

Marriage and Divorce

This article looks at the law of marriage, breakdown of marriage, divorce and the custody of children.

1. Marriage

In Australia, the legal age for marriage for males is 18 and for females is 16.

A marriage may take place at any time and at any place. However, Australian law recognises only three types of marriages: Civil marriage, Religious marriage, and Foreign marriage.

There is no legal requirement on either party to change their names on marriage. Although it is common practice for the females to adopt a new surname, they can opt not to do so.

2. Breakdown of Marriage

Couples who have been married for less than two years are required to have counselling before applying for a divorce. Counsellors can give advice and assistance to parties contemplating separation and can also help them resolve differences over custody and access. At each Family Court Registry there is a free counselling service.

3. Divorce

Divorce dissolves the legal bonds of marriage between parties. The only ground for divorce is the *irretrievable breakdown of marriage* [Section 48(1) of the Family Law Act 1975]. This is shown only where the parties have been living separately and apart for 12 months and there is no reasonable likelihood of them getting back together. The period may be broken by a trial reconciliation, provided that the break does not exceed three months.

After a year's separation, either spouse can apply to the Family Court for a divorce.

The 12 month period of separation begins the day both parties or one of them leaves the marriage and must be complete at the time of filing for divorce. One party does not usually have to inform the other that separation has begun.

A divorce can be applied for under a joint application, meaning that the divorce is applied for by both spouses; or under a sole application, meaning that the divorce is only applied for by one party. A sole application may expedite matters where the divorce is not contested by either party.

If there is no child of the marriage (including a step-child, foster child or adopted child), neither spouse need attend at the court hearing for the divorce. This is applicable to both joint and sole applications.

(a) Separation Under One Roof

It is also possible for the two (2) parties to live separately and apart for a year while under the same roof. It must be shown that both parties or one of them left the marriage relationship and that they live independently of each other. Usually, this is shown by the fact that the parties do not share any of the usual activities of marriage, such as sleeping together, eating together or socialising together. One party can perform household services, such as ironing and washing for the other, if it is necessary for the running of the home and the convenience of others who live there. The case for separation under one roof may be strengthened by showing:

- That there were reasons why the parties remained together, eg. lack of finance or interests of the children; and
- That the parties intend to live apart in the near future. An intention to continue living in the same house may indicate a reasonable likelihood of reconciliation.

In the event where there has been separation under one roof, an affidavit will need to be prepared by the Applicant of a sole divorce application. If the application is joint, both parties to the divorce will need to provide separate affidavits.

The Court will also normally require evidence (usually in the form of an affidavit) from a neighbour, friend or relative that there was a separation under one roof. This requirement of evidence is mandatory for both sole and joint divorce applications.

(b) Opposing a Divorce Application

The only two grounds on which one can oppose a divorce application are:

1. Where there has not been 12 months of separation as alleged by the other party in the application; or
2. Where the court does not have jurisdiction.

In instances where a divorce application is opposed, a Response to Divorce must be filed at the appropriate registry. The Response to Divorce is to set out the reasons why a dismissal is requested. The party filing the Response to Divorce, ie. the Respondent will need to attend at the court hearing, or otherwise run the risk of the court deciding the divorce application in the Respondent's absence.

(c) Finalisation of a Divorce

In most cases, a divorce will be finalised one month and one day from the date of the divorce hearing.

4. Disputes Regarding Children

In straightforward cases, the future of the children such as where they will be living, is normally agreed upon between both parents. However, if there is a dispute about children, the court will make an order and take into consideration the best interests of the child. Among other things, the court will take into account are: the age, sex, background, maturity and any expressed wishes of the child; the child's relationship with each parent and siblings; the effect on the child of separation from either parent; the parent's attitude to the child and to the responsibilities and duties of parenthood; the capacity of each parent to prove adequately for the physical, emotional and intellectual needs of the child and whether the child has been involved in or witnessed domestic violence.

Both parents are responsible for the financial support of their children until each child reaches the age of 18.

5. Property and Maintenance Orders

Property and maintenance agreements / orders are separate from a divorce application, and can be made any time prior to a divorce. There are two ways in which property and maintenance arrangements can be made:

1. By written agreement between the spouses. This written agreement will need to be subsequently filed with the Family Court; or
2. By seeking orders from the court, in the event where property and maintenance orders are disputed by the spouses.

If maintenance and property orders are to be applied for, a separate application to the court must be filed with the court within 12 months of the date the divorce became final. If maintenance and property orders are filed after the 12 months, court permission will be required to apply for an order of this kind.

Comasters Law Firm can advise clients on family law and will act in applications to the Family Court.

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Important: This is not advice. Clients should not act solely on the basis of the material contained in this paper. Our formal advice should be sought before acting on any aspect of the above information.

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