



# Divorce

Last updated 27 October 2020



This factsheet contains information on **applying for a divorce, children and property, and service of documents**.

The following is information only as a general guide to the law and is not a substitute for legal advice. If you would like legal advice, please call the Women's Legal Centre on 02 6257 4377.

## Applying for Divorce

### Has COVID-19 affected my ability to apply for a divorce?

No. The usual requirements for a divorce application still apply.

You can make an application for a divorce if:

1. Your marriage has broken down and cannot be fixed;
2. You have been separated from your husband or wife for the 12 months immediately before you apply for the divorce; and
3. There is no reasonable chance of you and your husband or wife both choosing to live together again.

Usually this will mean you and your husband or wife have been living in different places for the last 12 months. But it is possible to be separated and living in the same place if you and your husband or wife are living different lives. This will usually include having separate rooms, cooking and cleaning for yourselves only, and not having sex with each other. If this sounds like you, you will need to explain to the Court how you are living separately by making an affidavit (see below).

The Court will not grant a divorce if there is a reasonable chance that you and your husband or wife will get back together.

Your divorce application can still be completed online and electronically filed with the Court through the Commonwealth Courts Portal. If you do not have access to electronic filing, contact the Family Court on 1300 352 000.

### What happens if we get back together after we separated the first time?

There is one exception to the 12-month rule. If you and your husband or wife get back together one more time, and for no longer than 3 months in those 12 months, the Court will still treat you as though you have been separated for the whole time.

If COVID-19 has affected your ability to live under separate roofs, you can still be considered separated if living in the same place. However, you will need to explain this to the Court by making an affidavit.

If you get back together and stay together for long than 3 months, then you can't get a divorce until you have been separated for 12 months from the date you finally separated.

## What if I didn't get married in Australia or I'm not an Australian citizen?

You can apply for divorce in Australia if either you or your husband or wife:

- are an Australian citizen; or
- have been living in Australia for the last 12 months on any visa or as a permanent resident and intend to continue living in Australia.

## What if I haven't been married very long?

If you want to apply for divorce but you have been married to your partner for less than 2 years, there are extra requirements to meet before you can file your application for divorce.

You and your husband or wife will have to attend a counselling session to discuss strategies and possibilities to get back together. Due to COVID-19 counselling services are conducting these sessions over the phone or via video conferencing. If you cannot go to counselling, you will need to explain to the Court why you cannot go by making an affidavit (see below).

At the end of your counselling session the counsellor will give you a certificate to prove you attempted to resolve your problems. If you and your husband or wife are unable to resolve the issue you can now file for divorce. You must include the counselling certificate with your application for divorce.

For more information, see the fact sheet '[Have you been married less than two years?](#)' on the Family Law Courts website.

## What are the steps in getting a divorce?

There are usually 5 steps in getting a divorce:

1. You make an application for a divorce and file it in court;
2. If it is a sole application, you serve the application on your husband or wife.
3. Your husband or wife gets a chance to have their say about the application;
4. The Court considers the information, and may ask for more information from you or your husband or wife; and
5. The Court makes a decision about whether to grant the divorce.

## Where can I get a divorce? Has COVID-19 affected this?

You can make an application for divorce in the Federal Circuit Court of Australia.

Most divorces stay in the Federal Circuit Court until the court proceedings are finished, but more complicated divorces may be transferred to the Family Court of Australia. If this happens, your file will be sent to the Family Court and you will not need to apply again.

Due to COVID-19, the Courts have closed their face-to-face registry services. Applying for a divorce can only be done online through the Commonwealth Courts Portal at [www.comcourts.gov.au](http://www.comcourts.gov.au).

## How do I apply for a divorce online?

To apply for a divorce online you will need:

- A computer or laptop (it will not work on a phone or tablet);
- A printer and scanner; and
- A current credit or debit card.

You will first need to scan and save some documents onto your computer. The Commonwealth Courts Portal steps you through the online application form.

When you have finished filling in your application online, you will be asked to upload the scanned documents. If you do not have access to the equipment needed to apply for a divorce online, you can call the Federal Circuit Court of Australia on 1300 352 000 for advice.

## What documents do I need for my online application?

To apply for a divorce, you will need to gather some personal documentation and upload it to the Commonwealth Courts Portal upon application.

You will need the following documents:

- A copy of your marriage certificate
- If you are not an Australian citizen, proof of other citizenship or permanent residency (such as a passport or visa)
- If you have been married less than 2 years, a counselling certificate showing that you have discussed the possibility of getting back together, or an affidavit explaining why you haven't been to counselling.

## Do I have to pay for the divorce?

The fee to apply for a divorce is called a 'filing fee'. Currently this fee is \$910 for divorce.

You may apply for a reduced fee of \$305 if you can provide evidence of any of the following:

- You have been granted legal aid

- You have a health care card, pensioner concession card, Commonwealth seniors' card, or any other card issued by the Department of Human Services or the Department of Veterans' Affairs that lets you access Commonwealth health concessions
- You are on youth allowance
- You are under 18
- You are in prison
- You are legally detained in a public institution (e.g. an immigration detention centre)
- You are experiencing financial hardship (for this option, you will need to fill out the Reduction of Divorce Fee – Financial Hardship form, scan and upload it as a document to the Commonwealth Courts Portal along with your other documents. *The form is available on the Family Court's website*).

For all other options, you can include reasoning in an online divorce application.

## How do I know my application has been received by the Court?

When you file your forms and documents, the Registry will send you two copies that have been stamped with the Court seal. You will also be given two copies of a brochure titled '[Marriage, Families and Separation](#)', which is also available on the Family Court's website.

When you file your application, you will be given a file number that will go on all the legal documents that are filed about the divorce. You will also be given a hearing date and time, which will be written on the top right-hand corner of the Divorce Application.

## What do I do once I have filed my application?

Once you have received your application stamped by the court, if you have filed a sole application, you will need to make sure your husband or wife receives the

application. Please see below more information about service.

## What is an affidavit?

An affidavit is a way of giving evidence to the Court in writing. Affidavits should only contain things you know personally or that you can prove with other evidence.

An affidavit is finalised when you 'swear' to it or 'affirm' it in front of a Justice of the Peace (JP) or a lawyer. This means that you promise that what you have said is true to the best of your knowledge and belief. Due to COVID-19, it may be difficult to find a JP or a lawyer to witness your documents. If you cannot find someone to witness your documents, the Courts have indicated they will temporarily accept some documents that have not been witnessed.

- If you swear an oath, then you will be asked to use a Bible, Koran, or other religious book to make a promise.
- If you do not want to swear an oath, then you can make an affirmation, which is not religious.

It is very important to be truthful in an affidavit. Deliberately lying in an affidavit is taken very seriously.

## What is the Response to Divorce that my husband/wife filed in Court?

Your husband or wife may file a Response to Divorce after you have served them. The Response might include:

- whether your husband or wife agrees that you should get divorced; and/or
- any reasons why your husband or wife does not agree with something that was in your application.

Receiving a response does not mean that the divorce cannot happen. However, it might if your husband or wife can prove that you have not been separated for 12 months (as described earlier), or that neither you nor

your husband or wife are citizens and are not living in Australia.

## Do I need to go to Court to get the divorce?

When you file your application for divorce you will be given a time and date for a hearing. Sometimes this will need to change, and the Court will let you know a new time and date.

You should attend the hearing if any of the following happen:

- You have made a sole application for divorce and there are children under 18;
- Your Husband or Wife has filed a Response to Divorce;
- There are special circumstances which mean you need to give more evidence, such as if you were allowed not to serve your husband or wife.

Due to COVID-19, all divorce hearings are currently being conducted via telephone.

## When does my divorce become final?

The Registrar will usually tell you at the hearing if they grant the divorce. The divorce will then be final one month and one day after the hearing.

### Free legal advice

For more information or free legal advice, call us on 02 6257 4377 from Monday to Friday between 9am and 5pm. Email us at [admin@womenslegalact.org](mailto:admin@womenslegalact.org).

# Children and Property

## What does a divorce mean for our children and property?

There are several different reasons why you may want a divorce. But a divorce only means the legal end of your marriage with your husband or wife. The Court will not automatically make orders about property, children or anything else.

### Children

The Court will ask for a range of details about children during divorce proceedings (see below). However, the Court will not make an order about children (known as a Parenting Order) unless you apply for it. You can apply for parenting orders at any time – before, during or after a divorce. For more information, see the Women's Legal Centre fact sheet on Parenting Orders in the Family Court and the Federal Circuit Court.

### Property

Getting a divorce can affect how the property in a marriage is dealt with. This includes:

- **Limitation Period:** The cut off time to apply for a property orders is 12 months after a divorce is granted. If you miss this cut off time, you will need to ask the Court for permission to file your application. Usually you will need to explain to the Court why you missed the cut off, and there is always a chance that the Court will say no.
- **Wills and Estates Issues:** Upon divorce, any gift made to a former spouse in a previous will is automatically revoked. This means a former spouse is prevented from receiving a benefit under the will. However, if you divorce but did not do a new will, there is a risk that your property will not be distributed in accordance with your wishes upon death. You should make a new will, power of attorney and binding death benefit nomination to your superannuation fund when you divorce or in anticipation of divorce.

## Does the application form ask me about our children and their arrangements?

If you have children under 18 then you will need to enter some details about them in your application. This includes any:

- Step-children
- Adopted children
- Children who you both treated as a member of your family before separation

This includes 4 sections where you will need to explain different aspects of the children's lives. Here are some examples of what you might put in each section:

- (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 or wife. 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.

When the Court grants a divorce, it makes a record of whether it thinks that good arrangements have been made for taking care of the children. **This is for recording purposes only and is not a parenting order** (see above). Unless there is already a parenting order in place for the children, this means that you and your ex-husband or ex-wife will still be responsible for making decisions about the children in the same way as when you were married.

# Service of Documents

## The application form asks me if I am making a joint application or a sole application. How do I know?

Whether you make a joint application or a sole application for divorce depends on whether you and your husband or wife both agree to getting divorced.

A joint application is where you and your husband or wife agree to getting divorced and fill out the application form together. A joint application is much easier because you do not need to serve documents and you may not need to attend Court.

A sole application is where your husband or wife does not agree to the divorce. For these applications, you will be the 'Applicant' and your husband or wife will be the 'Respondent'.

## How will my husband or wife find out that I've applied for divorce on my own?

If you have filed a sole application for divorce, you will need to serve (give) a range of documents on your husband or wife. The Court will not do this for you.

You can serve your husband or wife by **post, in person**, or through their **lawyer** (see below). Service by post only works if your husband or wife is willing to cooperate, because it relies on them being willing to admit they have been served.

The documents you will need to serve on your husband or wife are:

1. A sealed copy of your application for divorce, with the Notice of Application for Divorce attached at the front. This will be a printed copy of the PDF you received from the Court with the Court seal on it.
2. Any other documents you filed on the Commonwealth Courts Portal, except your marriage certificate;

3. The Marriage, Families and Separation brochure, which is available on the Family Court website;
4. An Acknowledgment of Service form, which is available on the Family Court website;
5. If you are serving by post, you will also need:
  - (a) a letter asking your husband or wife asking them to sign the Acknowledgment of Service form and return it to you; and
  - (b) a stamped, self-addressed envelope.

This step is important, because the Court will not continue with the divorce proceedings unless you can prove that you served your husband or wife with these documents. If you do not serve the documents in time, the Court will adjourn the hearing until you can serve the documents.

If your husband or wife is in Australia, you must serve the documents at least 28 days (4 weeks) before the hearing.

If your husband or wife is overseas, you must serve the documents at least 42 days (6 weeks) before the hearing.

If you realise that you are unable to serve the documents by the deadline, it is a good idea to let the Court know by email as soon as possible so that the hearing can be adjourned.

## What are the different types of service?

### Service by lawyer

If your husband or wife has a lawyer, you can serve the documents on the lawyer. The lawyer will need to sign the *Acknowledgement of Service* form, and you will then need to file this on the Commonwealth Courts Portal.

### Service by post

1. You will need to send your husband or wife the documents listed above.

2. Your husband or wife then needs to fill out and sign the Acknowledgment of Service form and send it back to you. If you don't receive the form back, then you will need to try service in person instead.
3. When you receive the signed Acknowledgment of Service, you will also need to complete an 'Affidavit of Service by Post' form to say that you recognise the signature on the Acknowledgement of Service form and it is your husband's or wife's.

When you have finished, you need to sign the form in front of a JP or a lawyer, so that they witness you signing the form. The JP or lawyer must also sign the form and complete the Annexure Note at the very end of the form.

You will then need to file the completed and signed Acknowledgment of Service and Affidavit of Service by Post forms on the Commonwealth Courts Portal.

## Service in person

Service in person can be more difficult and expensive than service by post but will be necessary if your husband or wife will not accept service by post.

1. You will need to find someone willing to serve the documents on your husband or wife. They are called 'the process-server'. You cannot serve the documents yourself.
  - If you can afford it, there are professional process-servers whose job is to serve court documents. This is usually the easiest and safest option. You can find them online or through the Yellow Pages.
  - If you cannot afford a professional process-server, you can ask a friend or relative who is over 18 to serve the documents. If you do this, you will need to explain to them clearly what they need to do and encourage them to follow strict social distancing guidelines.
2. The server must find and identify your husband or wife. They can identify them using a photograph, by asking them, or from memory if they have met them before.

3. The server must then hand over the documents to your husband or wife and ask them to sign the *Acknowledgment of Service* form.
  - If your husband or wife refuses to take the documents or sign the form, the server must put the documents down nearby and say out loud that they are serving an application for divorce and say when and where the Court hearing will be. As long as this is done properly, service can still be successful.
4. The server must complete an '*Affidavit of Service by Hand*' form that sets out how they identified your husband or wife, how they attempted to serve the documents, and whether your husband or wife accepted the documents and signed the Acknowledgement of Service. The server must also attach any documents they used to help identify your husband or wife.
  - When the form is finished, the server will need to sign the form in front of a JP or a lawyer, so that they witness the server signing the form. The JP or lawyer must also sign the form and complete the Annexure Note at the very end of the form.
5. If the server does not know your husband or wife and your husband or wife signed the Acknowledgement of Service form, you will need to complete an Affidavit Proving Signature (Divorce) and sign the form in front of a JP or a lawyer, so that they witness you signing the form. The JP or lawyer must also sign the form.

You must then file the server's Affidavit (with its attachments) and your Affidavit and the original Acknowledgement of Service (if your husband or wife signed) to the Commonwealth Courts Portal.

## What if I cannot find my Husband/Wife?

If you cannot serve the documents on your husband or wife, you can apply to the Court to not serve the application (known as 'dispensation of service') or serve it on someone else who will bring it to the

attention of your husband or wife (known as 'substituted service'). This can be done by filing an 'Application in a Case' form and an affidavit.

These applications are very difficult and will normally only be granted in very unusual circumstances. You will need to tell the Court what you have tried to do to serve the documents, and why there are no other reasonable options available.

See the fact sheet ['Are you having trouble serving your divorce application?'](#) at the Family Court website for further information.

### Free legal advice

For more information or free legal advice, call us on 02 257 4377 from Monday to Friday between 9am and 5pm. Email us at [admin@womenslegalact.org](mailto:admin@womenslegalact.org).