

This article looks at the law of marriage in Australia, as well as what happens when there is a breakdown of a marriage.

Divorce, disputes over children and property order are also discussed.



## **A. MARRIAGE**

The legal definition of marriage, as outlined in section 5 of the *Marriage Act 1961 (Cth)* is “the union of 2 people to the exclusion of all others, voluntarily entered into for life.”

In Australia, the legal age for marriage is 18, unless the Court approves a marriage where one party is aged 16 or 17 years of age.

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, even though it is common practice for women to take their husbands' surname.

## **B. BREAKDOWN OF MARRIAGE**

Couples who have been married for less than two years are required to either have counselling with a family counsellor before applying for a divorce, or seek permission from the court to apply for a divorce. Family 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.

## **C. DIVORCE**

Divorce dissolves the legal bonds of marriage between parties. Pursuant to section 48 of the *Family Law Act 1975*, the only ground for divorce is the irretrievable breakdown of marriage. This is shown only where the parties have been living separately and apart for at least 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 Federal Circuit and Family Court of Australia (FCFCoA) 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 joint application may expedite matters where the divorce is not contested by the other party.

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

### **C.1. 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 duties, 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 stating that there was a separation under one roof.

This requirement of evidence is mandatory for both sole and joint divorce applications.

### **C.2. 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.

### **D.3. FINALISATION OF A DIVORCE**

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

### **D. DISPUTES REGARDING CHILDREN**

In straightforward cases, parents will organise and agree amongst themselves on important decisions about the children, such as where they will live.

However, if there is a dispute about children, the court will make an order and take into consideration the best interests of the child.

Some factors 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 provide adequately for the physical, emotional and intellectual needs of the child and whether the child has been involved in or witnessed domestic or family violence.

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

### **E. 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.

For more information on Consent Orders in Family Law matters, click [here](#) to see our legal article.

### **F. CHANGES FROM THE NEW COURT**

From 1 September 2021, the new Federal Circuit and Family Court of Australia commenced operation, governed by the *Federal Circuit and Family Court of Australia Act 2021* (Cth). The overarching purpose of this Court is to facilitate the just resolution of disputes in accordance with law and as quickly, inexpensively and efficiently as possible.



### F.1. CASE MANAGEMENT PATHWAY

The new case management pathway places greater emphasis on dispute resolution, encouraging parties at every opportunity to resolve the matter out of court.

Apart from urgent applications and cases in the specialist lists, all family law matters will proceed in the following way:

1. First Court event (directions hearing) – generally within one or two months of the commencement of a case. The case is assessed for compliance with filing requirements and directions may be made for parties to attempt dispute resolution.
2. Interim hearing – if any interim applications are made by either party, an interim hearing will be held (eg for urgent parenting orders).
3. Dispute resolution (eg mediation) – usually takes place within five months of the commencement of a case. May be conducted within the Court or externally.
4. Compliance and readiness hearing – if parties have complied with all orders and made a genuine attempt to resolve issues, but still cannot resolve it, the hearing will be used to allocate a trial date.
5. Trial management hearing – if the allocated trial Judge would like to address some issues prior to the final hearing, a trial management hearing may be held.

6. Final hearing – the aim is for the trial to be held within 12 months from the commencement of the case. The remaining issues are determined by the trial Judge, and the Court will aim to deliver judgment within three months of the trial.

### F.2. COURT CHILDREN'S SERVICE

Previously known as Child Dispute Services, the new Court Children's Service (CCS) involves social workers and psychologists as family consultants, assisting with dispute resolution and conducting risk assessments.

The CSS focuses on identifying and assessing the risks impacting children, providing expert evidence, providing resources and support services, and giving a voice to children to better understand their needs.

The CSS also provide Child Impact Reports, generally ordered by a registrar or Judge in the early stages of a case. This Report provides information about a child's experiences and needs in light of the separation, which assists a registrar or Judge in making appropriate orders on how the case should be managed in the best interests of the child.

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

© Comasters October 2022. **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.

## CONTACT US

**Jeffrey T Lee** Principal Lawyer  
**Radha Sri** Associate Lawyer  
**Daphne Ow Yeang** Associate Lawyer  
**Alice Huang** Senior Paralegal  
**Paula Kahwajy** Paralegal

**Comasters Law Firm and Notary Public**  
**Suite 101, Level 1, Capitol Terrace**  
**743-755 George Street**  
**Sydney NSW 2000, Australia**

**T +612 9288 0300**  
**F +612 9288 0399**  
**E [comasters@comasters.com.au](mailto:comasters@comasters.com.au)**  
**[www.comasters.com.au](http://www.comasters.com.au)**