Marriage and Divorce

CHAPTER CONTENTS

Introduction

The laws regulating marriage in Australia are federal laws contained in the *Marriage Act 1961* (Cth) (Marriage Act). This Act sets out:

- who may marry
- who may perform the marriage service
- how the service should be conducted
- where and when it may be performed.

This chapter explains in detail the procedures involved in getting married or in dissolving a marriage and refers to the respective legislation governing the processes.

Who May Marry

The Marriage Act provides that a person may marry if they are:

- unmarried at the time of the marriage ceremony
- of marriageable age
- not marrying a person in a prohibited relationship
- able to freely consent to the marriage.

Persons already married

A marriage is void (i.e. legally the marriage never occurred) if one or both parties are, at the time of the marriage, already legally married to someone else (s 23 Marriage Act). This is called 'bigamy', which is an offence punishable by up to seven years imprisonment (s 360 *Criminal Code Act 1899* (Qld)). If a bigamous marriage has occurred, one or both of the parties may apply to the court for a decree of nullity, which legally declares that the marriage is void.

Polygamous marriages (i.e. marriages where a person has more than one husband or one wife) are not valid in Australia. Such a marriage is, however, recognised if it occurred outside Australia (e.g. in Islamic countries) (s 6 *Family Law Act 1975* (Cth)).

Marriageable age

Under the Marriage Act, a person can marry at 18 years of age (s 11 Marriage Act).

A person over 16 but under 18 years of age can marry, but only with the consent of their parent/s, a relevant person, or a judge or magistrate (ss 12–13 Marriage Act). If a child needs to obtain parental consent, the following applies:

- When both parents are alive and living together, consent should be obtained from both parents.

- If the parents are living separately, the child must obtain the consent of the parent with whom they are living.
- If the child does not live with either parent and the parents have never been married, the consent of the mother is required.
- If either or both parents are dead, both parents have been deprived of the care of the child by a court order or the child is adopted, the consent is required from the people listed in the schedule to the Marriage Act.

The consent must be written, witnessed and presented to the person celebrating the marriage within three months of the marriage ceremony (s 13 Marriage Act).

If the parent refuses to give consent, the child may apply to a judge or magistrate for consent (s 16 Marriage Act). A magistrate or judge can only provide consent if the other proposed spouse is over 18 years (s 12(1) Marriage Act).

A marriage involving a person under 18 years where parental and court consent has not been obtained is void (s 23B(1)(e) Marriage Act). A person who goes through a marriage ceremony without that consent may be guilty of an offence punishable by up to five years imprisonment (s 95(1) Marriage Act).

Prohibited relationships

A marriage will not be valid if the parties are in a 'prohibited relationship' (s 23B(1)(b) Marriage Act). A prohibited relationship is one between a brother and sister (including half-blood) or between a person and an ancestor (i.e. a parent or grandparent) or descendant (i.e. a child or grandchild). For an adopted child, these rules apply to their adopted family as well as their natural family. It is not unlawful for cousins to marry one another. A marriage between parties in a prohibited relationship is void.

Non-consensual marriages

A marriage must be entered into freely and consensually. A marriage will be void where:

- there is fraud or duress
- there is a mistake by one or both parties about the identity of either party or the nature of the marriage ceremony
- one of the parties is mentally incapable of understanding the nature and effect of the marriage ceremony (s 23B(1)(d)(iii) Marriage Act).

Transsexual persons

Transsexual persons can validly enter into marriage. In the landmark case of *Re Kevin: Validity of Marriage of a Transsexual* [2001] FamCA 1074, the court established that the meaning of the word 'man' in the Marriage Act may include a post-operative female-to-male transsexual person. It also established that whether or not a person is a man or a woman is determined at the date of marriage and not at birth.

Same-sex marriages

Same-sex marriages are not currently recognised as valid marriages in Australia. In 2004, the Marriage Act was redefined to explicitly recognise marriage as the union of a man and a woman.

The Marriage Act specifically states that same-sex marriages solemnised in another country are not recognised in Australia (s 88EA Marriage Act).

Legislation in several states of Australia allows all couples including same-sex couples to register their relationship. It is expected that this type of legislation will be re-introduced in Queensland in 2016.

Marriage Procedure

A marriage can take place at any time and in any place.

Under pt 4 of the Marriage Act, a marriage must be solemnised by or in the presence of an authorised celebrant. The marriage celebrant may be either a minister of religion or a civil (non-religious) marriage celebrant. Civil marriage celebrants charge a fee for the marriage service. Ministers of religion usually receive a donation.

Australian citizens can no longer be married in accordance with Australian law in overseas countries. However, they can be married in overseas countries in accordance with the laws of the country in which the marriage takes place. Subject to the exceptions set out above, a marriage that is valid according to the law of the country in which it took place is treated as valid in Australia.

Persons who are not Australian citizens may be married in Australia before a foreign diplomatic or consular officer of their own nationality if their country is a proclaimed overseas country (ss 52–55 Marriage Act). If such a marriage is conducted in accordance with the law of the foreign country, it will be recognised as a valid marriage in Australia provided that neither party of the couple is already married and that, under Australian law, both are of marriageable age and are not within a prohibited relationship (s 56 Marriage Act).

Notice and other formalities

Notice of intention to marry must be given to the celebrant between 18 months and one month before the marriage date. This notice requires that birth certificates be produced and statutory declarations of the parties' existing marital status be signed (s 42 Marriage Act).

Change of names

There is no legal requirement that either party to a marriage change their name upon marriage. The parties may continue to use their own surnames, adopt the surname of their spouse or hyphenate the surnames of both spouses.

Proof of marriage

Proof of marriage is provided by a marriage certificate and is required for various purposes (e.g. obtaining passports). Proof of marriage is required when an application for divorce is filed in court.

Marriage certificates

Two certificates are prepared on the day of the marriage by the person performing the ceremony and are signed by:

- the husband and wife
- the person celebrating the marriage
- two witnesses who must be 18 years of age or over.

One certificate must be forwarded to the Registrar of Births, Deaths and Marriages within 14 days of official recording of the ceremony (s 50(4)(a)(i) Marriage Act). This is done by the marriage celebrant.

Foreign certificates

Where proof is needed of marriages made outside of Australia (e.g. in divorce cases), an extract of the marriage certificate from the foreign registry will usually be sufficient. If the marriage certificate is not in English, generally a translation into English will be required.

Effects of a Marriage

Property

There is no legal requirement for either person to transfer their property into joint names once they are married. However, if there is a dispute over property when a husband and wife separate, even assets in one party's name only may be subject to orders of the family law courts (i.e. the Family Court of Australia or the Federal Circuit Court of Australia), depending upon the circumstances of the case (see the *Property Division When Couples Separate* chapter).

It is common for married couples to buy homes, units or land in their joint names as either joint tenants or tenants in common. In these circumstances, neither party can subsequently sell or give away jointly owned property without the consent of the other, even though only one party may have provided the finance.

Wills and estates

Unless a will specifically states that it is made in anticipation of a particular marriage, marriage revokes a will. This is because the law presumes that spouses intend to provide for each other. Spouses should make fresh wills after marriage to reflect their intentions.

Divorce does not automatically revoke a will. Those parts of the will that give property to a spouse or appoint a former spouse as executor of the will are treated as if the spouse takes no benefit under the will of the testator. The rest of the will remains in force (see the *Wills and Estates* chapter).

Decree of Nullity

Section 51 of the Family Law Act provides that an application for a decree of nullity of marriage shall be based on the ground that the marriage is void.

The effect of a nullity decree is to declare that, because of certain facts surrounding the purported marriage, it has never been a true marriage.

The grounds for finding that a marriage is void are:

- bigamy—either of the parties was at the time of the marriage lawfully married to another person
- the parties are within a prohibited relationship (see above)
- invalid ceremony—a failure to comply with the laws regulating marriage ceremonies in the country where the marriage took place
- lack of real consent—both parties did not give their real consent to it. Consent may not be real because of fraud, duress, mistake or mental incapacity
- marriageable age—either party was not of marriageable age.

For a person involved in a void marriage, it is not sufficient to simply say the marriage does not exist. An application for a decree of nullity must be made to the Family Court or Federal Circuit Court. A copy of the application must be served on the other party to the marriage. At the court hearing, the judicial officer will hear evidence as to why the marriage is void. If the court is satisfied that the marriage is void, a decree of nullity will be issued. The effect of that decree is to declare that the marriage never existed.

Dissolution of a Marriage

A dissolution of marriage, or divorce, can be granted where:

- the parties were validly married
- the parties have a sufficient connection to Australia
- the marriage has broken down irretrievably
- proper arrangements have been made for the welfare of any children of the marriage under 18 years of age.

A divorce in Australia is simply the legal termination of the marriage. Other matters, such as maintenance, the distribution of property or matters affecting the children are usually dealt with in separate court proceedings.

Grounds for divorce

The only ground for divorce is that the marriage has broken down irretrievably (s 48 Family Law Act). This ground is established if the court is satisfied the parties have been separated for a continuous period of not less than 12 months before the application for divorce is filed. It is important to note that parties can separate and still live in the same house (see below). The court must also be satisfied that there is no reasonable likelihood of cohabitation being resumed (i.e. no likelihood of the parties getting together again).

The 12 months of separation can be deemed continuous even if, after separation, the parties resumed living together (cohabiting) on one occasion for a continuous period of three months or less. The 12-month period of separation, however, does not include any period of cohabitation. Further, a period of cohabitation shall be deemed to have continued during any interruption of the cohabitation that, in the opinion of the court, was not substantial (s 50 Family Law Act).

Separation

Separation involves two things:

- an intention to separate (by one party or both)
- acting upon that intention.

Under the Family Law Act, parties may be thousands of kilometres apart but not be separated; conversely, a husband and wife may be living under the same roof and yet be separate.

Apart from the requirements that a party forms an intention to separate, acts upon it and advises the other party of that intention, there are no further requirements for a legal separation to take place.

Separation under one roof

It is possible for a couple to have lived separate and apart for 12 months even though they still live under the same roof or rendered some household service to the other (s 49(2) Family Law Act). The Family Court will, however, examine such a claim very carefully

When the parties have continued to share the same household during the separation, the court will generally require corroborative (supporting) evidence from a third party (e.g. a relative or friend) verifying that separation has actually occurred.

In assessing whether parties have separated, the court will look to see whether all or some of the following features of a marriage relationship are absent:

- sexual intercourse between the parties
- sharing social activities as a married couple both publicly and privately
- sharing of household chores and day-to-day functions.

Commencement of separation

The 12-month period of separation begins the day the parties separate. One party may unilaterally decide that a marriage relationship has ended. The party who initiates a separation is not required to inform the other that the marriage has ended. However, a common dispute in divorce proceedings is about when separation actually took place. This can be avoided if the party seeking the separation informs their spouse of this in writing at the time to ensure that there is no confusion or disagreement about the date of separation later on.

A period of separation does not automatically begin due to some event (e.g. imprisonment, illness or the work transfer of one of the parties). So long as the marriage relationship is maintained, then the parties do not legally separate. In such circumstances, it remains necessary for one party to form the intention to separate and act upon that intention for separation to occur.

Rights during the separation period

Parents are jointly responsible for the care of their children, unless there is a court determination to the contrary.

Either party may seek an order about the children during the separation period, as well as applying to the Child Support Agency for child support. A man or woman who is unable to support themselves during the period of separation is entitled to apply to the Family Court, the Federal Circuit Court or a state Magistrates Court for spousal maintenance.

Children's issues, maintenance and property are dealt with in chapters *Post-separation Parenting*, *Spousal and Child Maintenance and Child Support*, and *Property Division When Couples Separate*. A property settlement can take place at any time after separation. An application to the court for property settlement or spousal maintenance must be made within 12 months of the divorce order being made by the court; otherwise, special leave must be sought from the court to bring an application out of time. An application in relation to children can be made at any time during separation or after the divorce of the parties. Multiple applications in relation to children are not encouraged, and if there are existing orders, any subsequent application will need to be based on a significant change in circumstances (*Rice & Asplund* (1979) FLC 90–725).

Divorce Application

The day after the 12-month separation period has expired, an application for divorce may be signed and filed in the Family Court.

Either party may file the application, no matter who left who or who wanted the separation. The parties may also file a joint application. Normally an application for dissolution of marriage will be heard about eight weeks after the filing of the application.

Requirements to grant a divorce

In addition to the requirement that there has been an irretrievable breakdown of the marriage (evidenced by at least 12 months separation) with no chance of reconciliation, a court will not grant a divorce unless convinced that:

- the parties are sufficiently connected to Australia
- proper arrangements have been made for the care of any children who are under 18 years of age
- reconciliation has been considered by the parties where the application is made less than two years after the marriage.

Sufficient connection to Australia

The Family Court cannot grant a divorce unless it is established that either party to the marriage is:

- an Australian citizen
- domiciled (permanently living) in Australia
- ordinarily resident in Australia and has been residing in Australia for at least one year prior to filing the application (s 39(3) Family Law Act 1975 (Cth) (Family Law Act)).

Proper care for children under 18 years

Before granting a dissolution of marriage, the court is required to be satisfied that:

- proper arrangements have been made for the care, welfare and development of the children of the marriage
- there is a good reason for the divorce being granted, although not completely (s 55A(1) Family Law Act).

For the purposes of divorce, children of a marriage include children who are ex-nuptial children of either party (i.e. born before marriage), a child adopted by either party or a child who is treated by the husband and the wife as a child of their family.

The divorce application requires information to be completed about the adults caring for or living with each child, the relationship between the children and an absent parent, the

nature and frequency of time spent with the absent parent, the accommodation details, the means by which the parties support, maintain and supervise the children, child minding (including arrangements made if the parent who has the full-time care of the child is working), present education and progress, future plans for education and details of the children's health.

Where the parties are in dispute about the arrangements for the care of the children, the court may decline to issue a divorce until the arrangements have been finalised. However, if there are current proceedings for the arrangements for the children, it is unusual for the court not to make the divorce order.

Divorce within two years of marriage

If the parties seeking a divorce have been married for less than two years at the time an application for dissolution is filed, the court must be satisfied that the parties have considered reconciliation.

The application for divorce must be accompanied by a certificate from a counsellor stating that the parties have considered reconciliation with the assistance of a marriage counsellor or some other approved marriage counselling organisation (s 44(1B) Family Law Act). The certificate is part of the divorce application and must be signed by the counsellor with whom the parties considered reconciliation.

When the court is satisfied that special circumstances exist to warrant the hearing of the application for dissolution even though the parties have not considered a reconciliation, the requirement of the certificate may be dispensed with (s 44(1C) Family Law Act). If one party refuses to attend counselling, the counsellor can still provide a certificate stating this fact, and it is not a bar to the divorce being granted.

Divorce orders

Once the court is satisfied that a divorce should be granted, it will issue a certificate of divorce one month after the divorce is granted. This is when the divorce order takes effect. The one-month delay allows time for the divorce order to be challenged if it has been obtained improperly. The parties can only remarry once the divorce order takes effect.

If the parties reconcile after a divorce is granted and before it takes effect, they must make an application to the court to have the order set aside, otherwise the order will take effect automatically after one month, and the marriage will be dissolved.

Procedure to Obtain a Divorce

This information is intended to provide a general guide to the process of making an application for dissolution of marriage. Step-by-step information for making an application (including copies of necessary forms) is available from the Federal Circuit Court of Australia.

Initial documents

In order to commence proceedings for a divorce, it is necessary to prepare an application for divorce. The form is prepared at least in triplicate (three copies). Usually, this consists of an original and two photocopies of each page of the completed document. The applicant will also need a copy of the marriage certificate. If the marriage certificate is in a foreign language, a written translation from a translator is required, as well as an affidavit by the translator as to the contents of the marriage certificate.

Filing of documents

All relevant documents must be filed in the Federal Circuit Court of Australia. The filing fee is $845 (although this should be confirmed before filing). A reduced fee of $280 may apply if the court is satisfied that payment of the fee would impose financial hardship on the applicant (e.g. if the applicant receives a pension or is eligible for a Health Care Card). The form on which to make an application for a reduced filing fee is available from the court registry or from the Federal Circuit Court of Australia.

At the time of filing, the court sets a hearing date for the application to go before a deputy registrar of the court. If the respondent resides in Australia, the period between the time of filing the application and the hearing date is usually eight weeks. The court has power to increase or reduce time limits. The court keeps the original application and the original marriage certificate and gives the applicant two stamped copies of the divorce application. The applicant should ensure that they obtain from the court two copies of the court brochure entitled *Marriage, families and separation* (to serve with the documents).

Service of documents

Once a divorce application is filed with the court, the applicant is required to serve a copy of it and the brochure on the other party. The copy of the application must be stamped with the seal of the court by the court registry. It is not necessary to serve an application for dissolution if the application was made jointly by both parties to the marriage.

Service is the process of providing a copy of the application to the other party. Service occurs when the application and the brochure are delivered to the respondent by hand or by mail. There are, however, special rules about how an application must be served.

Spouses must not personally serve documents on each other. They can, however, use a third party (e.g. a friend, relative or a paid process server) to serve the documents on the other party. This person must be over 18 years of age, and it is recommended that the children of the marriage not be involved in serving the documents on a former spouse.

Service can also take place by post. This requires that a copy of the court-sealed application and the brochure be sent by prepaid post to the other party's last known address.

Overseas service of documents

If the documents are to be served overseas, the mode of service will depend on whether the country where they are to be served is a convention country (i.e. a country with which Australia has an agreement about civil proceedings, including the service of documents) (pt 2AB *Family Law Regulations 1984* (Cth) (Family Law Regulations)).

If the country is a convention country, the documents for service must be forwarded to the Registrar of the Family Court who will forward them to the country. If the country is not a convention country, service should be effected by post or personally if possible.

The form of the application for service in a convention country is shown in the Family Law Regulations. In this case, the applicant will have to pay any costs arising from the overseas service.

Whereabouts of respondent unknown

If the whereabouts of the respondent are unknown, application may be made to the court to dispense with (do away with) service. This is only granted when the court is satisfied that all reasonable efforts have been made to trace the respondent.

Proving service

The court must be satisfied that the other party has been served with the application before a divorce is granted.

To prove that service has taken place, it is usual to have the other party complete an Acknowledgement of Service (Divorce). This is then provided to the court as evidence that the application has been given to the other party. If the other party is not cooperative, it may be necessary to complete an Affidavit of Service. These forms set out the details of how service took place. A court will not grant an order for dissolution of marriage unless there is proof of service or an order dispensing with service.

The family law courts have a very detailed kit explaining all of the requirements for service and providing copies of the relevant forms.

Response

The other party (the respondent) may oppose the granting of the divorce or advise the court of anything in the application with which they disagree by filing a response in the court within 28 days of being served with the application if the respondent is in Australia, or within 42 days if the respondent is overseas.

The response may be successful in stopping the divorce if it shows that the parties have not been separated for a period of 12 months or, alternatively, that proper arrangements have not been made for the welfare of the children.

The filed response must be served upon the applicant.

The hearing

When the application comes before the court, the registrar will need to be satisfied that the ground for divorce (irretrievable breakdown evidenced by separation for 12 months) exists. As the main evidence is contained in the application itself, the registrar will want to know whether any of the circumstances set out in the application for divorce have changed, in particular the arrangements for the children.

Where there are no children of the marriage and no response has been filed, neither party has to appear personally. If there are children of the marriage under the age of 18 years, or a response has been filed to the application, one of the parties must attend the hearing. It is usual in those circumstances for the applicant to attend. The respondent does not have to be present.

The hearing is open to the general public, but the court does have the power to exclude persons during proceedings. Children cannot enter the courtroom.

After a period of one month, the court forwards the divorce order to the parties, or if they are represented, to their lawyers. This is an important document as it proves a divorce has occurred and should be kept for future reference.

Do-it-yourself divorce

In most situations, obtaining a divorce is a straightforward matter and many people prepare and file the application themselves.

The Federal Circuit Court has a kit for those intending to do their own divorce.

Advice about the relevant law and procedures is available from community legal services, and the Family Court and Federal Circuit Court registries.

Relationship Counselling and Reconciliation

When a marriage breaks down, counselling may assist the parties in considering reconciliation or in adjusting to their altered situation. The Family Law Act sets out specific requirements for practitioners and counsellors, dispute resolution practitioners and others to provide information to clients about non-court based services and reconciliation (pt IIIA Family Law Act). The court is also obliged to consider reconciliation in appropriate cases where it can refer parties to alternative services and adjourn proceedings to allow parties to obtain further assistance (pt IIIB Family Law Act).

In some situations, it will be obvious that counselling would be futile. However, counselling may be useful when reconciliation is a real possibility, or the parties want emotional support during the turmoil caused by the breakdown of the marriage. Even if the parties are actively opposed to any reconciliation, counselling can be useful to help them make arrangements and decisions that arise from their continuing separation.

In Queensland, a number of organisations are approved under the Family Law Act as marriage counsellors (see Contact Points).

When, at the time of filing an application for dissolution, the parties have been married for less than two years, the application must include a certificate signed by a counsellor to show that the parties have considered reconciliation (see Divorce within two years of marriage above). An assault can also be committed by threats and gestures.

Legal Notices

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