

How can I get a divorce?

To legally end a marriage you need to apply to the Federal Magistrates Court for a divorce. Orders about property and children are not dealt with as part of a divorce application, so you will have to make separate applications for these orders if you need them.

To get a divorce, you need to prove to the Court that:

- You have a valid marriage (e.g. by providing your marriage certificate or equivalent documentation); and
- Your marriage has broken down and there is no chance that you will get back together. This is called an irretrievable breakdown of your relationship; and
- You have been separated for 12 months; and
- You are an Australian citizen, a permanent resident or have been living in Australia for at least 12 months before applying for divorce.

What does 'separated' mean?

You are considered to be separated from the day either of you decides the marriage is over and communicates this to the other.

You can get back together for up to 3 months without re-starting the 12-month separation period. However, the time you spend back together does not count as part of the separation. For example, if you separate for two months, get back together for one month and then separate again, the Court will consider that you have been separated for two months not three months.

You may be able to get a divorce if you and your partner have separated but still live in the same house for financial or other reasons. This is called separation under one roof. When you apply for a divorce you will need to prove that your marriage has ended and you and your partner live separate lives – for example, you sleep in separate rooms, do not cook their dinner or do their laundry, do not go out as a family, or eat and entertain together. To prove separation under one roof you will need friends or family to write an affidavit to tell the court about your separate lives. Children over 18 can do this affidavit.

What if I was married for less than two years?

If you have been married for less than 2 years, you need to consider a reconciliation with the help of a counsellor before you can apply for a divorce. If your partner is violent and you are afraid to see them, discuss this with the counsellor when you make an appointment. The counsellor should arrange separate appointments. If your partner will not attend counselling, you may still get your divorce by applying for permission (called special leave) from the court. Unless you urgently need a divorce, it is easier to wait for two years from the date of marriage to apply for your divorce.

What are the steps involved in getting a divorce?

There is help to apply for a divorce without using a lawyer. The Family Law Courts divorce kit provides a step-by-step guide to doing your own divorce and an application form. You will find this kit at the Family Court, Federal Magistrates Court, Local courts and legal stationers and on the Family Law Courts website.

The Legal Aid Commission holds divorce classes to help people fill out the divorce form and explain the process of getting a divorce.

A summary of the steps involved in getting a divorce is set out below:

1. Complete an application for divorce form

This form can be filled out by hand. You can apply on your own or together with your partner (this is known as a joint application). The application form has to be signed and witnessed by a solicitor or Justice of the Peace.

2. File your application

You file your application by taking or sending the original plus two copies of the application, and any affidavits (if they are necessary) and a photocopy of your marriage certificate to the Federal Magistrates Court.

You will have to pay the court filing fee or apply for a reduction of the fee. There is a form to use to apply for the reduction of the fee.

When you file your application you will be given a 'hearing date' for when your case will be heard. The court will keep the original documents and give you back the copies with the court's original seal and the hearing date stamped on them (called sealed copies). You will also get two copies of the brochure *Marriages, Family and Separation*.

One of the sealed copies of the application and the brochure is for you to keep and one must be served on your partner.

3. Serve the application on your partner

You will need to serve the following documents on your partner:

- A sealed copy of the application for divorce
- A copy of the *Marriages, Families and Separation* brochure and
- Any other documents filed with the court, except the copy of your marriage certificate

If you have made a joint application you do not have to serve your partner with the documents.

You can serve the documents on your partner in 2 ways:

- **Service by post.** If you are confident that your partner will sign and return an Acknowledgment of Service form, you can attempt service by post. Without a signed Acknowledgment of Service form the court cannot be sure that your partner received the documents.
- **Service in person.** You cannot serve the documents on your partner yourself. You can get a friend or relative aged over 18 to deliver the documents, or use a professional process server.

Your partner must be served at least **28 days** before the hearing date if they are in Australia or **42 days** before the hearing date if they are overseas.

4. File the service documents

You must prove to the court that your partner has been served by filing an Affidavit of Service and the signed Acknowledgment of Service form, if it has been signed by your partner. This proves to the court that your partner received a copy of your application and the date they received it.

5. The court hearing

If there are no children aged under 18, then you do not have to go to court.

If you are the one asking for the divorce and you have children under 18, you need to go to court for the hearing. When you arrive, there will be a list of cases on display in the court building and a court attendant to direct you to the right courtroom. A court officer will call your name when the court is ready for your case. Tell the Federal Magistrate that you are the applicant and that you want the court to grant your application for divorce. If you have a solicitor, she or he will talk for you.

6. The court makes its decision

The court can:

- Grant your divorce
- Grant your divorce but refuse to make it final until proper arrangements are made about your children
- Adjourn your case. This means the hearing is postponed to another day so you can give the court better evidence that your partner was served or for another reason; or
- Refuse or dismiss your application

If the court is satisfied there are grounds for divorce and proper arrangements have been made for your children, it will make a divorce order. The divorce order usually becomes final one calendar month later and is called a final divorce order. The court can decide to shorten the time after which the divorce order becomes final. The court will send you a sealed copy of the final divorce order, which is proof that you are divorced.

What if I cannot find my partner?

The court will require proof that your partner has been served with (given a copy of) the divorce application. If it is impossible to send a copy of the divorce application to your partner the court can agree to dispense with this requirement. You must prove that you have tried to find them by, for example, checking with their family or friends or the last place of work. If you know where one of your partner's relatives is, the court can order that you serve that person instead of them. Or the court may require you to put a notice in a local newspaper instead of serving them.

If you cannot find your partner, you will need to make a separate application to the court about this problem. You can either make an application for substituted service, so you can serve the application on someone else, or an application to dispense with service altogether.

What if my partner is overseas?

You can serve your partner by post or in person with the assistance of a process server. The court can order some other type of service, for example, substituted service (service on a relative).

If I was married overseas, can I still apply for a divorce in Australia?

If you were married overseas you can apply for a divorce in Australia on the same basis as Australian marriages. Evidence of the foreign marriage must be by an official extract from the foreign registry of marriages. If the official extract is not available, an affidavit explaining the reason must be filed.

What if I do not want a divorce but my partner has started proceedings?

You or your partner can choose to divorce whether the other person agrees to or not.

You cannot legally stop a divorce once the required separation has occurred. However, the law provides for a fair property settlement, maintenance and child support so you should get advice about these matters if they haven't already been sorted out.

How much will the divorce cost?

When you apply for a divorce you need to pay a court filing fee. The current fee can be found by contacting the Family Law Courts National Enquiry Centre on 1300 352 000 or visiting the website, www.familylawcourts.gov.au. If you cannot afford this, you may be eligible for a reduction in the cost of the court filing fee if you are on a Commonwealth benefit, or if paying the full fee would cause you financial hardship. You must apply for the fee reduction by completing the Application for Reduction of Payment of court fees – general or the Application for reduction of fees on the basis of financial hardship form at the same time that you apply for the divorce.

Other expenses may include getting a certified copy of your marriage certificate (if you do not have the original) and the cost of a process server, if necessary, to serve the divorce application on your partner.

If you have a child under the age of 18 you will have to go to court for the divorce hearing. A day off work may be an additional expense.

If you use a solicitor, you will also be required to pay your solicitor's costs. This is in addition to other costs such as the filing fee and the cost of a process server to serve the application.

If your partner starts the divorce proceedings then you will not have to pay for the divorce and you will not have to go to court.

What if I can't find my marriage certificate?

If you do not have your marriage certificate, you can order a certified copy from the Registry of Births, Deaths and Marriages. The current fee can be found by contacting the relevant Registry. The NSW Registry can be contacted on 1300 655 236 or by visiting their website www.bdm.nsw.gov.au and the Victorian Registry can be contacted on 1300 396 367 or by visiting their website www.bdm.vic.gov.au.

If your foreign marriage certificate is unavailable, you must file an affidavit with your divorce application explaining why the certificate is not available.

What if I need my marriage certificate translated?

If your marriage certificate is not in English, you will need to have your marriage certificate translated into English by a certified translator. The translated version of your marriage certificate must be filed at the court with an affidavit by the translator stating they are competent to make official translations.

You can have your marriage certificate translated into English at the Community Relations Commission. There is a fee payable for this service. They may waive the fee in cases of hardship.

The cost for this translation can be waived if you have a Centrelink benefit card and are an Australian citizen or a permanent resident living in Australia for more than 2 years.

The Community Relations Commission can be contacted for more information on 02 8255 6767 or www.crc.nsw.gov.au.

What if my partner files for divorce and makes untruthful statements in their application?

You can file a response, putting your version of events in a statement. If you file a response you must then go to court for the hearing. It is best to have the record set straight, as the divorce application will remain in the court file.

When can I get married again?

One month after your divorce hearing, your divorce order becomes final. Once your divorce order becomes final, your marriage is over and you can legally remarry. The court can shorten the one-month period.

What about my will?

It is good general advice to make a new will when something big changes in your life like marriage, divorce or the birth of a first child. When you get married, your will is automatically revoked unless that will was stated to be made in contemplation of the marriage. A divorce does not automatically revoke a will. However, if you have a will leaving anything to your partner, when your divorce becomes final that gift to your ex-partner will be revoked unless they can prove that it was not your intention to revoke their gift.

Most couples own their family home as joint tenants rather than tenants in common. If you own property as joint tenants with your partner, that property will go directly to your partner as surviving tenant and will not become part of your estate when you die (the reverse is also true). Marriage or divorce does not have any effect on a joint tenancy. If you don't want your share of the property to go to your partner should something happen to you, it is important to pursue a property settlement as soon as possible. You may also want to get legal advice on ending the joint tenancy and then owning the property as tenants in common.

When can I get a property settlement?

You can make a property settlement any time after you separate. Once a divorce becomes final, you must apply within 12 months if you need a property settlement or spouse maintenance. Generally, it is better to do a property settlement first or at the same time as applying for a divorce. If your partner applies for divorce, seek legal advice to get a property settlement if you have not already done so.

This information was produced from the Women's Legal Services NSW "Women and Family Law" (9th edition, 2010) Resource Booklet

DISCLAIMER:

This fact sheet is NOT a substitute for individual legal advice. There may be other issues that are relevant to your case. You should seek legal advice from a lawyer for assistance with understanding your specific entitlements.