Family Law

Plain English Guide on Divorce

What are the grounds for divorce?

Under the Family Law Act there is only one ground for divorce, that being that the marriage has broken down beyond repair. This is established by separation of no less than 12 months. If there was a brief reconciliation (of no more than three months) then the Court can calculate the period of separation before and after reconciliation as one continuous period.

Are you considered separated even though you are both living under the same roof?

The answer is yes. In this case you will have to satisfy the Court that you were truly separated although still living at the same residence, and the Court may require evidence from some other person to confirm what you say about the circumstances of the separation.

Does it make any difference who applies for the divorce and how do you go about making an application for divorce?

To formally end your marriage you need to apply for a divorce. You can apply for a divorce on your own or you can make a joint application with your spouse.

When you apply for a divorce you need to show that:

- you were married (a photocopy of your Marriage Certificate is required);
- you separated at least 12 months ago; and
- there is no likelihood of you and your spouse reconciling.

The Court can consider your application for divorce if either you or your spouse:

- is ordinarily resident in Australia; or
- is an Australian citizen; or
- regards Australia as their permanent home.

What if there are children under the age of 18 involved?

If you and your spouse have a child or children under the age of 18 years, or if there are children under the age of 18 who were ordinarily members of your household, then your application for divorce must include information about the arrangements for the care, welfare and development of these children. The Court must either declare that it is satisfied that proper arrangements have been made for the children, or alternatively that there are reasons why the divorce should be granted even though the Court is not satisfied that proper arrangements have been made. In some cases the Court will delay a divorce until problems relating to the care of the children are rectified.

Refer to our Plain English Guide regarding Parenting Issues for more information in this regard.

What happens after the divorce application is lodged?

Once your application for divorce is prepared and signed, it is filed with the Court and the Court gives a date for the hearing of the application. This is generally within two months of the date of filing. Unless the application is a joint application, a copy of the application must be served on your spouse no less than 28 days before the hearing date. If there are children involved then the applicant for the divorce must attend at the hearing.

If the Court is satisfied that the grounds for divorce have been proved, it will make a divorce order. The divorce does not take effect until one month and one day later. The Court then issues a certificate that the divorce has taken effect.

Under what circumstances could the divorce not become final?

A divorce order will not take effect if the parties reconcile during the month after the divorce order is made and ask the Court to cancel the divorce. The Court can also stop the divorce order from taking effect if someone can prove that the divorce order was obtained fraudulently.

What happens if I have been served with a Divorce?

If you have been served with a divorce application then check to make sure all the details on the application are correct. If dates of marriage, separation or details as to the arrangements of the children are incorrect they can have implications on parenting and property matters later on.

You can file a Response to the Application if the details are incorrect within 28 days of being served with the Application.

Do you need to make a new Will once you are divorced?

Once you are divorced, any gift to your former spouse in a Will made before the divorce is no longer effective. If you are divorced you should consider whether you need a new Will.

What are the implications for my property matter?

A divorce application is simply in relation to the marriage itself and does not affect or change the property arrangements between the parties. Therefore you will continue to own property together until an agreement is reached (or orders made) as to the division of the assets. You will need to file for property orders (whether they are by consent or you apply for the Court to make orders) within 12 months of the divorce order being effected. It is therefore important that you start negotiating well before that time as to how the property should be divided.

Refer to our Plain English Guide regarding Property Settlements under the Family Law Act for more information in this regard.

Does Mills Oakley have specialist expertise in the area of family law?

We have a number of lawyers, including accredited specialists, practising exclusively in the area of family law. As well as our practical experience in all aspects of family law, other specialist lawyers in the firm are able to contribute their expertise in areas such as commercial, taxation and property law where such issues need to be considered in dealing with your case.

We aim to provide the service that is right for you, whether that be simply advising you as to your rights and obligations, assisting you in negotiating a resolution of issues in dispute or representing you in contested proceedings in the Family Court or Federal Circuit Court.

Where appropriate we will work with your other advisers, such as your accountant, so as to achieve a good understanding of all aspects of your case.

What are some examples of the ways in which we can assist you?

As family lawyers we can assist you in many different ways. For example:

- If you are having problems in your marriage or relationship, we can advise you of the legal consequences of a separation. In some circumstances we may be able to offer suggestions to help resolve the problems or refer you to other advisers or agencies.
- If you and your spouse or partner have reached an agreement as to how you will divide your property or how youwill care for your children, we can assist you in formalising the agreement so as to make it legally binding and enforceable.
- If you wish to enter into negotiations with your spouse or partner with a view to arriving at a mutually acceptable settlement without having to go to court, we can conduct those negotiations on your behalf with the other party or his or her lawyer.
- We can advise you of your rights and obligations in relation to child support and assist you in dealings with the Child Support Agency.
- We can represent you in court proceedings concerning children, division of property, maintenance, child support, and any other issues arising under the Family Law Act.
- We can advise you in relation to binding financial agreements under the Family Law Act or in relation to domestic relationships agreements or termination agreements under the Property (Relationships) Act.
- A marriage breakdown in which you are not directly involved may have implications for you, for example where you have some financial relationship with the parties or where your contact with a grandchild is affected. In these situations we can advise you as to your rights and represent you in negotiations or court proceedings where this is necessary.
- If you are a victim of domestic violence, we can advise you as to how the law can help you.
- If you are concerned that your child may have been abused, we can offer advice and where appropriate take court action on your behalf for the protection of the child.

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