

# Divorce

***This information is based on the law as at April 2014. It is written for the use and benefit of women in the Australian Capital Territory and Region. The information is a general guide to the law and should not be relied upon as a substitute for legal advice.***

## **What is a divorce?**

A divorce is the legal end of your marriage. It does not include orders about your property and children. You need to do those separately.

You have to be separated for 12 months before you can apply for your divorce. In some circumstances, you can be separated while still living under one roof (see below).

If you do your divorce before your property settlement, then you have another 12 months to file an Application for property settlement. If you don't file your Application within this time, you will have to ask the Court for leave to file out of time. This will not always be granted.

## **What are the grounds for divorce?**

To get a divorce you need to show that your marriage has broken down and that there is no chance that you will get back together (reconcile). You show this by proving that you have been separated from your Husband for 12 months. This is the only ground for divorce in Australia.

## **How do I get a divorce?**

To get a divorce you file a Divorce Application in the Federal Circuit Court. See the Family Law Courts website at [www.familylawcourts.gov.au](http://www.familylawcourts.gov.au) for a Divorce Application Kit.

If you file the divorce application on your own, it is a *sole* Application where you are the 'applicant' and your Husband is the 'respondent'.

If you file for a divorce together with your Husband, it is a *joint* Application where you and your Husband are both applicants. To do this you need the co-operation of your Husband. A joint application is much easier than a sole application as you do not need to serve any documents (see below) and you do not need to attend Court, even if there is a child under the age of 18.

## **What if there are children?**

If there are children under 18 years of age then you need to give information about *time and communication with the other parent, financial support, health and education* for each child.

Examples of how to complete these headings are as follows:

- a) *time and communication with the child* - Sarah spends time with her Father on each alternate weekend from 5pm Friday to 5pm Sunday and half of all school holidays, as per the order made in the Family Court at Canberra, by consent, on 1.6.2013.
- b) *financial support* - The Wife receives \$100 a week (as assessed by the Child Support Agency) from the Husband. The Wife is otherwise able to support Sarah through the income she receives from her sole parent payment.
- c) *health* - Sarah is in good health, except for a mild case of asthma.
- d) *education* - Sarah is in Year 7 at the Lyneham High School and is progressing well with her studies.

The Court requires information about every child who was treated as a member of your family when you separated, not just biological children. This may include step-children, adopted children and any other child who was treated as a member of your family immediately before you separated.

### **What is the difference between an Application for Divorce and Parenting Orders?**

Giving information about who a child lives with and when the child sees the other parent in a Divorce Application does not mean that the Court makes a parenting order when it grants the divorce. You need to apply separately for parenting orders. See the Centre's fact sheets on *Parenting Orders in the Family Court and the Federal Circuit Court*.

### **How to file a Divorce Application**

Once you have completed your Divorce Application, it needs to be signed by you in the presence of a Justice of the Peace (JP) or a solicitor. You then need to file at Federal Circuit Court Registry:

- The Application for Divorce (plus two photocopies);
- A copy of your marriage certificate;
- If you are not an Australian citizen by birth or descent, a copy of your Australian citizenship certificate, Australian passport, visa or other proof of citizenship or permanent residency.

The current filing fee of \$845 must be paid when you file your application. You may apply for a reduced fee of \$280 if:

- You are on a pension or have a health care card. Here, you file an Application for Reduction of Payment of Divorce or Decree of Nullity – General.
- You have financial hardship. Here, you file an Application for Reduction of Payment of Divorce or Decree of Nullity – Financial Hardship.

If you have already filed documents at the Court in relation to other family law matters you may have already filed a copy of your marriage certificate. There is no need to file another copy. If this is the case, then you will also have already received a *file number* from the Court, which should be inserted on the top right hand corner of your Divorce Application.

When you file the documents at the Registry, they will keep the original Divorce Application, and return to you the two copies which have been stamped with the Court seal. You will be given a hearing date and time, which will be written on the top right hand corner of the Divorce Application, together with the file number. You will also be given two copies of a brochure titled *Marriage, Families and Separation* (the brochure).

Divorce applications can now also be filed electronically through the Commonwealth Courts Portal. You will need to register at [www.comcourts.gov.au](http://www.comcourts.gov.au). See the 'Guide to using the Commonwealth Courts Portal' at the Family Law Courts website for further information.

### **Separation under One Roof**

It is possible for you and your Husband to be separated while sharing the same home for part or all of the 12 month separation period. Here, you and your Husband must lead separate lives, for example, you agree that you are separated, you sleep in separate rooms, you don't cook or clean for each other and you don't have sex.

If you are relying upon a period of time when you and your Husband were separated under one roof, then you will need to file affidavits proving you were in fact separated. For sole applications, you must file your own affidavit and an affidavit by an independent person (for example, a family member or friend). For joint applications, you and your Husband must both file a separate affidavit. See the fact sheet 'Separated but Living under One Roof' at the Family Law Court website for further information.

### **Reconciliation**

You and your Husband can attempt to reconcile (once or several times) as long as those periods of reconciliation are for no longer than three months. The time spent reconciled cannot be included in calculating the 12 month separation period.

### **Marriages of less than two years**

If you have been married for less than two years when you apply for divorce you must either attend counselling to discuss the possibility of reconciliation or seek permission from the Court to apply for a divorce without counselling. See the fact sheet 'Have you been married less than two years?' at the Family Law Courts website for further information.

### **How does my Husband find out about my Application if it is a sole Application?**

After the documents have been filed at the Federal Circuit Court, it is then up to you to arrange for one of the sealed (stamped) copies of the Divorce Application, together with the brochure, to be served on your Husband. This is not something the Court will do for you. Proving to the Court that your Husband has in fact been served with your Divorce Application is often the hardest part of your divorce proceedings. You can serve him in one of two ways: by post or by hand.

### **Service by post**

If your Husband is prepared to accept service of your Divorce Application by post, then you send to him:

- the sealed Divorce Application (with the Notice of Application for Divorce attached to the front page);
- any other documents you filed at the Court (except the marriage certificate);
- the brochure *Marriage, Families and Separation* given to you by the Court;
- an Acknowledgment of Service form;
- a stamped, self-addressed envelope, and
- a letter asking your husband to sign the Acknowledgment of Service form and return it to you.

By signing the Acknowledgment of Service form, your Husband is not necessarily agreeing with the contents of your Divorce Application, he is simply acknowledging the fact that he has received it, together with the brochure. The Acknowledgment of Service form need only be signed by your Husband; he does not need to have his signature witnessed by a JP or a solicitor.

Once the Acknowledgment of Service form has been returned to you by your Husband, you must then complete an Affidavit of Service by Post stating you recognise your Husband's signature, and have the Affidavit witnessed by a lawyer or a JP. The witness must also complete the Annexure Note on the Acknowledgment of Service form. You attach the signed Acknowledgment of Service form to the Affidavit of Service by Post, and file them plus a photocopy of each in the Registry prior to your hearing date.

Although service by post is easy and cheap, it depends on your Husband's co-operation. If your Husband does not return the Acknowledgment of Service form to you, then you will have to serve your Divorce Application by hand and you may need to have the hearing adjourned until you can prove that he has been served.

### **Personal service by hand**

If you do not think that service by post will work then you will have to arrange for your Divorce Application, the Acknowledgment of Service form and the brochure to be served personally upon your Husband. If you can afford it, then it is best for you to get a professional process-server to do this for you. You will find local process-servers listed in the Yellow Pages. If you cannot afford a process-server, then you will have to find a friend or relative over 18 who is prepared to serve the Divorce Application for you. *You cannot serve the Divorce Application yourself.*

The server (that is, the person serving the Divorce Application and brochure) must identify your Husband (either by knowing him personally, using a photograph or asking questions). The server must then hand the documents to your Husband and ask him to sign the Acknowledgment of Service form. If your Husband refuses to sign or accept the documents, the server can put them down and state that s/he is serving a Divorce Application and tell your Husband when and where the Court hearing is.

The server then needs to complete an Affidavit of Service by Hand signed before a JP or solicitor. The server must include any information or attach any documents that helped him or her to identify your Husband. (The witness must also complete the Annexure Note on the Acknowledgment of Service form).

If your Husband signed the Acknowledgement of Service form, and you recognise his signature you must complete an Affidavit Proving Signature (Divorce), also signed in front of a JP or a solicitor. If your Husband refused to sign the Acknowledgment of Service form, it will not matter as long as there is sufficient information in the server's Affidavit of Service by Hand, establishing that your Husband is in fact the person whom they have served.

You must take a copy of all service forms and file them at the Court Registry.

If your Husband is in Australia, you must serve the Divorce Application at least 28 days before the Hearing. If your Husband is overseas, you must serve the Application at least 42 days before the Hearing. If you do not serve within these time limits the Registrar will not hear your matter on the assigned date and it will have to be adjourned. There may be an exception if your Husband gives written evidence saying that he is prepared for the hearing to proceed despite the fact that he has not had the required amount of notice. See the Divorce Service Kit at the Family Law Courts website for further information.

#### **What if I cannot find my Husband?**

If you cannot find your Husband, you can make a separate Application to the Court for either Substituted Service or Dispensation of Service.

Substituted Service allows you to serve your Divorce Application on a third party who the Court is satisfied will bring the Application to the attention of your Husband. For example, if you cannot find your Husband you may be able to serve it on his mother or other family members or friends.

Dispensation of Service allows you to dispense with service altogether.

To apply for either Substituted Service or Dispensation of Service you need to file an Application in a Case and an Affidavit that proves you have taken all reasonable steps to find your Husband. For example, reasonable steps may include enquiries of your Husband's relatives, friends, employers and details of joints properties or bank accounts. This is a difficult Application to succeed in as the Court is generally of the view that your Husband has a right to know that you are applying for a divorce.

See the fact sheet 'Are you having trouble serving your divorce application?' at the Family Law Courts website for further information.

### **What happens if my Husband files a Response to Divorce?**

You Husband may file a Response to Divorce.

In the Response your Husband may say he opposes the divorce, however, he cannot stop the divorce from proceeding simply by opposing it. The only way which your Husband can stop your divorce from proceeding is if he is claiming that you have not been separated for 12 months or that the Court does not have jurisdiction for the divorce (for example because neither of you are Australian citizens or live in Australia). Your Husband cannot stop the divorce simply because he does not want to get divorced or because he believes he is getting insufficient time with the children.

Alternatively, in the Response your Husband may say he wants the divorce to go ahead, but he disagrees with some fact or facts in your Application.

### **When should I attend the hearing?**

You should attend the hearing when:

- It is a sole application **and** there are children under 18;
- Your Husband has filed a Response;
- There are special circumstances which may require you to give further evidence, for example, you have applied for substituted service or dispensation of service.

### **What happens at the hearing?**

If all of your Court documents are in order, then the actual hearing of your Divorce Application should be straightforward.

As the 'best interests of the child' is the guiding principle behind the *Family Law Act*, the Registrar hearing your matter will want to be informed as to the circumstances relating to your children. You may, for example, be asked if there have been any changes in relation to your children's circumstances since filing the Divorce Application. If there are problems in relation to your children seeing their father or with child support, then you may be asked to provide the Court with further information in relation to these matters.

When you attend the Court for your hearing, you will not be the only person applying for a divorce at that time. You will need to wait until your name is called before you can enter the courtroom.

### **What if I am supposed to attend Court, but don't want to because my Husband is violent and I am scared of him?**

If you have any safety concerns about attending court, call the Family Law Courts Enquiry Line on 1300 352 000 or talk to staff at the Court Registry before your hearing about arranging a safety plan to be put in place before you attend court. For further information you can also see the fact sheet 'Do you have fears for your safety when attending court?' at the Family Law Courts website or call the Women's Legal Centre.

In these circumstances you also do not need to disclose your residential address on the Divorce Application.

**When does my divorce become final?**

Assuming that all goes smoothly at the hearing the Registrar will announce your order for divorce. The divorce will then come into effect one month and one day after the hearing date.

**What about my will?**

A divorce does not automatically revoke a will. However, if you have a will leaving anything to your Husband, when your divorce becomes final that gift will be revoked unless he can prove that it was not your intention to revoke his gift. It is good general advice to always make a new will when something big changes in your life like marriage, divorce or the birth of a child.

**Joint tenancy**

If you own property as *joint tenants* with your Husband, that property will go directly to your Husband as surviving tenant and will not become part of your estate when you die (the reverse is true, if your Husband dies before you). Marriage or divorce has no effect on a joint tenancy. If you do not want your share of the property to go to your Husband if something happened to you, it is important to do a property settlement quickly. You may also want to get legal advice about ending the joint tenancy and owning the property as tenants in common.

**About the Women’s Legal Centre**

The Women’s Legal Centre (ACT & Region) Inc. is a community legal centre for women in Canberra and the surrounding area. The Centre is run by women and aims to improve women’s access to justice. The Centre offers free, confidential telephone advice Monday to Friday from 9.30am to 12.00 noon, and face to face appointments when appropriate.

The numbers for legal advice (weekdays 9.30am to 12 noon) are:

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| Local            | 6257 4499    |
| Outside Canberra | 1800 634 669 |

The Women’s Legal Centre is funded by the Social Inclusion Division of the Civil Justice and Legal Services Group, Commonwealth Attorney-General’s Department.