial issues of the marriage, including spousal maintenance, you have a period of 12 months from the date your Divorce becomes final to commence Court proceedings.

You should also note that any Will made before a Divorce is revoked when the Divorce Order takes effect unless a contrary intention is expressed in the Will. We would be happy to also assist you review your Will and estate arrangements.

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Butlers

At Butlers we pride ourselves on being “The Personal Law Firm”. Our commitment at Butlers is to make the law more accessible, affordable, understandable and human. We aim to reduce your concerns by speaking and writing in plain English, cutting through legal jargon and keeping you informed at all times. Through it all, we work closely with your family’s accountant, bank manager, financial adviser, and other professionals as required. We therefore encourage you to contact us if we may be of any assistance

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