PATERSON & DOWDING EST. 1987

FAMILY LAWYERS & MEDIATORS

FREQUENTLY ASKED QUESTIONS

1) *How we can help?*

We can prepare the divorce application, organise for the respondent to be personally served with these documents, and represent you at the mandatory Divorce Hearing at the Family Court.

We can also help you with other common issues arising following separation, such as parenting issues, child support, property division and spousal maintenance.

2) *What is a divorce?*

A divorce is the legal dissolution of a marriage by the Family Court.

3) What are the requirements to get a divorce?

A divorce application can be brought by either party to the marriage or jointly by both parties to the marriage. For a divorce order to be granted, the marriage must have broken down irretrievably. Broken down irretrievably means the court is satisfied that the parties separated and lived separately and apart for a continuous period of not less than 12 months immediately preceding the date of filing the application for divorce.

4) What does 'separation' mean?

When looking at whether a party has separated, the court looks at the action, intention and communication between the parties. Separation involves more than mere physical separation needed, it involves the breakdown of the marital relationship whereby at least one of the parties intends to and acts on severing or not resuming the marital relationship. For instance, in Campbell & Cade (2012) the court held the parties had not separated because they still acted as a couple by maintaining a sexual relationship, attending social functions together, staying in hotel rooms together and operating a joint bank account.

The Family Court will not grant a divorce order if it is satisfied there is a reasonably likelihood of cohabitation being resumed.

5) What if we resume cohabitation?

The Family Court can aggregate the periods of separation if the parties resume co-habitation on one occasion for not more than 3 months. The period of co-habitation is not included as part of the period of separation. Resuming a sexual relationship does not in itself constitute a resumption of cohabitation, it is one factor amongst many considered. Agreeing to resume co-habitation but not actually resuming cohabitation is not re-cohabitation. Where re-cohabitation occurs after a divorce order is filed, the court considers whether there is a likelihood of further re-cohabitation.

6) *What if we've been married less than two years?*

If the parties filed a divorce application and it is less than two years since you were married, they must file a signed certificate stating they have considered a reconciliation with the assistance of a family counsellor or an individual or organisation nominated by a family consultant. Parties are exempt from needing a certificate if there are special circumstances and an affidavit is filed in support of the application. You should obtain legal advice in such circumstances.

7) What if we have children?

Where children are involved, the Family Court will not grant a divorce order unless it is satisfied that either, the children are 18 or older, the children are under 18 but proper arrangements have been made for their care, welfare and development (i.e. financial support, education, housing and medical needs) or there are circumstances where the divorce order should take effect anyway (for example, the whereabouts of the other party are unknown).

If the court is not satisfied that arrangements for the care, welfare and development of a child have been met, it may adjourn proceedings until a report has been obtained from a family consultant.

A child is a child of the marriage if they were treated by the husband and wife as a child of their family at the relevant time. This includes ex-nuptial children of either party, adopted children by either of them or a child who is not a child of either of them. Relevant time is the time immediately before the husband and wife separate, or, if

they've separated on more than one occasion, the time immediately before they last separated before the divorce order application was made.

8) *What if we are divorcing and either of us are not Australian citizens?*
When an application for a divorce order is filed, one of the parties must be a citizen, regard Australia and intend to live indefinitely in Australia or ordinarily reside in Australia for 12 months before filing the application.

Citizenship is gained by birth, adoption, formal approval or being abandoned in Australia. If citizenship has been granted by formal approval i.e. a citizenship certificate, that approval is required by the court.

Domicile is the person's place of residence, of which they can only have one. Domicile can be by origin or choice. The onus of proof for a change of domicile rests on the person asserting the change.

Resident means a lawful residence for one year immediately preceding that date. A person's residence is where they abode in a particular place or country which they have adopted voluntarily for a settled purpose as part of the regular of their life for the time being.

9) Are there any formal requirements for notifying the other party?
If a sole application for divorce is made, the other party must be personally served with a copy of that application by the relevant time limit. Personal service is effected by physically handing the document to the person named in the document. The relevant time limit for service to a party within Australia is 28 days of the date listed on the application and 42 days if they are outside of Australia.

There are strict service requirements and the party serving the application must file a Form 6 Acknowledgement of Service and Form 7 Affidavit of Service. There are occasions when such service can be dispensed, such as when you have made multiple attempts to contact the other party and have been unsuccessful you should obtain legal advice in such circumstances.

10) *Can we divorce if we were married overseas?*
If the parties were married overseas, you should provide the original or certified copy of the certificate, entry or record of the marriage from the foreign country, and if it isn't in English, an affidavit translating those documents.

11) How do I prove our marriage to the court?
If the parties were married in Australia, you should provide the original or certified copy of the marriage certificate. If the parties were married overseas, you should provide the original or certified copy of the certificate, entry or record of the marriage from the foreign country, and if it isn't in English, an affidavit translating those documents. If the marriage certificate is not available, for example it's been destroyed, evidence of a marriage ceremony in accordance with the laws and customs of where the marriage occurred should be provided.

12) How long will it take?
When the divorce application is filed, you will be given a Divorce Hearing date, which is when the divorce application is considered by the Family Court. This is usually between one to three months from the date of filing the divorce application.

13) When does a divorce order takes effect?
A divorce order takes effect 4 weeks from the date of the hearing.

The Family Court may delay this time if it is satisfied there is a possibility of an appeal. The Family Court may reduce this time if it is satisfied there is a special circumstance that justifies doing so.

If an appeal is instituted before a divorce order has taken effect, the divorce order takes effect at the expiration of one month from the day the appeal was determined or discontinued.

If either party dies before the divorce order takes effect, the divorce order does not take effect.

14) Can the court rescind a divorce order?
If a divorce order has been made but not yet taken effect, the court may rescind the order if the parties have reconciled or rehear the proceedings on the grounds of fraud, perjury, suppression of evidence or any other reason it thinks fit on the application of one the parties or the Attorney-General. The divorce order cannot be appealed after it takes effect.

15) Can I oppose a divorce application?

If you have been separated for more than 12 months you cannot oppose a divorce application unless the court does not have jurisdiction or there has not been 12 months' separation as alleged in the divorce application.

If you do not want the divorce granted, you must complete and file a Response to Divorce setting out the reasons you seek the dismissal, and then appear in person at the divorce hearing date. You should file the Response to Divorce within 28 days of receiving the divorce application if you are in Australia or within 42 days if you are outside of Australia.

16) Does divorce deal with property and children's issues?

A divorce does not deal with property or parenting's issues (save for that the children's welfare, care and development is being looked after). Property division and parenting arrangements will need to be dealt with separately.

17) What effect does a divorce have on my ability to bring a property or maintenance claim?

Once a divorce order takes effect or the marriage is considered void, the parties have twelve months to institute property or maintenance proceedings unless they both consent or the Family Court grants them leave.

The Family Court will not grant leave unless hardship would be caused to a party or child if leave is not granted or in relation to maintenance, at the end of the period within which court proceedings could've been instituted without leave, the circumstances of the applicant were such that they wouldn't have been able to support themselves without an income-tested pension, allowance or benefit.

The test used for whether leave should be granted once the time limit has expired is in Whitford (1979). Firstly, whether hardship would be caused to the applicant or child of the marriage if leave wasn't granted. Secondly, if hardship is established, whether in exercising its discretion the court should grant or refuse leave to institute proceedings, taking into account all relevant factors, such as the reason for delay and the prejudice on the respondent.

18) What effect does a divorce have on my will?
A party's will is revoked by divorce unless it is made in contemplation of the divorce (i.e. the impending divorce is written in the will) or other evidence establishes such an intention.

19) When can I remarry?
A party may remarry when the divorce order has taken effect.

20) What does an application for divorce cost?
There is a filing fee for divorce applications. Current fees are available on the Fees page of the Family Court which can be accessed here:
http://www.familycourt.wa.gov.au/F/fees_and_forms.aspx?uid=9339-7089-1873-0177

The application for divorce fee as at 1 July 2018 is $900.00.

In some cases, for example, if you hold certain government concession cards or you are experiencing financial hardship, you may be eligible for a reduced fee. To be eligible for a reduced fee for a joint application, both you and your spouse must qualify for the same reduction. If only one spouse qualifies for the reduction, then the full fee applies.

If you qualify for financial hardship, the application for divorce reduced fee as at 1 July 2018 is $300.

21) ***Can the court nullify my marriage instead?***
The Family court may make what is known as 'decree for the nullity of a marriage' if they deem the marriage void.

22) ***Am I eligible to have my marriage nullified?***
A 'decree of nullity of marriage' can be instituted by either party to the marriage or jointly by both parties.

A marriage may be void for any of the following reasons –

- if either party at the time of the marriage was lawfully married to another person.

- if the parties are related i.e. siblings (whether whole or half), ancestors or descendants.
- if either party was under 18 years old, unless the person is 16 or over and the court deems the circumstances so exceptional and unusual as to justify the marriage.
- if the union was performed in a foreign country between a man and man or a woman and woman.
- if consent was invalid because -
  - it was obtained by duress or fraud.
  - that party is mistaken as to the identity of the other party.
  - that party is mistaken as to the nature of the ceremony performed.
  - that party is mentally incapable of understanding the nature and effect of the marriage ceremony.

23) What does an application for nullity cost?

There is a filing fee for nullity applications. Current fees are available on the Fees page of the Family Court which can be accessed here: http://www.familycourt.wa.gov.au/F/fees_and_forms.aspx?uid=9339-7089-1873-0177

The application for nullity fee as at 1 July 2018 is $1,275.00.

In some cases, for example, if you hold certain government concession cards or you are experiencing financial hardship, you may be eligible for a reduced fee. To be eligible for a reduced fee for a joint application, both you and your spouse must qualify for the same reduction. If only one spouse qualifies for the reduction, then the full fee applies.

If you qualify for financial hardship, the application for nullity reduced fee as at 1 July 2018 is $425.