

# Divorce

***This information is based on the law as at February 2011. It is written for the use and benefit of women who contact the Women's Legal Centre (ACT) and is to be read in conjunction with the specific advice given to those women when they contact the Centre.***

## **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. If you do your divorce before your property settlement (which is rare), then you have another 12 months in which to file an Application for property settlement. If you don't, you will have to ask the Court for leave to file it 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 an Application in the Federal Magistrates Court.

Divorce Applications are relatively easy to do yourself, compared with Applications for property settlements and children's issues. You can, however, use a solicitor if you want.

You can get a Divorce Application form and all the other forms mentioned in this tip sheet from:

- the Family Law Court website at [www.familylawcourts.gov.au](http://www.familylawcourts.gov.au)
- the Federal Magistrates/Family Court Registry, Childers Street, Civic
- the Women's Legal Centre

If you are the person filing the Divorce Application, then you are the 'applicant' and your Husband is the 'respondent'. You can do a *joint* Application where you would both be applicants. To do this you need the co-operation of your Husband. If you and your Husband are doing a joint Divorce Application 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. This will make your Application much easier than a sole Application.

### **What if there are no children?**

If there are no children under 18 years of age then you only need to answer questions about names, occupations, place and date of marriage, date of separation and whether or not it is likely that you and your Husband will ever reconcile. You will not have to attend Court, unless your husband disagrees with some fact(s) in your Application, and files a *Response*.

### **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*. Examples of how to complete each of 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 1.6.2010.
- 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 10 at the Lyneham High School and is progressing well with her studies.

The Court also requires information about a child who is *regarded* as a child of the marriage and not just a biological child of you and your Husband. This could 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 he or she 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 tip sheet on *Parenting Orders in the Family Court and the Federal Magistrates Court*.

### **What is the process?**

Once you have completed your Application, it needs to be signed by you in the presence of a Justice of the Peace (JP) or a solicitor. It then needs to be photocopied twice and filed at the Court, together with a good photocopy of your marriage certificate and the filing fee, which is currently \$550.

If you are on a pension or have a health care card you can fill in an Application for Reduction of Court fees and pay a reduced fee of \$60. It is also possible to apply to reduce the Court fees on the basis of financial hardship. You need to file an Application for Reduction of Court fees, and the reduced fee of \$60, at the time that you file your Application for Divorce. Further, you can ask for the *Deferral* of your fee.

If you have already filed documents at the Court in relation to other matters you may have already filed a copy of your marriage certificate. There is no need to file another copy. If that 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 Application.

When you file the documents at the Registry, they will keep the original 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 also be written on the top right hand corner of the form, together with the file number. You will also be given two copies of a brochure titled *Marriage, Families and Separation*.

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

After the documents have been filed, it is then up to you to arrange for one of the copies of the 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 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 Application by post, then you can send it to him together with:

- the brochure
- an Acknowledgment of Service (Divorce)
- 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, your Husband is not necessarily agreeing with the contents of your 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 have to have his signature witnessed by a JP or a solicitor.

Once the Acknowledgment has been returned to you by your Husband, you must then complete an Affidavit of Service by Post (Divorce) form, and have it witnessed by a lawyer or a JP. You attach the signed Acknowledgment form to the Affidavit of Service by Post (Divorce), and lodge 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 to you, then you will have 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 Application, the Acknowledgment of Service form and the brochure to be served personally upon your Husband. If you can afford it, then it is desirable 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 who is prepared to serve the Application for you. *You cannot serve the Application yourself.*

The person serving the Application and brochure should ask your Husband to sign the Acknowledgment form. If he refuses to sign or accept the documents, the server can put them down and state that s/he is serving a Divorce Application. S/he should also tell your Husband when and where the Court hearing is.

The server then needs to complete an Affidavit of Service by Hand (Divorce) form before a JP or solicitor, who must also complete the annexure note at the bottom of the Acknowledgment form.

If your Husband has signed the Acknowledgement form, take a photocopy of it, and then complete an Affidavit Proving Signature (Divorce) form, also in front of a JP or a solicitor, to inform the Court that you recognise your husband's signature. Once this document is lodged, the Court will know that the right person received the Divorce Application.

If your Husband has refused to sign the Acknowledgment form, it will not matter as long as there is sufficient information from the server on their Affidavit of Service, establishing that your Husband is in fact the person whom they have served.

There must be 28 clear days between your Application being served on your Husband and the hearing. If, for example, your Husband does not receive your Application until 2 April, and the hearing has been set for 30 April, the Registrar will not hear your matter on that date and it will have to be adjourned. The only exception is 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. If your Husband is overseas, there must be 42 clear days between service and the hearing.

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

You can make a separate Application to the Court for orders allowing substituted service of your Divorce Application. This is service of your Application through someone else who knows where your Husband is, such as his mother.

If you are unable to do this you can apply to the Court for them to dispense with service altogether. You must prove that you have diligently tried to find him by, for example, checking the telephone directories, with his family or friends or at his last place of work. To prove this, you need to file an Affidavit with your Divorce Application, listing the steps you have taken to find him, when you last had contact

with him, etc. This is a difficult Application to succeed in as the Court is generally of the view that a party has a right to know that the other party is applying for a divorce.

### **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. If there are no children under 18 years of age, then you do not have to attend at the Court. If there are children, but it is a joint Application, then again you do not have to attend at the Court.

As the 'best interests of the child' is the guiding principle behind the Family Law Act even though your Application is one for Divorce, the Registrar hearing your matter will still 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 the filing of your 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 at the Court for your hearing, you will not be the only one applying for a divorce at that time. The Court is not closed to the public, so other people will be sitting in the Court that day. A lot of women find it quite reassuring to sit in the back of the Court before their matter is called. Once they see how little is actually involved, they are less likely to be nervous when it is their turn.

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

In these circumstances, the Court may grant you leave to attend the hearing by telephone. You should put your request in writing as early as possible. If you have fled from a very violent relationship and don't want your Husband to know which state or territory you are living in, there may still be a way to obtain a divorce. Otherwise, you can contact the Court and arrange for a "safety plan" to be put in place for your attendance at Court. Contact the Women's Legal Centre for advice.

### **What if my Husband contests my Divorce Application?**

If your Husband is contesting your Application then he will have filed and served upon you a Response to Divorce form prior to the hearing date. The only ground upon which your Husband can stop your divorce going through is if he is claiming that you have not been separated for a period of 12 months before filing your Application.

Your Husband cannot, for example, oppose the divorce on the basis that he believes he is getting insufficient time with the children. If this is an issue for him, then the Registrar may advise him to file the appropriate application in the Court. Some Registrars may adjourn the divorce hearing until another day in order for counselling to take place to discuss issues relating to the children. This, however, rarely happens, and when it does, it just means that the divorce is delayed for a few weeks.

If your Husband wants the divorce to go ahead, but disagrees with some fact or facts in your Application, he can say so in his Response. If he does this, you should both attend the hearing, in case the Registrar wants to clarify the matters your Husband has disagreed with. It will usually not stop the divorce going ahead.

**What if there has been a separation under the one roof?**

Separation under the one roof means that you and your Husband lead separate lives but continue to share the same home. Examples of this would be that you have agreed 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 the one roof to form part of the required 12 months of separation, then you will be required to provide further evidence to the Court proving that you were in fact separated. This could, for example, be an Affidavit from a friend or adult family member. See the Centre's tip sheet *Separation Under the One Roof*.

Under the Act 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.

**When does my divorce become final?**

Assuming that all goes smoothly on the return date in Court the Registrar will announce your order for divorce. The divorce will then come into effect a month after the hearing date. The Court does have the power to reduce this period of one month if 'special circumstances' exist, for example, you are re-marrying and have arranged a date sooner than a month after the divorce. However, this is not something that you should take for granted.

**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.

However, 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:

Local	6257 4499
Outside Canberra	1800 634 669

The Women's Legal Centre is funded by the Indigenous Justice and Legal Assistance Division, Commonwealth Attorney-General's Department.