

FAMILY Flyer



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No. 277

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HOW TO SERVE A DIVORCE IF YOU CAN'T FIND YOUR FORMER SPOUSE

If an application for divorce has been made and it is not a joint application, the Applicant is required to serve a sealed copy of the application on the respondent. Service can be made either by way of personal service or through the post.

When the respondent cannot be located to enable service to happen, there are two options:-

1. Substituted service; or
2. Dispensation of service

Substituted Service

The court can order that the documents be served on another person other than the respondent. Before the court will make an Order for substituted service, it must be satisfied that the substituted person (for service) will be able to bring the documents to the attention of the respondent.

Dispensation of Service

The court may order that service does not need to occur if it can be shown that all reasonable attempts have been made to locate the respondent.

CONFERENCE OR PROFESSIONAL DEVELOPMENT DAY? NEED A SPEAKER?

If you are looking for a speaker on Family Law for your next Conference or Professional Development day, please give us a call.

Our principal, Michael Lynch, presents many seminars each year to accounting, financial planning and legal firms, as well as other groups.

If you want your staff to be better equipped to serve clients (or you would like to offer your clients tips) call us on (07) 3221 4300 to organise a FREE seminar.

The seminars are generally for 1 hour and include a PowerPoint presentation and additional hand-out material and we come to you. For more information or possible seminar topics, visit our [Seminar Series webpage](#) or phone 3221 4300.

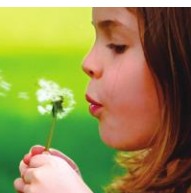
WHAT CONSTITUTES SEPARATION?

A Divorce application requires an 'irretrievable breakdown' of the marriage and that is held to be 12 months 'separation'. So what makes separation?

The Family Court has determined that separation is when the following 3 elements are present;

1. an intention to separate;
2. acting upon that determination; and
3. communication of that intention to the other spouse.

Whilst it may seem relatively straightforward, what constitutes separation can sometimes be a grey area. The issue of separation was recently considered in a case on appeal where the wife opposed the husband's application for divorce on the grounds that they had not been separated for 12 months. She argued that the parties had maintained a married relationship even though they were not 'living under the one roof'. She said they were only living separately because of the husband's mental health issues, and that they otherwise continued to socialise together and engage in personal intimacy right up to just before the husband filed his divorce application.



The husband's account of these reasons for separation were different, but to some extent he agreed that they had continued a relationship as the wife had contended, however he said that his contact with the wife was on the basis of 'friendship/religion or obligation' but that he had been clear to the wife that they were separated and that he had no intention of reigniting the marriage. The Judge in the first instance had taken the wife's case at its highest and still found that the parties had been separated for at least 12 months. The appeal Court agreed with the single Judge's decision and dismissed the wife's appeal.

If you are not sure whether or not you have been separated for 12 months and would like to discuss this issue and the consequences which flow, please contact us on 3221 4300 for an initial appointment - we would be happy to help.

RELOCATION GRANTED CONTRARY TO REPORT RECOMMENDATION

In a recent case a Judge made an Order which permitted the relocation of 3 children with the mother from North Queensland to Brisbane, despite the family report recommending that it would not be in the children's best interests.

Relocation is treated on a case-by-case basis and it may be years after separation that one of the parties might apply for a relocation in the court. It is inevitable that the actions and behaviour of both parties towards the children during the intervening proposal will be taken into account.

The court must consider a variety of factors when determining whether to allow the relocation, including the effect the move will have on their relationship with the other parent.

In this case, the mother's main argument for the relocation was that the youngest child, aged 8 had been diagnosed with severe autism and she was struggling as the primary carer for all of the children. The mother also had extended family in Brisbane who would be able to support her and there were greater facilities available to assist to care for the child with autism.

The father opposed the relocation proposing that if it was to be allowed that the eldest child live with him due to their 'very close bond'. The added complication was that the father earned a significant income by working a roster which prevented the children from living with him on a permanent basis.

The eldest child, a boy aged 13 had a very close relationship with his father and expressed a wish not to move. There was evidence that the middle child aged 9, was often excluded and felt "left out", as the care for the youngest child often overshadowed her needs.

The report concluded that relocation for the oldest child would be "highly detrimental" based on the level of development and his attachment to the father. It was also concluded that relocation would not be in the other children's best interests.

The court allowed the mother to relocate with the children to Brisbane. Although the father had a good relationship with all 3 children, he did not intend to take on more responsibility for their care and had indicated that he could not handle all 3 children on his own. The court found that the children would still be able to have a 'meaningful relationship' with the father by 'spending time' during the term and block time in school holidays. The court expressed a concern that, if required to remain in North Queensland, the pressure the mother was under would detrimentally affect her parenting capacity and her relationship with the children.

Q & A

Q: Can my former partner and I divide our property without going to Court?

A: Yes, but it is important you correctly document your agreement. This can be done either with an Application for Consent Order or a Financial Agreement. You do not need to personally attend the court for either of these but it is important that you get Specialist Family Law advice to ensure the document is completed correctly.

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