

The Divorce Law Guide for Australia



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This guide covers a range of divorce law issues in Australia and is for anyone separating or getting divorced .

The guide was created by Mathews Family Law, a specialist boutique family law firm.

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THE DIVORCE GUIDE FOR AUSTRALIA

Divorce is the legal termination of a marriage. For those considering it or going through a divorce, the process is emotional, sometimes heartbreaking. If children are involved, there are even more issues and people to consider. And then, of course, there is the legal process. For many, the legal side of divorce is not only one more step along the path to terminating the marriage but an actual obstacle in the way.

This guide is aimed at anyone thinking about divorce or already in the process. Our goal is to help couples considering divorce, those who are already separated and even those already in the divorce process, by offering a clear, easy to understand explanation of the divorce process in Australia. Our aim is not to provide legal advice but to give readers an understanding of the law and the procedure so they can make well-informed decisions, either on their own or with a lawyer.

Before making any serious changes in family arrangements, make sure to read through this book thoroughly. The Family Law Courts also provide important information that can be found at the website www.familylawcourts.gov.au.

This guide is not meant to replace legal advice. To better understand your rights and to get advice on what you should do for your specific situation contact a family lawyer in your city or town. Every case is different and only an experienced family lawyer can tell you how best to proceed.

NANCY & BEN– A CASE STUDY

Nancy and Ben met when they were in their twenties. They married in their early thirties, in 2004. They have three children, ages 3, 6 and 8. Ben worked full-time in building and Nancy is a paediatrician. The first seven years of the marriage, both agree, they were financially stable and happy together. Their lives were very busy with work and children. When the world recession hit, Nancy and Ben fell on hard times. Ben lost his job, and with it, a large source of family income. Despite his experience, Ben remained out of work for two years. Following several good years together, the couple struggled through some financial problems. Though back on their feet, the problems took their toll and despite several years of couples therapy, Nancy and Ben have decided to get a divorce. They are hoping to make the process quick and as painless as possible for their children.

Ben and Nancy have many choices on how to proceed. Following them, we can see how the divorce process works, what choices need to be made and what a couple should consider when making those choices.

DIVORCE LAW IN AUSTRALIA

Divorce in Australia is covered by the Family Law Act of 1975, which also covers all other issues of family law, including maintenance, custody and division of property. A couple wishing to divorce must submit an application to the Federal Circuit Court. The Family Court is used in divorce cases only as an appellate court.

Where you were married does not necessarily matter. There are three requirements for divorcing in Australia:

- You must consider Australia your home and currently be living in Australia and intend to live in Australia indefinitely, or;
- You are an Australian citizen by birth, descent (one or both parents are Australian) or by grant of Australian citizenship, or;
- You ordinarily live in Australia and have lived in Australia for 12 months immediately before filing for divorce (even if you took short holidays or business trips overseas).

NULLITY

While the focus of this guide is separation and divorce, you may be able to end your marriage through a third option, nullity, essentially an invalidation of the marriage by the court. A marriage can be ruled as invalid if:

- (1) One or both partners were already married at the time or;
- (2) One or both partners were under age (18 at the time of the marriage) and did not receive the approvals required by law or;
- (3) One or both parties was forced into the marriage under duress.

You can apply for nullity by filing an Initiating Application, along with an affidavit that includes the facts relied on to have the marriage annulled and details of the marriage ceremony.

THE FIRST STEP: SEPARATION

Nancy and Ben decided they could no longer live together. Ben signed a lease on a separate apartment a few kilometres from their home and moved in. They are giving this new arrangement a chance to see if this is what's best for them and their family.

The Family Law Act permits divorce when "the marriage has broken down irretrievably." Neither spouse is required to put blame on the other or accuse the other spouse of some type of immoral or illegal behavior. This also means that the agreement of the other spouse is not required in order to obtain a divorce. This is referred to as "No Fault Divorce".

The law requires a couple to be separated for at least 12 months and one day before filing an application for divorce and a court may ask for proof of this separation before granting a divorce. The court may also deny a divorce if it believes that there is a reasonable likelihood that the couple might live together again.

SEPARATION UNDER ONE ROOF

Separation usually means that the couple does not live in the same house.

However, the law also recognises "separation under one roof". This may happen if no alternative living arrangement is available or affordable. Couples who remain living under one roof are separated if they maintain separate lives (see box). The court may require you to give evidence that you were separated if you remain living together.

In both cases, the spouse who wants to separate must communicate their intention to the other that he or she wishes to separate. This can be done verbally or in writing.

Leading separate lives may include:

- No sexual relations
- Living in separate rooms
- No attending social functions together
- Not eating together
- Not providing each other household services (laundry, cooking, cleaning)
- Not telling friends and neighbors that the marriage is continuing

CHILDREN DURING SEPARATION

Nancy and Ben's children noticed something was going on. Their parents were speaking to each other less, clothing and kitchen items were being put into boxes and the atmosphere was tense. Ben and Nancy felt unsure about what to tell them. Ben wanted to be honest with them.

As difficult as separation is, telling your kids about it and actually discussing it with them is even harder. But remember that they are affected by this process too and need to be reassured by you and your spouse that you love them and will continue to care for them. It is very important that they understand that the separation is not their fault.

Once you decide to separate you'll need to decide on several things right away:

- Who leaves and who stays?

What your children need when you and your spouse separate:

- *DO tell your children what's happening*
- *DO make sure they know it's not their fault.*
- *Do reassure them that you both still love them*
- *DO NOT talk badly about the other parent*
- *DO NOT make your children choose between you and your spouse*
- *Talk to other people involved in your children's lives – teachers, coaches – so they know what's happening*
- *Let them see you packing so they can see the process taking place and not be surprised or shocked when you move out*
- *Make sure you have space for them in your new place*
- *Work out arrangements for your children, like getting them to school and activities and tell them what those arrangements are.*
- *Listen to what they want and what they need. If you choose to do something else, tell them why.*

- Where will the children live?

- Who supports who and who supports the children?
- Who pays outstanding debts, loans, bills, etc.?
- Who pays the mortgage or rent?

While you don't have to resolve all of the issues right now, you should begin thinking about:

- What happens to joint accounts (bank, mortgage, pensions, etc.)?
- What happens to the house, car and other joint property?

APPLYING FOR A DIVORCE

Now living apart, Nancy and Ben tried couples therapy and sought the advice of friends and family in an effort to work out their problems. After a year, Nancy decided she had done her part in helping the marriage but that there were too many obstacles to overcome. Nancy felt it was time to call it quits and get a divorce. Ben didn't agree. After 11 years of marriage, he believed they owed it to themselves and their children to work a little longer.

Anyone applying for a divorce in Australia must fill out an application form which is then filed with the courts. The Family Law Courts provide an application for divorce kit on their website, including a step by step explanation of how to apply for a divorce. ***Mathews Family Law offers a fixed fee on-line application for divorce service at www.divorce-online.com.au.***

Applications for divorce can also be filed online. The Family Law Courts website provides a special link for e-filing a divorce application as well as a user guide

DO BOTH SPOUSES HAVE TO FILL OUT AN APPLICATION FOR DIVORCE?

One spouse may fill out the form (sole application) or both spouses may do it together (joint application). If you are making a sole application, you need to fill out all questions relating to you and your spouse. If you don't know some of the answers to questions about your spouse, and have made attempts to find out the answers, you can fill in "not known" on the form*. If you are filing a joint application, you can answer it together or have one of you fill it out and the other one add in the missing information.

*If you do not answer all questions, the court may not accept it and send it back to you for completion.

COUPLES MARRIED FOR LESS THAN TWO YEARS

Couples married under two years have slightly different requirements than other couples. They too must be separated for a period of 12 months, from the day of separation until the day they apply to the courts for a divorce. The law requires proof that the couple considered reconciliation.

To prove that you tried reconciliation, you must attend counselling with a family counsellor. He or she will then provide you with a certificate stating that reconciliation was discussed.

If you choose not to attend counseling, you must obtain permission from the court to apply for a divorce by submitting an affidavit, or sworn statement, along with your application for divorce. The affidavit must explain why you both have not attended counselling. For example, you can say that your spouse cannot be located and give details about how you went about looking for him or her. The affidavit should also include any special circumstances, for example one spouse living overseas, or violence or abuse in the relationship, preventing you from attending counselling. The affidavit must be witnessed by a lawyer or Justice of the Peace or someone else authorised to sign affidavits.

FILING THE APPLICATION FOR DIVORCE

Once the application is filled out, it must be signed in front of a lawyer or a Justice of the Peace or somebody else permitted to sign as a witness to an affidavit in your state or territory. You must make two copies of the signed application and file the original and the two copies, as well as a copy of your marriage certificate, at a Family Law Court Registry. Appendix B contains a list of locations for Family Law Court Registries throughout Australia.

If you don't have a copy of your marriage certificate, you can obtain one from the Registry of Births, Deaths and Marriages in the capital city in which you were married.

Appendix C contains a list of these Registries.

If you cannot obtain a copy of your marriage certificate, you must prepare an affidavit, with a lawyer, and file it with the Court. This affidavit needs to explain the details of your marriage, including date, city and location as well as the reasons why you cannot obtain a copy of your marriage certificate.

A fee for filing an application for divorce is also required. An updated list of fees can be found on the Family Law Courts site, as well as the accepted methods of payment. To obtain a reduction in or an exemption from court fees, you must fill out one of the fee forms found on the Family Law Courts website.

Once the application is filed and the fee paid, the court will assign a hearing date. If the application was made by both spouses, the court will keep the original application for divorce and give both spouses a sealed copy of the application and an information brochure entitled 'Marriage, Families and Separation'. If a sole application was made, the court keeps the original application and provides the

Marriage Certificate in a Foreign Language

If you were married in another country and your marriage certificate is in a language other than English, you must have it translated before it can be submitted to court. The person who translated the marriage certificate must submit an affidavit which:

- *Includes a copy of the marriage certificate*
- *Includes a copy of the translation*
- *States the translators qualifications to translate*
- *States that the translation is an accurate translation of the marriage certificate*

filing spouse with two copies of the sealed application and information brochure 'Marriage, Families and Separation'.

SERVING THE OTHER SPOUSE

If you filed a sole application, you are now responsible for serving the sealed application on your spouse. This must be done at least 28 days before the hearing if your spouse is in Australia, or 42 days before the hearing if he or she is overseas.

The application, as well as the brochure "Marriage, Families and Separation", must be served by registered mail or in person. If an application is sent to the other spouse by registered mail, an Acknowledgment of Service (Divorce) must be sent back by the spouse as proof that the application was received.

Your spouse may also be served in person, but NOT by you, the filing spouse. An individual over the age of 18 who is a family member, friend or professional process server may serve the application on your spouse. If your spouse has a lawyer who is willing to accept service, you can serve the documents on this lawyer, who must sign an Acknowledgment of Service (Divorce), which serves as proof of service. The acknowledgment must be filed with the court.

WHEN A SPOUSE CANNOT BE SERVED

In some cases, it may not be so easy to serve the divorce application on your spouse, either because he or she is out of the country or refuses to accept the papers or cannot be found. You must be able to show the court that you've taken all reasonable efforts (see box) to find your spouse. If you have taken all reasonable steps to serve your spouse, you can apply to the Court for either substituted service, or dispensation of service.

Reasonable steps for locating a missing spouse:

- *Search the phone book*
- *Search online, including linkedin, facebook and twitter*
- *Ask friends and relatives*
- *Ask current and former employers*
- *Search the electoral roll*

What you are NOT required to do to locate a missing spouse (unless ordered by the court):

- *Hire a private detective*

RESPONSE TO A SOLE APPLICATION FOR DIVORCE

Australia recognises no-fault divorce, so a sole application for divorce can be opposed for only two reasons:

- By claiming that there has not been a separation of 12 months and filing a Response to Divorce application OR;
- By claiming that the court does not have jurisdiction and filling out a Response to Jurisdiction (Divorce) OR;
- Proper arrangements have not been made for the children.

If your spouse files a Response to Divorce, he or she must serve you with the Response before the date of the hearing.

If the dispute is unable to be resolved by consent, the court will allocate a hearing date to hear evidence from you and your spouse (and any other witnesses that either of you may call) and make a determination as to whether or not the divorce ought to be granted.

THE FINAL STEP: THE COURT HEARING

You do not have to attend the hearing if:

- 1) There are no children under age 18
- 2) You filed a joint application for divorce (even if there are children under age 18)

You must attend the hearing if:

- 1) There are children under age 18
- 2) You made a sole application for divorce

You should attend the hearing if you filed a Response to Divorce. If you do not attend, the court may decide on the application without you.

The court hearing takes place in the Federal Circuit Court in your state or territory. Here's how the hearing might go:

1. You (and your lawyer, if you have one), will sit at a table called the "bar table". While you may bring friends and family (over the age of 18) into the courtroom with you, they may not sit with you at this table and they may not speak on your behalf.
2. The person who hears the divorce application is either a Judge, and should be addressed as "Your Honour", or a Registrar, and should be addressed as "Registrar".
3. If you have a lawyer, he or she will probably do the talking for you. If you are alone, you will need to answer to the Judge or Registrar.
4. The Judge or Registrar will read out the documents that were filed with the court. He or she may ask you or your lawyer questions. These questions can be about information given on the Application for Divorce, the children and their arrangements or other questions the Judge or Registrar feels need clarification.

Five things everyone should know about the court hearing:

1. *Dress appropriately. Shorts, very short skirts, and hats (unless worn for religious reasons) are not acceptable*
2. *Don't bring in any food or drinks into the courtroom and definitely don't chew gum!*
3. *Turn off all electronic equipment, including phones, ipods and computers.*
4. *Stand up when the judge or registrar enters and remain standing until she sits down. Stand up again when you speak and when the judge leaves the room.*
5. *Don't talk to other people in the room while your case or other cases are being heard*

5. If there are children under the age of 18, the court will want to be sure that proper arrangements have been made before it grants the divorce. The court will want to know where the children will live, how they will be supported, information about the children's health and education and how they will maintain a relationship with both parents.
6. Once the Judge or Registrar is satisfied that all of the requirements for divorce were met, he or she will announce that the marriage has been dissolved and the divorce will take effect in one month and one day. The divorce order is proof of the divorce.

The divorce is final one month and one day from the date of the hearing. The court will send a Divorce Order to both you and your spouse.

You will become eligible to remarry only after the divorce has become final.

CHOOSING A DIVORCE LAWYER

Choosing the right lawyer can make the difference between a smooth process with a successful outcome and a painful course of action that fails to meet your expectations. Look around, ask questions, investigate, weigh the options and choose the lawyer who is best for your particular needs. Here are a few ways to choose a lawyer.

1. Look and ask around. Turn to friends and family for names of lawyers. Everybody knows somebody who went through separation or divorce. You can also turn to the Law Society or Institute in your state or territory to get a list of family lawyers if you haven't received enough names from friends and family and have a look on Google.
2. Look up the names on the internet. Every lawyer has a website these days, filled with useful (and less useful) information about their firm. Is this lawyer a sole practitioner or part of a large firm? Does he or she specialise in family law? Sometimes sole practitioners specialise just in family law, but sometimes they end up doing a little bit of everything. If he or she is part of a larger firm, his or her expertise may be family law, but does he or she have the time to commit to your case? There's no right answer, but know what the factors are that you need to consider.
3. Listen to other people's experiences with the lawyer. A lawyer's website most likely says great things about their skills, experience and professionalism. But recommendations from people who used the lawyer can give you better perspective. You might need to ask several people to get a balanced view.
4. Choose a family lawyer. Family law is a very specialised area. While your brother's best friend might be an amazing criminal lawyer, that's not too helpful when you need help dealing with issues of parenting with your former spouse. A good family lawyer knows the law, has experience in the courtroom, presents you with successful cases and has satisfied clients.

Also check if he or she is involved in family law issues, written papers on the topic or participates in professional forums and organizations.

5. Start with an initial phone call. You can get a lot of information just from that first call. If you leave a message with the secretary, how long does it take for the lawyer to call you back? If you waited more than a day or two, the lawyer might be too busy (or too uncaring) to deal with your case. How does the lawyer treat you on the phone? Use this opportunity to ask about fees. You might discover immediately that their price is too high for you. Also use the time to ask about their expertise in family law. And if you decide you do want to meet them, find out if they charge for an initial meeting and how much.

6. Interview before you hire. Set up appointments with the lawyers who sound right for you so you can interview them. When you meet, does he or she give you the time you need, addressing your issues and questions, or is he or she busy checking emails and answering phone calls? If he or she talks about other clients, is it in an appropriate way? Is his or her style right for you? He or she might be an aggressive, savvy lawyer who knows how to get her way, but this might mean you don't feel comfortable with him or her. Do you feel you can confide in this person and he or she will be discrete with your details? Sometimes a first read is not correct, but sometimes it's good to go with your gut feeling. You know what works for you.

7. Find out the costs. Lawyers work in different ways. Most charge an hourly fee. In this case, see if the lawyer can give you an estimate of how many hours your case will take. Most likely he or she won't know 100% but they might be able to give a general idea based on previous, similar cases. Other lawyers will give you a price for the entire package of services. Find out what is and isn't included. What happens when special circumstances arise not included in the cost? How does the lawyer charge for those services?

8. Access to other areas of law. Many times in family law, other issues will come up that require expertise in other fields such as business, wills, estates, etc. Is the lawyer in a firm that deals with these other issues so he or she has someone to consult with? Or are there other professionals he or she regularly consults with on their cases?

9. Location, location, location. With so much work done today over the internet and via skype and fax, your lawyer's office does not need to be within a ten minute drive from you. But you will probably be required to sign documents periodically so be sure you can get to your lawyer with a car or with public transportation.

QUESTIONS YOU SHOULD ASK WHEN CHOOSING YOUR LAWYER:

- Do you have the time to give to my case?
- Will you be handling my case? If someone else will be involved, can I meet with him or her?
- Can you estimate how long you expect my case to take?
- What is your policy about communicating? Do you communicate by phone, email, fax? How long does it take for you to return my phone call or email?
- If you aren't available, will there be someone else I can talk to about my case?
- How many cases do you handle a year?
- How many cases of yours went to trial last year and how many were settled out of court?
- What is your usual or preferred strategy or "philosophy" for handling a divorce case?
- Do you recommend mediation to your clients? If so, in what circumstances?
- Are you trained in mediation or other alternative dispute resolution practices?
- Do you encourage or discourage direct contact between spouses or *de facto* couples or parents?

- How long do you think my case will take?
- Based on what I've told you, how would you predict a judge would rule on it?
- Are there experts in your firm or outside of your firm with whom you regularly consult?
- What are your fees?

HELPFUL RESOURCES

- Mathews Family Law: www.mathewsfamilylaw.com.au
- Divorce Online www.divorce-online.com.au
- Family Law Courts: www.familylawcourts.gov.au
- Divorce information: www.australia.gov.au
-
-
- Family Relationship
Advice Line: www.familyrelationships.gov.au

ABOUT THE AUTHOR

Vanessa Mathews is the founder and managing director of Mathews Family Law. Vanessa is accredited as a family law specialist, mediator, and family dispute resolution practitioner with many years of experience in the full range of legal issues that arise following the breakdown of marriage.

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