

Divorce Applications

■ Divorce Application (Form 4)

An application for divorce must be in compliance with Form 4 of the Family Law Rules. An application can be instituted by either party or both of them [section 44(1A) of the *Family Law Act* 1975].

Joint applications will not be considered in this manual. The author believes that it would not be prudent for a legal practitioner to act for both parties in a joint application, having regard to Order 37 Rule 2, which provides that a practitioner 'shall not in any proceedings represent or act for any two or more parties having adverse interests in the proceedings'.

It is suggested that, where parties want to undertake a joint application, they do so personally. If a solicitor does act, he or she cannot subsequently act for either party in relation to any further family law matters.¹

The commentary and precedents which follow relate to a 'typical family' with two children. If there are no children, the divorce application (no children) kit is used. Essentially, the only difference between the two forms is that the pages relating to the arrangements for the children are removed. Divorce kits with detailed explanatory notes are available from the Family Court.

Precedent: Divorce Application (Form 4), see Attachment 2A.

■ Completing the Application

A divorce application can be completed by hand [Order 2 Rule 2(5)], as can all the ancillary documents which are required to complete the application.

If the document is being completed using a word processor, the contents of each page must correspond precisely with the printed form available from the court. Failure to meet this requirement may result in your application being rejected at the filing counter.

Given this scenario, it may be more cost effective for the client to complete the form by hand, with some guidance from you. You should note that if the court authorised computer software is used to prepare a Form 4, the resultant document is taken to be completed in accordance with the required form in Schedule 1 [Order 2 Rule 5(3B)].

The following points should be noted when completing the divorce application (Form 4):—

Cover Sheet

The Form 4, itself, does not have a cover sheet [Order 2 sub-rule 3(2)]. The front page is set out in the typical 'boxes' format required for initiating applications, whether for principal or other relief.

If a file number exists, it should be inserted in the top right hand corner (e.g. ML 4711 of 1998 - 'ML' being the reference to Melbourne).

The place at which the document is filed and the date of filing is completed by the counter staff and need not be completed by you. The same applies for the place of hearing and the hearing date and time. Those details are inserted by the court counter staff when issuing the application.

Part A: Personal Details

Parties Names (Items 1 to 3)

In items 1 to 3, the family name of each party is requested, followed by the given names and then the full name as it appears on the marriage certificate.

There may be instances where the name used by either or both parties is very different to the actual names on the marriage certificate. Note that in the case of the wife, her maiden name will appear on the marriage certificate and hence it is the surname which should be used.

The details thereafter involve current addresses, including postcode and phone numbers. Why this information is required, is not known. The author has filed

numerous applications without the phone number being included and without any comment from the counter filing section or from the court.

If the client does not want to be contacted by the other party, a 'care of' phone number might be given or the information omitted altogether.

Occupation, Birth, Residence (Items 5 to 7)

In item 5, you complete current occupations, and in item 6, the date and country of birth. Those facts, alone, very often answer item 7 relating to citizenship, domicile and residence.

Check the details of date and place of birth against what appears on the marriage certificate if the information is available. Where instructions differ from what is on the certificate, the details on the certificate prevail.

If a client is unable to provide details regarding the other party's date or place of birth and no details appear on the marriage certificate, insert 'not known'.

Note that under Part F of the application (the affidavit of the applicant), the client swears to the effect that 'the facts of which I have personal knowledge are true' and that 'all other facts are true to the best of my knowledge, information and belief'.

Jurisdiction — Citizenship, Domicile and Residence (Item 7)

It is under item 7 that the court's jurisdiction to deal with the divorce is determined [section 39(3) of the *Family Law Act 1975*]. If either party qualifies on any one of the options, that is enough. Very often, both parties qualify under all grounds, both having been born in Australia and having resided permanently here (apart from holidays for short periods overseas). Do not rely solely on citizenship, as it may be necessary to produce a birth certificate or a naturalisation certificate.

Domicile: domicile is usually the easiest ground, where available. (For example, in Victoria it has historically been the preferred jurisdictional option of judges.)

A person who migrated to Australia and intends to remain here permanently can apply for a divorce in Australia almost immediately upon arriving, provided he or she can establish the intention to remain here permanently. This could be done by proving, for example, that permanent employment has been taken up. The applicant must, of course, still satisfy the required ground for divorce (namely, a separation for 12 months or more), even though the separation took place overseas.

Citizenship: if you are relying on citizenship (i.e. an immigrant being naturalised), the naturalisation certification should be filed. Beware of forgetting to file the certificate in situations where there are no children and a request not to attend proceedings has been opted for. Failure to file the certificate may result in a divorce not being granted and the matter adjourned.

Other Information

If the applicant or respondent satisfies jurisdiction by checking one of the relevant boxes, other information is not required. However, you may need to explain when the applicant was naturalised if citizenship is relied on. It is better to rely on domicile (chosen by checking the second and third boxes) or to check the last box for residing here for over 12 months.

The relatively rare instance of a recent immigrant taking up permanent residence (i.e. satisfying domicile), would be required to fill in this section. Otherwise, it may be left blank. Suggested wording might be to the effect that:—

‘The applicant migrated to Australia on (date) to take up permanent employment as a university lecturer. He regards Australia as his permanent home.’

Address for Service (Item 8)

If a solicitor is completing the form, the appropriate box is checked and his or her details should be set out as required. The Solicitors’ Code referred to is provided by the Family Court. Every legal firm in Australia is allocated a unique Solicitors’ Code for the Family Court (e.g. in the case of Barker Gosling it is M03B.)

Part B: Request Not to Attend Proceedings

If there are children under the age of 18 years, either the applicant or their solicitor is required to attend court, to ensure that the court can be satisfied as to the arrangements made for the welfare of the children. In these cases, this box should not be checked. (The divorce kits from the court omit this option if there are children.)

If there are no children under 18, the relevant box may be marked and the application can be dealt with in the absence of the parties.

You should be aware of the risk this involves, namely, that if the court requires further information neither you nor your client are immediately available to provide it and an adjournment may result.

Part C: Details of Marriage and Separation

Applications within Two Years of Marriage (section 44(1B) FLA)

Where the parties have been married for less than two years, proceedings cannot be filed without a certificate stating that a reconciliation has been considered with the assistance of a counsellor, or there are other special circumstances.

There are relatively few applications in this category. As a twelve month separation is required before a divorce can be applied for, only marriages lasting less than 12 months will be affected by the requirement.

If a certificate is required, telephone the counselling section of the Family Court to obtain details of an appropriately qualified counsellor.

The fact that an application falls within this requirement will be checked by the court filing staff. A certificate pursuant to section 44(1B) or 44(1C) of the *Family Law Act* needs to be completed and filed with the application.

Date and Location of Marriage (Item 10)

With item 10, ensure that the details comply exactly with the marriage certificate. It is surprising how often the client does not recall these details correctly. Frequently, the name of the town has changed over the years. Use the details on the certificate.

Separation (Items 11 to 14)

Items 11 to 13 relate to the separation, including when it occurred and whether the parties commenced living separately. There are usually two situations: the parties separate and remain that way or there is a period of attempted reconciliation.

The parties are allowed one attempted reconciliation of up to three months (section 50). During that time, the 12 month separation period is suspended.

e.g. assume the parties separated on 1 January 1995 and then attempted a reconciliation for one month from 1 February 1995 to 1 March 1995. They finally separate on that date. The applicant could apply for a divorce 13 months after the initial separation (i.e. a month after 1 January 1996, being 1st February 1996). This is, in effect, 12 months from the date of separation plus the period of attempted reconciliation. Hence for item 11, the initial date of separation (not necessarily the date of final separation) is inserted.

Item 12: To obtain a divorce, the applicant must supply evidence that their intention to end the marriage has existed for at least twelve months. Part (a) of item 12 therefore asks whether the applicant intended to end the marriage. If a client had the requisite intention then the appropriate box is checked. There are situations when a client did not want the marriage to end at first, but ultimately applies for a divorce. In those circumstances, the 'no' option would be marked.

Part (b) of item 12 requires your client to specify when he or she thought the marriage was over. This will often be the date of separation and hence the words 'at separation' can be inserted. Otherwise, a later date would be inserted.

Item 13: this item is normally completed by crossing the 'no' option. If that is not the case, details of what occurred when the parties lived together need to be set out in Part (b). Any attempt at reconciliations should be set out. Remember, only one period of up to three months is allowed. In the precedent provided, this situation is not dealt with. However, the explanation could be given that 'the parties resided together in an attempted reconciliation from (date) to (date)'.

Item 14: If there is a separation under the one roof, the application must be supported by an affidavit from an independent witness (perhaps a neighbour or friend) expanding on the matters referred to in this section. The affidavit should set out the relevant material required to establish that the parties really are separated.

Corroborative evidence set out in an affidavit is also required at the hearing. In practice, this could be provided by the other party, but such evidence should involve a third person, not being an infant child of the marriage.

‘One roof’ applications are not as common nowadays, given that property applications can be issued without divorce proceedings being on foot and they are not covered in this manual. Given, also, the simplicity of the procedure where there is no separation under the one roof, clients would be well advised to wait the additional period to avoid the complications.

Possible Future Reconciliation (Item 15)

Item 15, ‘Do you think it is likely that you will reconcile and live together as husband and wife?’, is a trap. If the wrong box is crossed, the application can be dismissed. Why this is presented as an option remains a mystery. Your computer prepared precedents should not have this option, to avoid any mistakes.

Children (Item 16)

Item 16 requires a ‘yes’ or ‘no’ answer regarding children under the age of 18, and if yes, the number of children. Note that for divorce proceedings, section 55A(3) of the *Family Law Act* deems certain children to be a child of the marriage for the purposes of an application for divorce. It is a broad definition meaning effectively ‘any child of the household at the time of the parties separating’.

Part D: Other Proceedings and Orders

Pending proceedings and existing orders are set out in items 17 and 18. In item 17, the summary can be as brief as ‘Melbourne Family Court: Child Welfare and Property Proceedings’. Alternatively, details may have to be annexed to a separate sheet.

With item 18, you are offered the option of attaching a copy of relevant orders or typing in the details. Invariably, the details will not fit into the space allocated in the form. Since pagination must be maintained on the Form 4 itself, attaching the relevant orders is the best approach if your fact situation requires this information.

Part E: Details of Children under the Age of 18 Years

Items 19 to 21 require details of each child under 18 years of age. The child's surname is set out first, followed by their given name and then their date of birth.

Items 22 to 23 require that details be inserted of the address at which the child is living and the name, age, sex and relationship to that child of each person who also resides in the home.

Since the most common fact situation is for all the children of the marriage to be living with one parent, setting out the details of other siblings living in the home often requires much duplication with items 19 to 21. To counteract this, where information is common to both children it is permissible to type across the page on word processor-produced forms.

Remember that details for the first two children must be on one page and any subsequent children (in blocks of two) appear on following pages. The pro forma allows for four children. If there are more, simply insert additional pages for each child, two per page.

Arrangements for Child (Item 24)

Item 24 requires details of the arrangements made for each child under the headings: housing, supervision, contact, financial support, health, and education.

A short commentary on each of the various topics should be set out for each child. If it is the same for every child the words can be spread across the page, rather than being confined to the rather impractical columns. An alternative is to insert the detail for the first child in column 1 and then for each other child (assuming the information is the same) simply state 'As for Child 1'.

There may be instances where a client has little contact with the children and is not able to precisely give details regarding some of the arrangements, such as housing. Remember that Part 4 of the affidavit sworn by the applicant states 'All of the facts are true to the best of my knowledge, information and belief'.

If a client cannot provide any information, it may be possible for the respondent to be asked to provide the information by affidavit. Alternatively, the respondent could be served with a subpoena to attend court on the date to provide the required information (see page 2—23). Most respondents are co-operative, particularly when they are informed that they will not incur any legal costs and they are provided with a stamped self addressed envelope for the return of any answering information.

Note that, as a general rule, evidence in divorce proceedings must be given by affidavit, unless the court otherwise orders [Order 30 Rule 2(1)]. In practice, divorce applications in most registries are dealt with by a registrar; oral evidence is allowed, and registrars are generally very co-operative in allowing amendments, so that applications can be dealt with on the day with minimum formality.

If the application involves children under the age of 18 years, one of the parties should attend court to give further evidence relating to their welfare, in case this becomes necessary.

A precedent affidavit relating to the welfare of children (Form 16) is set out in Attachment 2M. However, it is unlikely that such an affidavit will be required in the normal course of events. If circumstances have significantly changed since the filing of the application, the client can simply be asked to attend court to provide the details if called upon. As a matter of experience, registrars hearing divorce applications are co-operative in allowing evidence from the bar table updating the situation.

If your client is unable to attend court for whatever reason, the suggested affidavit may be prepared and presented.

Proposed Changes to Arrangements for Child (Item 25)

With item 25, given that divorce proceedings are usually issued, served and dealt with within a maximum period of three months, no substantial changes are usually proposed. There may, however, be instances where pending property proceedings will involve a sale of the children's home, in which case that probable change should be brought to the attention of the court. Such information could be presented orally at the hearing or in affidavit form.

<p>Precedent: Affidavit Relating to the Welfare of Children (Form 16), see Attachment 2M.</p>
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Part F: Affidavit of Applicant

This has been commented on previously, noting that 'reasonable knowledge, information and belief' is what is required to be sworn to.

The client swears the document before an appropriate witness, being a notary public, a lawyer or a justice of the peace (see section 198 of the *Evidence Act (Comm)* 1995).

Note that if the applicant is blind or illiterate a special jurat (swearing clause) is required. If the applicant cannot read English, an interpreter's clause will be necessary (see page 4—11).

Part G: Declaration by a Solicitor

A solicitor is required to certify that the applicant was provided with a copy of the *Marriage, Families and Separation* brochure, pursuant to Order 24. As a matter of course, this fact should be recorded on the file at some stage.

The best time to hand a client the brochure is when instructions are first taken. Consider the prospect of reconciliation and give the client general advice regarding ancillary matters. Very often, this may take place a year or more before a divorce application is applied for.

Part H: Notice to Respondent

The notice of application is addressed to the respondent and the address of the court is set out. Instructions are given to the respondent should they wish to oppose the application, which in practice rarely occurs. This part of the application is signed and dated by the registrar.

■ Marriage Certificate

Court Requirements

For the purposes of a divorce application (Form 4), the marriage certificate is defined, in Order 1, as being:—

‘A certificate of a marriage or a certified copy of the certificate or a certified copy of the entry of a marriage in a register of marriages or an extract of the entry of a marriage in a register of marriages’.

As a matter of practice, all registries are accepting photocopies of marriage certificates without them being certified as true copies.²

Obtaining Certificates

If the original certificate is not available, a certified copy should be obtained from the Registrar of Births, Deaths and Marriages in the appropriate state or country (e.g. in Victoria, as at October 1998, the fee for a certified copy is \$17, whether or not the registration number is provided). Note that overseas certificates will have different fees and may take some time to obtain.

It is preferable to obtain the full certified copy of the marriage certificate so that birth details can be obtained. Ironically, if the shorter certificate is obtained and details are not correct, no one will ever know unless the respondent files an Answer, which is unlikely.

If there have been previous proceedings in the same court another marriage certificate is not required. However, the file should be checked on the return date to ensure that there is, in fact, a marriage certificate on file, as the existence of a file number does not guarantee that a marriage certificate has been filed (e.g. an undertaking may have been given in previous ancillary proceedings that the certificate would be filed and that undertaking may have been forgotten about!).

If you are given the original marriage certificate, you can photocopy it and file the copy in place of the original certificate. Many clients either have a sentimental attachment to the original document or (more likely) require it for pension/passport purposes. Although it is relatively easy to obtain a marriage certificate back from the file, there are logistical problems.

Cover Sheets

The marriage certificate does not require a cover sheet but it is desirable to have one, as this will make it easier for the court to place it on the right file. In practice, a photocopy of the marriage certificate without certification or cover sheet is accepted in most registries.

Undertaking to File a Marriage Certificate

Where a marriage certificate is obtainable but is currently unavailable, a solicitor can, in appropriate circumstances, give an undertaking to file the certificate when it has been obtained [Order 7 Rule 6 (3)(b)].³

If the marriage certificate is not immediately available but can be obtained, give the undertaking and obtain the return date. This will save the delay in waiting for the certificate. The deadline being the return date can then be worked to. This will give time to obtain the actual marriage certificate.

If an undertaking is given, that undertaking is endorsed on the cover sheet of the Form 4 application and takes the following form:—

‘I, JOHN SMITH, solicitor hereby undertake to file a marriage certificate in this matter within 14 days’.

The statement is then signed and dated.

In the relatively rare situation of a marriage certificate being unavailable, perhaps because records have been destroyed (e.g. as may be the case with several Asian countries), an affidavit setting out the circumstances of the marriage should be completed and filed [Order 7 Rule 6(3)(a)]. These situations can be rather complex and are beyond the scope of this manual.

Translation of Foreign Certificates

If the marriage certificate is not in English, a translation is required. The translation must be set out in affidavit form. This is filed at court but not served [Order 7 Rule 6(5)]. There are various agencies available which undertake this work. Their advertisements frequently appear in the Law Society Journals.

Precedent: Affidavit of Translation of Marriage Certificate, see Attachment 2B.

■ Filing — Step by Step

Filing Fee

The filing fee on a divorce as at October 1998 is \$505. That fee must be paid when filing the application, either by cheque payable to 'the Family Court of Australia' or in cash. Some registries may require a bank cheque. Most registries will accept a solicitor's trust account cheque.

Where the applicant is in receipt of a pension or legal aid, they are exempt from paying filing fees. An application form for exemption can be obtained from the Family Court registry.

If the client is not in receipt of a pension but payment would cause hardship to him or her, they may qualify for a waiver of the fee.

The information set out in the application for waiver must be verified by affidavit (see Part H of that form). The court publishes guidelines regarding the eligibility for a waiver of court fees.

Precedents: Application for Waiver of Fees (Pensioner), see Attachment 2C.

Application for Waiver of Fees (Financial Hardship), see Attachment 2D.

Guidelines: Guidelines for Waiver of Court Fees (as at 1st November 1997), see Attachment 2E.

Copies of Documents

It is strongly recommended that copies of documents be taken after the original has been sworn and fully completed. Many practitioners complete copies of documents by writing in the signature '(signed) Neil Richard Bloggs etc.' However,

the respondent often complains to the solicitor that ‘that’s not my spouse’s signature. It’s all the solicitor’s idea, this divorce’. By taking photocopies of the original after it is sworn, the problem is avoided.

(In practical terms, it is less time consuming to photocopy the completed, sworn original than it is to make true copies by hand.)

It is also recommended that further copies of documents required for serving upon the respondent not be taken until after the original has been filed and the court seal placed on it. This means there are sufficient copies in existence evidencing that the original was sworn and filed at court. On the odd occasion that original documentation (i.e. the court file) is lost, true copies can be made available. In most cases, registrars will accept them in substitution of the lost originals, thereby allowing the matter to proceed.

Documents to File with the Court

Post or take all relevant documents to the Family Court registry for filing, including:—

- (a) original sworn divorce application (Form 4) *plus two copies*;
- (b) a photocopy of the marriage certificate (a cover sheet is not necessary);
- (c) \$505 (cheque or cash) or an application for waiver of fees, fully completed and sworn, and
- (d) other documentation as necessary (e.g. affidavits if separation occurred under the one roof, certificates under section 44 if the marriage is less than two years, affidavit of translation of marriage certificate).

When posting documents, a stamped self-addressed envelope for the return of documents is required. Alternatively, use your document exchange number, if you have one.

Posting documents means that if anything is incorrect a requisition will issue and it will take several weeks for the error to be corrected. If time is not vital, post. Otherwise, brief an agent to file documents.

In Victoria, the filing counter is open between 9.30 a.m. and 4 p.m. (including between 1 p.m. and 2 p.m). These times may differ in other states.

The filing clerk will process the documents and provide a receipt for the filing fee, together with a sealed copy of the application. If the documents do not conform with the Rules, they will be rejected.

Note that the filing clerk does not have the authority to actually reject documents and filing can be insisted upon. However, the insistence will be noted on the document in question and appropriate explanations may have to be given to the court in due course. The registrar may, depending on the seriousness of the errors, adjourn the application to give time to ‘get it right’, or even dismiss the application.

This last consequence is most serious. An additional filing fee is payable for re-issuing.

If the solicitor is in doubt, he or she should go back to the office and find out the effect of the error in question.

If there is an application for waiver of fees, the counter clerk will have the application assessed, usually on the spot. If unsuccessful, filing will have to be delayed until the client is financial.

Hearing Date

A hearing date will be allocated by the filing clerk. Do not forget to diarise the date and time of hearing. Advise the client, both by telephone and in writing. It is suggested that in confirming the date, the client be requested to telephone a few days before the hearing to discuss their attendance at court on that day. This way, a reminder system for both your client and you is built in.

■ **Serving the Application**

Documents to be Served

Pursuant to Order 25 Rule 3(5), the following documents must be served on the respondent in a divorce application:—

- **Application**
a sealed copy of the divorce application (Form 4), and
- **Prescribed Pamphlet**
the prescribed Family Court counselling pamphlet, *Marriage, Families and Separation* (see page 1—2 for further details).

Time for Service

The sealed copy of the application and the counselling pamphlet must be served on the respondent at least twenty-eight clear days before the hearing date (see Order 7 Rule 10). If the respondent is overseas, 42 days must be allowed. In practice, you will probably have up to a month to serve the documents.

Methods of Service

The options for serving a divorce application are set out in Order 18 Rule 7, being:—

- personal service, or
- by posting them to the person at their last known address.

■ Service by Post (Forms 19, 20, and 23)

Often, the respondent is quite prepared to receive documents by post, provided that he or she has been asked politely beforehand and you have explained that they will incur no legal costs at all this way.

Order 18 Rule 11 states that to effect service by post:—

- you must provide the respondent with a stamped self-addressed envelope with the correct postage for its return, and
- a properly completed acknowledgment of service (Form 19 — see below) must be returned and filed at court, together with any other necessary documents⁴.

Proof of Service by Post

Service Upon Respondent's Solicitor

If documents are served by posting them to the respondent's solicitor, the filing of an acknowledgement of service (Form 19) signed by that solicitor will be deemed sufficient service. This is taken to constitute proof of service of the document to which it refers on the date on which service of the document is acknowledged [Order 18 Rule 14(3)]. *There is no need to complete an affidavit of service by post (Form 20).*

<p>Precedent: Acknowledgement of Service - upon the Solicitor for the Respondent (Form 19), see Attachment 2I.</p>

Service Upon Respondent

Where documents are served by posting them to the respondent, the following documents must be prepared for filing with the court:—

- acknowledgement of service upon the respondent (Form 19), which has been signed by the respondent, pursuant to Order 18 Rule 11;
- affidavit of service by post (Form 20), pursuant to Order 18 Rule 15(2)(a), and
- *except where the respondent has already filed a notice of address for service (Form 18), an affidavit of proof of signature (Form 23), pursuant to Order 18 Rule 16(1).*

Date of Service

Order 18 Rule 14(3) deems service to be effected on the day of signature of the acknowledgment of service by the respondent. Clearly, that date is very important. Make sure the requirement for 28 clear days (or 42 days for overseas respondents) has been met.

Overseas Service by Post

Under Order 18 Rule 11(2), service by post out of Australia is canvassed. Documents must be posted by airmail. The time for service is deemed pursuant to Order 18 Rule 12, although service is not effective unless the required acknowledgment is returned.⁵

Precedents: Acknowledgement of Service - by Respondent in Person (Form 19), see Attachment 2H.
Affidavit of Service by Post - upon the Respondent (Form 20), see Attachment 2F.
Affidavit of Proof of Signature (Form 23), see Attachment 2J.

■ **Personal Service (Forms 19, 21, and 23)**

If service by post cannot be undertaken, personal service is necessary (Order 18 Rule 7). The only person not able to serve documents on the other party personally is the applicant (Order 18 Rule 6), although the applicant can be present to identify the respondent at the time of service.

It is probably best to obtain a photograph of the respondent when taking initial instructions, just in case personal service is required later. Ironically, it is often the case that the photograph provided turns out to be a wedding photograph.

Proof of Personal Service

The following documents must be prepared for filing with the court, to prove personal service in accordance with Order 18 Rule 16:—

- acknowledgement of service upon the respondent (Form 19), which has been signed by the respondent, pursuant to Order 18 Rule 11. (Otherwise a more detailed affidavit of service is necessary which annexes a photograph or refers to conversations);
- affidavit of personal service (Form 21), pursuant to Order 18 Rule 15, and
- except where the respondent has already filed a notice of address for service (Form 18), an affidavit of proof of signature (Form 23), pursuant to Order 18 Rule 16(1).

Precedents: Acknowledgement of Service - upon the respondent in Person (Form 19), see Attachment 2H.
Affidavit of Service by Post (Form 21), see Attachment 2G.
Affidavit of Proof of Signature (Form 23), see Attachment 2J.

Affidavit of Personal Service

When service occurs, an affidavit of personal service (Form 21 — see Attachment 2G) should be prepared for filing, pursuant to Order 18 Rule 15.

The respondent will usually sign an acknowledgement of service (Form 19), a copy of which is annexed to the affidavit of service.

Failure to complete an acknowledgement of service is not fatal to proving personal service. In the case of an unsigned acknowledgment, comments made by the respondent will have to be set out in the affidavit of the person serving documents so as to establish the identity of the person being served. In this situation, the affidavit of service becomes the most important document regarding service.

Affidavit of Proof of Signature

Where an acknowledgement of service is completed, an affidavit of proof of signature (Form 23 — see Attachment 2J) should also be filed by the applicant, verifying that the signature on the document is that of the respondent — see Order 18 Rule 16(1).

Difficult Respondents

If there is a possibility that the respondent is going to be difficult, obtain a photograph from the client. Warn the process server to ‘keep on talking to the respondent’. Note that for difficult respondents, the rules provide for proper service by leaving the required documents in their presence, and informing them what the document is [Order 18 Rule 6(2)].

Notice of Address for Service (Form 18)

A notice of address for service (Form 18) filed on behalf of the respondent would be helpful. Respondents represented by solicitors will normally take this step, as it ensures that the court sends them a decree absolute in due course.

A notice of address for service (Form 18) signed by the respondent personally (rather than by their solicitor) does not attract the deeming provision under Order 18 Rule 14(3) which are described on the previous page. Nonetheless, preparing such a notice to be filed on behalf of a respondent may persuade them to accept service by post and be more co-operative with providing information regarding children if necessary.

■ Affidavit of Service: Which Form?

Three forms are available under the Rules for the completion of affidavits of service. These are Forms 20, 21, and 22. They should be used as follows:—

- **Form 21 affidavit of service (see Attachment 2G):—**

Form 21 should be used in relation to the service of Form 4 divorce applications in most situations. The only time it is not used is where service is by post direct to the respondent (see below).

- **Form 20 affidavit of service by post upon the respondent (see Attachment 2F):—**

Form 20 should only be used in relation to the service of a Form 4 divorce application, and then only where service is by post direct to the respondent.

- **Form 22 affidavit of service for ancillary applications (see Attachment 5C):—**

Form 22 is used in relation to the service of any applications other than Form 4 divorce applications. Form 22 is the correct affidavit of service for all ancillary applications, regardless of how the documents were served (i.e. whether served by post to the respondent or their solicitor, or in person on the respondent).

<p>Precedent: Affidavit of Personal Service (Form 21), see Attachment 2G.</p>
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■ Completing the Form 21 Affidavit of Service

The Form 21 affidavit of service must be set out on a single sheet of paper [Order 2 Rule 2(6)]. Therefore, be very brief in completing service details.

The normal headings contained in the divorce application itself are duplicated in the Form 21 affidavit of service. A file number is now allocated and must be used. The place of filing is known and should likewise be inserted. The filing date will be inserted by the filing clerk at court. The hearing date must be inserted as it is now known.

Items 1, 2 and 3 inclusive are self explanatory. In item 4, 4(a) and 4(b) must be crossed. Item 4(c) would be crossed in the case of service by post, where reference must be made to the form of acknowledgement of service (Form 19 — see precedent at Attachment 2H) and to a stamped addressed envelope. This is necessary to comply with Order 18 Rule 11. Item 4(d) therefore could be completed as:—

‘Form 19 acknowledgment of service, stamped self addressed envelope’.

Remember that this information must fit on one page. Note that for service outside of Australia the stamped self addressed envelope is not necessary, but the document must be sent by airmail (Order 18 Rule 11(2)).

In item 5, details of how the person was served are set out. In this section very brief details of conversations can be set out. For example the process server may state:—

‘I asked the person if they were Neil Richard Bloggs, to which they answered yes’.

More conversation can be included, but remember the rule on keeping this document to one page limit. If you cannot comply with the rules and fit in all the information on the one page regarding service details, then do not use the standard format. Rather, prepare a standard affidavit setting out the full details and circumstances of your attempts at serving the respondent. This may be particularly relevant to the next section.

The Unco-operative Respondent

There will be times when service by post is not possible. Despite polite requests, the respondent refuses to answer and a process server is the only option. However, if the respondent still refuses to sign an acknowledgment of service or even accept the documents. How is service effected?

By virtue of Order 18 Rule 16, the signed acknowledgement of service is the best situation to be in, as a signed acknowledgment is evidence that the document in question (the divorce application) was served in accordance with the acknowledgment (Order 18 Rule 16(2)). Pursuant to Order 18 Rule 16(1), this then allows the use of the affidavit of proof of signature (Form 23 — Attachment 2J).

Order 18 Rule 16(4) refers to proof by reference to a photograph.

If another person is present at the time of service, that other person can, by virtue of Order 18 Rule 16(5), give the appropriate evidence by affidavit.

There is a general ‘catch all’ provision in Order 18 Rule 16(6). It is effective service to put down documents in the presence of the respondent, provided the person serving the documents tells the respondent what the documents are (Order 18 Rule 6(2)). If this occurs, that fact must be set out in the affidavit of service.

A photograph as proof of the person’s identity would be very useful here and the affidavit of service would refer to the photograph as identity. The conversation in paragraph 5 would perhaps be:—

‘I informed the respondent that the documents were a divorce application by his wife with the prescribed documents’.

Dispensing With Service

In the event that the respondent is unable to be located, it is necessary to dispense with service of the application (see Chapter 3).

Be aware that service can be dispensed with even in circumstances where the respondent can be found but is proving difficult. For example:—

a respondent overseas can be 'set up' by writing to them regarding service of the divorce application. Photocopies can be sent in anticipation of their accepting, just in case. Quite often, a respondent will write back acknowledging receipt of the copies but indicating their refusal to accept the formal sealed copies. Such evidence can, nonetheless, be used as proof of the fact that they are aware of the proceedings being instituted. Therefore, you can dispense with further service of the application.

Personal service overseas can be difficult. It is necessary to have documents translated [see Family Law Regulations, Regulation 12(4), convention countries only].

Serving Prescribed Pamphlet

A final point regarding service: do not forget to serve the prescribed Family Court pamphlet, *Marriage, Families and Separation*, pursuant to Order 25 Rule 3(3). Failure to serve this pamphlet will almost certainly result in the proceedings being adjourned to allow rectification. There have been instances of applications being dismissed where this document is omitted. An affidavit of service does not have to be served on the respondent.

■ Acknowledgement of Service (Form 19)

With the simplified procedures, completing the acknowledgement of service (Form 19 — see Attachment 2H and Attachment 2I) is the same as for the previous documents. The only change is item 4, setting out the documents actually served.

Parts (a) and (b) must be crossed in relation to divorce applications. Part (c), regarding mediation is not relevant to divorce applications. Under Part (f) it is necessary to make reference to a stamped addressed envelope for return of documents.

Under the signature section, the respondent either signs personally or their solicitor signs on their behalf. Wherever possible, the signature of the solicitor should be obtained, given the deeming provision for service pursuant to Order 18 Rule 14(3).

The only other aspect to check that this document is completed is that the date of service as acknowledged in item 3 is, in fact, 28 clear days prior to the return date.

The document should be completed as much as possible before sending it out with the divorce application for service on the respondent. Do not rely on the respondent to complete it properly! A good covering letter helps.

Precedent: Acknowledgement of Service - by Respondent in Person (Form 19), see Attachment 2H.

■ Affidavit of Proof of Signature (Form 23)

An affidavit of proof of signature (Form 23 — Attachment 2J) is normally sworn by the applicant, who can usually state the set formula identifying the handwriting of the respondent.

Note that this document annexes the original acknowledgement of service. It appears that the original acknowledgement of service is also required to be annexed to the affidavit of service. Which one takes precedence? It is submitted that the original should be attached to the affidavit of proof of signature and a photocopy attached to the affidavit of service. This form is very much a 'cross the box' form.

Precedent: Affidavit of Proof of Signature (Form 23), see Attachment 2J.

■ Acting for the Respondent: Notice of Address for Service (Form 18)

The filing and serving of a notice of address for service (Form 18) ensures that the decree absolute is received in due course. This is not the case if only the acknowledgement of service (Form 19) is completed on behalf of your respondent client.

Clearly, the applicant is assisted by having service deemed to be proved, thus avoiding the necessity for an affidavit of proof of signature (Form 23).

Strictly speaking, your only obligation is to complete the notice of address for service (Form 18), not an acknowledgement of service (Form 19). However, common sense and co-operation suggests that both documents should be completed. No doubt the client wishes to ensure that the divorce application proceeds smoothly and with no delay. Perhaps one day the forms will be combined to make things easier.

Completing the Notice of Address for Service

The applicant's solicitor should take care to ensure the date on which service is acknowledged satisfies the required time, being 28 clear days before the hearing date.

The respondent's solicitor fills in the date on which the documents were received by the client. The form is completed in the usual way following the same format as other documents filed for divorce proceedings.

In Part 3, there is the option of nominating a notice of address for service, generally or for specific proceedings. It is a matter of what instructions you receive. You may only be asked to receive documents relating to the divorce and nothing more. If so, the second box is crossed and the words 'divorce proceedings only' inserted. It is this option which is used for the precedent in this chapter.

Precedent: Notice of Address for Service (Form 18), see Attachment 2K

■ Extending the Hearing Date/Abridgement of Time

When it becomes obvious that documents cannot be served within the required twenty-eight days prior to the hearing date, that date can be extended. The sealed documents should be taken back to the registry at least two days before the final return date, or a request for an extended date can be made in writing.

Alternatively, the respondent may agree to short service, and abridge all necessary time to enable the matter to proceed (Order 3 Rule 3). In that case, a letter from the respondent or their solicitor will suffice. This is handed to the registrar dealing with the matter.

■ Filing Ancillary Documents

Documents such as the affidavit of service, affidavit of proof of signature and further affidavits relating to the welfare of the children can be filed at the filing counter at any time up to the day before the hearing date.

Documents filed on the hearing date need the leave of the court (Order 2 Rule 4(2)). Given that documents are sometimes lost in the registry, or do not find their way to the court file by the hearing date, it is often safer to file all ancillary documents at the actual hearing. Leave is freely given in Melbourne, however this is not the case in Canberra. Likewise, other registries may have different policies. Check your particular registry's requirements.

Documents must be filed so that they are entered into the Family Court computer system. There is a 'fast track' for practitioners in most registries, up to 10 a.m. on the day. When filing documents on the same day as the hearing, you should file the original and receive back a copy with the court seal. The original needs to be handed up to the registrar in court.

■ Preparation for Court

Make sure the client is available on the day of the hearing. Telephone the client the day before to make certain. Better still, ask them to telephone a few days before hand (to remind you that their case is on). The case should be listed in the law list in the daily newspaper.

Ensure that all documents have been filed or are available for filing. Divorce applications in Melbourne and Brisbane are usually set down at 10 a.m. and 2.15 p.m. Other registries may have different times.

Solicitors should arrive with their client a short time before the scheduled hearing time and enter an appearance at the court reception counter. There will usually be no appearance for the respondent. It is then a matter of waiting for the case to be called, and presenting the application to the registrar. (It is most unusual for a judge to hear divorce applications.)

Have the client re-read the application to refresh their memory, just in case they have to give evidence. If unfamiliar with the procedure a particular registrar adopts, it is useful to sit in on earlier applications if possible. If you are listed first, you may be able to persuade the court orderly to put you further down the list!

Steps to Success

In broad terms, to succeed in your application it is necessary to:—

- (a) *prove the marriage*: the marriage certificate is conclusive proof;
- (b) *establish jurisdiction*: properly completing section 7 of the application achieves this, usually without further documentation. However if citizenship only is relied on, based on naturalisation, the naturalisation certificate should be brought to court 'just in case';
- (c) *prove the ground for divorce (evidenced by 12 months separation)*: properly completing paragraphs 11 to 15 achieves this;
- (d) *prove service*: the affidavit of service (Form 20 or 21), acknowledgment of service (Form 19), and proof of signature (Form 23) should achieve this, and
- (e) *show that proper arrangements have been made for the welfare of any children*: the material in the application regarding their welfare should suffice, otherwise it may be necessary for the client to give evidence or (less likely) to swear and file a further affidavit (see page 2—23).

Clearly, properly prepared documentation means a solicitor can virtually rely on the documents as filed to prove (a), (b), (c) and (d). However, sometimes things change from the date of filing or other matters are overlooked. Hence, it is important for the client to be available for instructions and to verify amendments.

In the Melbourne registry, the registrars have adopted a policy of generally attempting to ensure that a divorce is dealt with on the day. Minor amendments to documents are allowed and strict compliance is not usually insisted upon. This is clearly in keeping with the philosophy and intention of the Act, ensuring that clients have speedy and cheap access to the courts.

■ Affidavit Evidence: Children's Welfare (Form 16)

Prior to granting a divorce, the court must be satisfied that proper arrangements have been made for the welfare of any infant children (children under 18 years of age) — section 55A(2) *Family Law Act*.

The welfare arrangements at the time of swearing are set out in Part E of the application. At times, you may choose to set out these arrangements very specifically, on the basis that they will not change. You can then simply rely on what is set out in that section to satisfy the court.

At other times, you may anticipate possible changes to these arrangements and choose to set out the details only briefly. Later, an affidavit as to the welfare of the children can be prepared for filing at court on the day of the hearing.

Precedent: Affidavit Relating to the Welfare of Children (Form 16), see Attachment 2M.

The affidavit should be prepared only a few days beforehand, so that it is up to date. It should refer to the matters set out in Part E of the divorce application, but only deal with any changes.

If there are any doubts about whether the information set out in the application is sufficient, this is also the chance to make amendments.

Non-Residence Parent

Note that if the client is not the residence parent of the children but has contact with them, he or she will probably still be able to provide sufficient details regarding their welfare.

In the unusual case where the client does not know the arrangements for the children, the solicitor may be able to persuade the respondent to provide the relevant information, instead of resorting to a subpoena. The client will, of course, bear the costs of preparing the affidavit, and there will still be the problem of explaining to the court why the client has no contact with the children.

■ Dealing with the Client's Emotions at Court

Clients generally want to attend court for this momentous occasion. For the legal practitioner, it can become a relatively routine process. However, try to remember the emotional implications which the granting of a divorce can have on your client and behave accordingly. Sometimes you wish you could tell the registrar the same thing. Experience will dictate the appropriate approach to take.

■ Subpoena to Respondent to Give Evidence (Form 36)

If the respondent has the care and control of the children and is not co-operative in providing details then a subpoena will have to be used. This would be a last resort step.

Precedent: Subpoena to Respondent to Give Evidence (Form 36), see Attachment 2L.

The subpoena must be personally served on the respondent [Order 28 Rule 1(2)], who should be properly identified and provided with conduct money (Order 28 Rule 2). An affidavit of personal service of the subpoena would need to be filed.

A subpoena to give evidence must be served within three months of being issued (Order 28 Rule 6). In the unlikely event that the subpoena is not complied with, the court may issue a warrant.

Although a witness can claim witness expenses, it is unlikely that an unco-operative respondent could claim any costs, particularly if every opportunity to give information was afforded. The matter of costs is nonetheless within the court's discretion (Order 28 Rule 9).

To issue a subpoena, a covering letter addressed to the registrar which briefly explains why the subpoena is required (namely, to bring proper evidence regarding the welfare of the children before the court) would be advantageous. Remember that a subpoena must be served personally and conduct money provided. (For further information in relation to subpoenas, see page 4—33.)

■ Hearing Applications in the Absence of Parties

If there are no children under the age of 18 years, a court attendance is not necessary. If opting for this procedure, the appropriate box is checked on the first page of the application. The procedure is only available where there are no children under the age of 18 years.

The author does not recommend proceeding in the absence of the parties. At the very least, the solicitor should appear. If there are problems with the application and no one is in attendance, the application will be adjourned to another date. It

will not be known what has happened for several days. The client is probably anxiously awaiting the outcome of the day, and it will appear most unprofessional to say 'I don't know what happened'.

■ The Decree Nisi/Absolute

Shortening of Time for Decree Absolute

The usual time between the granting of the decree nisi and the decree becoming Absolute is one month.

However, there are circumstances where the time for decree absolute may be shortened, sometimes even to the 'rising of the court', for example:—

where the applicant wife is pregnant to her de facto husband and wishes to formalise the relationship promptly. In many instances, such a situation would enable the reduction of a decree absolute to, say seven days.

If the client seeks a reduction in time, an affidavit setting out the reasons for such a reduction should be prepared. The respondent should also be served with that affidavit. If no objection is forthcoming, a registrar will then be satisfied that no injustice would be done by granting the application.

The application for shortening the decree nisi can be made orally at the hearing of the divorce. In some registries, no affidavit is required if both parties consent to the shortening of the decree. Check your local registry's requirements in this regard.

Problems Obtaining a Decree Nisi

When pronouncing the decree nisi of dissolution of marriage, the court will, with children under 18, make a finding as to whether it is satisfied about the arrangements concerning the children.

There are occasions when the court will pronounce a decree nisi without being satisfied that such arrangements have been made [section 55A (1)(b)(ii)]. In these circumstances, the decree will still become absolute a month later.

However, the court has the power [section 55A(2)] to adjourn proceedings until such time as it is satisfied as to arrangements for the children. It may order a report from a court counsellor or welfare officer regarding arrangements (e.g. where the non-residence parent is not seeing the children and no satisfactory reasons are advanced for the situation).

In practical terms, most registrars recognise that a marriage is over and the parties should not be kept together artificially. The parties often find themselves in circumstances beyond their control or which are not satisfactory, but which are quite frankly as 'good as can be expected in the circumstances'.

A situation where the court is likely to adjourn proceedings is where the applicant, being the non-residence parent, is able to pay maintenance for the children but is not doing so, or is not paying what is seen by the judge to be a proper sum. A respondent wife here is in a good bargaining position, depending on how anxious the husband is to obtain his decree.

If the applicant wife is not receiving maintenance, the court will usually advise her to apply for maintenance in some form (if not already covered by the Child Support Agency), but will otherwise pronounce a decree nisi, possibly stating that the court is not satisfied with the arrangements.

Husbands seeking a divorce who do not have contact with the children may, likewise, risk a judicial 'inquiry' as to why this is so. Be ready with the reasons.

■ After Court

After the hearing, confirm with the client that the decree nisi has been pronounced. If the client was not at court, telephone him or her to confirm that 'all is well'. Simultaneously confirm with the client that they are not in a position to remarry until the decree absolute, being one calendar month after the decree nisi (section 55).

■ Decree Absolute: the Document

The decree absolute is completed by the court and sent to the applicant care of their address for service. No precedent is provided. All Family Court decrees are prepared by the registry.

Although the decree becomes absolute a month after the hearing [section 55(1)], there is often at least a few days delay in receiving the document from the registry.

The respondent will only receive a decree absolute if he or she has filed a notice of address for service.

There is no fee for any order or decree received from the court, nor for the first copy of any such document. There is, however, a fee for any additional copies (see page 4—36). Typically, a second copy of a decree absolute will cost \$20.

■ Time Limits for Issuing Financial Proceedings

If financial matters have not been finalised and proceedings have not been issued, you should very carefully note and diarise the important time limit for the issuing of those proceedings. Warn your client accordingly. [See page 7—3 for a discussion of the effects of section 44(3).]

■ Footnotes

1. A joint application is very straight forward. Apart from the marriage certificate and the application itself, there are no service documents. This is because both parties swear the application. If it is completed properly, there is nothing further required apart from one or both parties attending court on the day, either in person or represented by a solicitor. If there are no children of the marriage under 18 years, no-one need attend.
2. As a matter of interest, different definitions of what constitutes a marriage certificate apply for divorce applications compared to other applications. (See Order 7 Rule 6 compared to Order 8 Rule 12)
3. In practice, it is relatively uncommon to file a divorce application without a marriage certificate if it is not already on file.
4. In earlier versions of the Rules, there was a deeming provision whereby the filing of a notice of address for service by or on behalf of the respondent meant that service was proved. The respondent was not required to sign and return an acknowledgement of service, nor were an affidavit of service or an affidavit of proof of signature necessary. However, somewhere amongst the all too frequent amendments to the Rules, that provision was removed, apparently accidentally. Order 18 Rule 14(3) came into effect in February 1995, whereby the solicitor signs the acknowledgement of service on behalf of a party to proceedings. This is taken to constitute proof of service of a document to which it refers on the date on which service of the document is acknowledged.
5. Nonetheless, Order 18 Rule 13 is interesting, in that the court has a discretion relating to service and there may be methods for proving service notwithstanding the failure of the respondent to actually return the signed acknowledgment.

(For example, it is possible that a replying letter may acknowledge receipt of documents but refuse to formally accept service. That information can be used against the respondent in an application to dispense with service — see Chapter 3).



Checklist for Divorce Proceedings

Instructions

1. Take instructions (see Chapter 1).
Provide client with court prescribed separate and counselling pamphlets.

Application

2. Prepare Form 4 application, with or without children (see page 2—2).

Other Documents

3. Obtain marriage certificate (see page 2—9)
*Check details on divorce application against marriage certificate.
Is translation necessary?*
4. Translation of marriage certificate, if appropriate (see page 2—9).

Swearing of Application

5. Client to swear application before Justice of the Peace, lawyer or commissioner (see page 2—8).

Filing

6. File documents in Family Court (original and 1 copy) with photocopy marriage certificate (if not already filed) and filing fee or Waiver of Filing Fee application (see page 2—11).

Preparation for Hearing

7. Notify client of hearing date (see page 2—13).
8. Arrange service (documents to be served - sealed application, prescribed pamphlet, acknowledgment of service and notice of address for service to be signed by party being served) - 28 clear days before hearing (or 42 days if outside Australia) (see page 2—13).
Personal service or service by post.
9. Prepare and file affidavits of service (see page 2—16).
10. Prepare and file affidavit of proof of signature (see page 2—20).
11. Prepare updated affidavit regarding children's arrangements if necessary and/or if client cannot attend court (see page 2—23).

Hearing

12. Prepare for, and attend, the hearing (see page 2—20).

After Hearing

13. Receive decree absolute from court and send to client (see page 2—25).
If property proceedings have not been filed, check deadline for filing proceedings within 12 months of decree absolute.