



FAMILY LAW

This information sheet aims to provide a brief overview of family law specifically relating to divorce.

Requirement

You can apply for a divorce if either you or your spouse:

- Regard Australia as your home and intend to live in Australia indefinitely;
- Are an Australian citizen by birth, descent or by grant of Australian citizenship; or
- Ordinarily live in Australia and have done so for 12 months immediately before filing for divorce.

You will be required to satisfy to the Court that you and your spouse have lived separately and apart for at least 12 months and there is no reasonable likelihood of resuming married life. It is possible to live together in the same home and still be separated, this is called “separation under the one roof”.

Separation under the one roof

Separation under the one roof refers to when spouses separate but continue to live in the same home. If you and your spouse lived in the same home during part or all of the required 12 months separation period, you need to provide extra information to the Court. You need this information before you can apply for a divorce. If this applies to your situation, you will need to support your divorce application with an affidavit.

Affidavit

An affidavit is a written statement prepared by a party or witness. It is main form of evidence you present to the Court. You must swear or affirm the affidavit before a person authorised to witness affidavits, for example, a lawyer or Justice of the Peace.

In your affidavit you will need to prove there has been a change in the marriage, gradual or sudden, showing you and your spouse have separated. You will need to explain why:

- Change in sleeping arrangements;
- Reduction in shared activities or family outings;
- Decline in performing household duties for each other;
- Division of finances, for example, separate bank accounts; and
- Any other matters that show the marriage has broken down, for example, if you have notified family and friends of your separation.

Your affidavit should also explain:

- Why you continued to live in the same home following separation and what intention, if any, you have of changing the situation;
- The living arrangements you made for any child of the marriage, under 18 years during the time you were living under one roof; and

- What government departments you have advised of your separation if you receive a government benefit, for example, Centrelink or the Department of Human Services (Child Support).

Engaging a Lawyer

Contrary to popular belief, you are not required to engage a lawyer for divorce, financial separation and parenting matters. Some people can achieve outcome with their partner without having to see a lawyer. However, you will need to engage a lawyer:

- If you require legal advice;
- After you have been to a mediator and been unsuccessful in reaching an outcome in property and/or parenting matters;
- If you wish your financial settlement to be documented in a binding financial agreement;
- If violence/abuse is an issue or possible issue; or
- If there is a child custody dispute which cannot be resolved.

My spouse and I are separating, what will happen to the business?


In family law property settlement proceedings, all assets and liabilities of each party (whether they are owned jointly or separately) are combined to form what is commonly known as the “matrimonial property pool”. The pool is then subject to scrutinisation and possible division by the Court upon separation.

A business interest owned either jointly or separately, and whether in a partnership, sole trader, company or trust structure, can be treated by the Court as “property” as defined in the Family Law Act 1975 (Cth) and will fall into this asset pool. Each spouse’s business interests will need to be valued (if a value is not agreed to).

If you and your spouse are operating a small business as a sole trader or a partnership, it is generally the assets of that business that largely determines its value. If the business has little by way of assets and generates income through your or your spouse’s efforts, skills or trade (e.g. plumbing business), its value may be very little (nominal).

Other businesses may have a corporate and/or trust structure, extensive assets and goodwill, and each spouse’s interest in that business will need to be valued. This may involve a valuation of the entire business enterprise, with the value of the share owned by the spouse(s) then calculated.

Should you have any questions or require further information on this subject please don’t hesitate to get in touch.

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