

DIVORCE

How can I get a divorce?

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

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

- You have a valid marriage by providing your marriage certificate or equivalent documentation
- Your marriage has broken down and there is no chance you will get back together. This is called an 'irretrievable breakdown' of your relationship
- You have been separated for 12 months
- 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 separated from the day either person tells the other person the marriage is over.

You can get back together for up to **three months without re-starting the 12-month separation period**. However, the time you spend back together does not count as part of the separation.

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.

Example: you sleep in separate rooms, do not cook dinner or do laundry together, and 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 IS AN AFFIDAVIT?

An affidavit is a written statement prepared by a person or witness. It is the main way evidence (facts of the case) is given to the Court. You must swear or affirm the affidavit before an authorised person, such as a lawyer or Justice of the Peace.

What if I was married for less than two years?

If you have been married for less than two years, you need to consider family counselling to discuss reconciliation before you apply for a divorce. If your partner is violent and you are afraid of them, discuss this with the counsellor when you make a reconciliation appointment. If you are unable to attend counselling with your spouse, you will need to file an affidavit and ask for the Court's permission to divorce.

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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?

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

Most divorce applications are now completed online. You can complete the interactive divorce application form and find more information online at:

<http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/how-do-i/divorce/register-ccp-efile-edivorce/register-ccp-efile-edivorce>

You will need to upload certain documents into the online Commonwealth Courts Portal system. These documents include your marriage certificate, and a copy of your Centrelink pension card or health care card (if applicable).

2. File your application

Once you have completed the online application, you need to print the application and sign the Affidavit of e-Filing before an authorised witness (such as a Justice of the Peace or a Lawyer). If you are filing a joint application, both you and your spouse will need to sign the affidavit (this can be done separately).

Once you have signed the Affidavit of e-Filing in front of an authorised witness, you need to upload it onto the online system and pay the court filing fee or apply for a reduction of the fee. When you file your application, you will be able to select a 'hearing date' for when your case will be in court.

You will need to print the completed Application and also the *Marriage Families and Separation* brochure. <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/reports-and-publications/publications/separation/marriage-families-and-separation>

If you have completed a sole application, you will need to print two copies of the documents. One for you and one to serve on your partner (discussed below). If you have completed a joint application, then you will only need to print one copy of the documents, and this is just for your records.

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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
- Any other documents filed with the court, except the copy of your marriage certificate.

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

- **Service by post:** If you are confident your partner will sign and return an Acknowledgment of Service form, you can serve by post. Without a signed Acknowledgment of Service form, the court cannot be sure 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 with your Divorce Application by filing an Affidavit of Service and the signed Acknowledgment of Service form, if it has been signed by your partner. You will need to scan and upload those documents onto the online system, the Commonwealth Courts Portal - www.comcourts.gov.au.

If you cannot apply for your divorce online (i.e. you do not have computer access or anyone who can help you) you can still apply for a divorce by using a paper form. The Federal Circuit Court can give you this form.

5. The Court hearing

- **No children under 18:** If there is no child of the marriage aged under 18 years, you **are not required** to attend the Court hearing. This applies for both sole and joint applications.
- **Joint application with children under 18:** If you have made a joint application, you and your spouse **are not required** to attend the Court hearing (even if there is a child of the marriage aged under 18).
- **Sole application with children under 18:** If you have made a sole application and there is a child of the marriage aged under 18 years, you (the applicant) **are required** to attend the court hearing.

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When you arrive at Court, there will be a list of cases on display in the court building. A Court attendant will direct you to the right courtroom. A Court officer will call your name when the Court is ready for your case. If you have no representation, tell the Judge you are the **'applicant'** and you want the court to grant your application for divorce. If you have a solicitor, they will tell this to the court, you will not need to speak.

6. The Court makes its decision

The Court can:

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

If the Court is satisfied there are grounds for divorce and proper parenting arrangements are in place, 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 in which the divorce order becomes final. The court will send you a sealed copy of the final divorce order, which is proof you are divorced.

What if I cannot find my partner?

The Court will require proof 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 waive this requirement. You must prove you have tried to find your spouse, including through their family or friends or place of work if you know this. If you know where one of your partner's relatives lives, the Court can order you serve that person instead of your partner.

If you cannot find your partner, you will need to make a separate application to the Court about this. 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 also order some other type of service, such as 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 for divorce must be filed.

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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 steps on the first page of this brochure have occurred.

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.federalcircuitcourt.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 Centrelink benefit, or if paying the full fee would cause you financial difficulty. You must apply for the fee reduction 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 for you.

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 cannot 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.

NSW Registry can be contacted on **1300 655 236** or by visiting their website www.bdm.nsw.gov.au

Victorian Registry can be contacted on **1300 369 367** 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.

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You can have your marriage certificate translated into English by Multicultural NSW. A fee applies for this service. It may be set aside if paying the fee causes financial difficulty. The cost for this translation may also be set aside if you have a Centrelink benefit card and are an Australian citizen, or a permanent resident living in Australia for more than two years.

Multicultural NSW can be contacted for more information on **02 8255 6767** or <http://multicultural.nsw.gov.au/>

What if my partner files for divorce and makes statements I disagree with in their application?

You can file a response, putting your side of the story in a statement. If you file a response you must go to Court for the hearing. It is best to have your story on the record, as the divorce application will remain in the Court file.

When can I get married again?

Your divorce order becomes final one month after the divorce hearing, then you can legally remarry.

What about my will?

You should make a new will when something big changes in your life like marriage, divorce or the birth of a child. You should consider getting legal advice to update your will.

Please be aware: **When you get married, your will is automatically cancelled** unless that will was stated to be made in contemplation of the marriage.

A divorce does not automatically cancel a will so it is wise to get your will reviewed to ensure your wishes are recorded.

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 to the Court **within 12 months if you need a property settlement or spousal maintenance**. If your partner applies for divorce, seek legal advice to get a property settlement if you have not already done so. Sometimes you can get leave of the Court to apply out of time for property orders. You should get legal advice about this.

IMPORTANT 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.