

Divorce and Separation



This fact sheet summarises the Ask LOIS webinar on this topic, presented by Alex Davis, Solicitor, Women's Legal Services NSW on 17 September 2013. This webinar can be downloaded for free at www.asklois.org.au/webinars/past-webinars.

This fact sheet covers:

- Does your client need a divorce?
- The 4 requirements to get a divorce; and
- Procedural steps involved
- Does your client have to go to court?

Does your client need a divorce?

- Many people believe they need a divorce before they can settle other matters such as dividing property
- The only thing you need a divorce for is to remarry. You can choose to remain legally married, even though you have separated. However, many seek a divorce to signal the end of their marriage
- Property settlements and parenting arrangements are separate to divorce and can be done regardless of whether the parties are divorced
- Once a divorce is final you have **12 months** to make an application to the court regarding property
- Where possible, clients are better off to settle their property matters before applying for a divorce to avoid running into the 12 month time limit
- Your client can complete and file their application by themselves (which is called a "sole application") or if you both parties agree to divorce, they can make the application together (a "joint application")
 - The benefit of a joint application is that the cost of the divorce is shared and the parties don't need to serve the documents or attend court
 - A sole applicant will be responsible for paying for the divorce and all the related costs

Requirements for divorce

To legally end a marriage you need to apply to the **Federal Circuit Court** for a divorce. You need:

1. Valid marriage
2. Irretrievable breakdown
3. 12 months separation
4. Australian citizen, a permanent resident or have been living in Australia for at least 12 months before applying for the divorce

Procedural requirements:

1. Fill out application form
2. Attach additional documents (e.g., affidavits, proof of marriage etc.)
3. File documents
4. Pay filing fee
5. Serve on other party
6. File served documents
7. Hearing
8. Wait one month for divorce to become final

1. Valid marriage

A marriage may be invalid (and therefore require annulment) on the following grounds:

- Either/both already married at the time
- Either/both under-age without necessary approvals
- Either/both forced into the marriage (duress)

For an annulment, file an application with an affidavit stating the facts relied on and details of the ceremony. Then serve the documents on the other party. For more info & application form search 'applying decree nullity' at <http://www.familylawcourts.gov.au>

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To prove a marriage was valid your client needs to provide a copy of a marriage certificate or equivalent document:

- Same-sex marriage, even in performed a country where legal, is not recognised as valid in Australia (ie, no need for divorce)
- If your client can't find her Australian marriage certificate she can get a copy from Australia Post OR the Birth, Death and Marriages Registry
 - Non-urgent (3 weeks) - \$51
 - Urgent - \$75
 - Form available at <http://www.bdm.nsw.gov.au/AustPost.html>
 - Registry offices – Sydney, Parramatta, Newcastle, Wollongong
- If your client was married overseas she can apply for a divorce in Australia so long as her marriage is recognised by the government of the country where she was married
 - If your client's marriage certificate is in another language your client will need:
 - **A translation AND;**
 - **An affidavit of translation** - www.familylawcourts.gov.au
 - Note – some countries do not use marriage certificates but have other equivalent documents that can be used as proof of marriage (e.g., Family Register)
 - **TIS** provides free document translation to eligible Australian citizens/migrants within first 2 years of arrival/grant of permanent of eligible temporary/provisional visa
 - See www.immi.gov.au (Living in Aus > Help with English > Free Services)
 - **TIS: 131 450**
 - **Community Relations Commission** also translate documents - www.crc.nsw.gov.au
 - Current cost of translation + affidavit of translation = \$97 (14 days)
 - The Commission may waive fee in cases of hardship for a person who:
 - Is a permanent resident in Australia for more than 2 years; &
 - Holds a Centrelink Health Care Care
- **If your client can't get a copy of her marriage certificate:**
 - She will need to prepare an **affidavit** (a written legal statement) explaining why she can't get a copy of the divorce, what she's done to try to get it and details of the marriage
 - Your client should seek legal advice about how to do this:
 - Legal Aid – LawAccess: **1300 888 529**
 - Her local CLC - http://www.clcnsw.org.au/postcode_search.php
- If your client has been married **less than 2 years** she must either:
 - Attend counselling to discuss the possibility of reconciliation and ask the counsellor to complete a certificate stating they discussed this with your client and her spouse; OR
 - Seek permission from the Court to apply for divorce without a certificate by filing an affidavit with the divorce application. The affidavit would explain why your client and her spouse have not attended counselling, e.g., history domestic violence

2. Irretrievable breakdown

- Since 1975, Australia has had a “no fault” divorce system
- The focus is on the ‘irretrievable breakdown’ of the relationship. This means the marriage has broken down and there is no chance your client and her husband will get back together
- It does not matter whether or not the other party agrees the marriage is over, so long as one party **communicates** to the other party that they consider the marriage is over
- The day this is communicated to the other party marks the day the ‘separation’ begins

3. 12 months separation

- Separation starts the day a person DECIDES the marriage is over and COMMUNICATES this to their spouse, the parties must then wait 12 months before they can apply for a divorce
- Can get back together for up to 3 months without re-starting 12 month separation period
- Time spent back together doesn't count as part of the separation



- **Separation under one roof:**
 - Your client and her husband can still live together but be separated, however, she must prove there has been a change in the relationship demonstrating she and her husband have separated
 - Supporting affidavit of a neighbour, friend or family member (including children if over 18) who can tell the court about your separate lives
 - If joint application and both parties provide affidavits, a supporting affidavit is not always necessary
 - In her affidavit, your client should address:
 - Changes in allocation of household duties (shopping, cooking, cleaning)
 - Changes in sleeping arrangements and shared activities
 - Changes in the division of finances; e.g., separating bank accounts
 - Telling family/friends of your separation
 - Explain why she has continued to live in the same house following separation
 - Changes in care/living arrangements for any children of the marriage (under 18 years) while living under one roof
 - Notifications to government departments or changes in benefits post separation

4. Australian citizen, permanent resident or living in Australia for at least 12 months before applying for the divorce

- It is also a requirement that at least the person applying for the divorce is an Australian citizen or permanent resident or has been living in Australia for at least 12 months before applying for the divorce
- Your client may need to provide the Court with a copy of their Australian citizenship certificate, Australian passport or other proof of citizenship

Opposing a divorce

- A person can only oppose a divorce where there has not been 12 months separation as alleged in the application, or the court does not have jurisdiction
- If your client is thinking of opposing a divorce, she should seek legal advice first
- She would need to file a Response to Divorce and set out the grounds on which seeking the dismissal
- A Response needs to be filed at a family law registry within 28 days of the Application being served in Australia or 42 days if served outside Australia

Filling out the divorce application

- Legal aid run free divorce workshops across NSW to assist with filling out the application - <http://www.legalaid.nsw.gov.au/what-we-do/workshops/manage-your-own-divorce>
 - Divorce Toolkit: www.familylawcourts.gov.au
 - Online filing: www.comcourts.gov.au

Filing the application form

- Your client must then file the documents with the Family Law Registry by taking, posting or e-filing them. She will need to file:
 - The original application + **2 photocopies**
 - Any original affidavits + **2 photocopies**
 - Proof of marriage
 - Passport/proof of citizenship in some cases
 - Pay **filing fee - \$800 or \$265 reduced fee**
- **Reduced fee applies** where:
 - Client has card entitling Commonwealth health concessions; OR



- On Youth allowance, Abstudy or Ausudy; OR
- Legally aided; OR
- Has '**Notice of Exemption**' from CLC; OR
- Legally detained (prisoner)
- The Court keeps the original documents and gives back:
 - The two copies with the **Court's seal** and **hearing date** stamped on them
 - Two copies of *Marriages, Families and Separation* brochure
- Your client keeps one of the sealed copies and a brochure
- The other copy and brochure are to be **served** on (formally given to) her husband

Service

- Serving documents is the process of making sure the other party has received the documents filed with the court.
- If it is a **joint application**, service is not necessary.
- Service is either by post OR in person
- If your client's husband has a lawyer, these documents can be served on his lawyer

Filing served documents

Once your client has had the documents served on her husband, she must then file the original and one copy of the following documents at a family law registry before the hearing date:

1. Affidavit of Service by Post or by Hand (depending on how the husband was served) and
2. Acknowledgment of Service (Divorce)
3. Affidavit Proving Signature - filled out by your client to say that she recognises her husband's signature

What if my client cannot find her husband?

- If your client cannot find her husband, she should **seek legal advice**
- **Substituted Service** - allows your client to serve court documents on a third person if the Court is satisfied this will bring the documents to the attention of her husband
- **Dispensation of Service** – your client doesn't need to serve the documents on her husband if the Court is satisfied she has made all reasonable attempts to find her husband. Dispensation of service is not granted lightly. If the Court isn't satisfied all possible steps have been taken, they may adjourn the case and direct your client to take extra steps to find him, which can prolong proceedings

Does my client need to go to court?

Only if:

- 1) It is your client's application AND
 - there are children under 18; &/OR
 - It has not been possible to serve the application on her husband, OR
- 2) Your client's husband filed the divorce application AND your client filed a response

Safety concerns at court: Contact staff at a family law registry at least 2 days before the hearing so arrangements can be made – ph: **1300 352 000**

What happens next?

- **At court:** the divorce hearing is usually very short and heard by a Registrar, if all requirements are met, it is likely it will be granted
- **Wait one month:** Your client needs to wait for one month after it is granted for the divorce to be final. The divorce certificate will be mailed to her. Your client cannot remarry until the divorce is final.