



Précis Paper

Discussions on Family Law: Applications for Divorce

This presentation discusses issues that may arise in applications for divorce, including where divorces may become contentious.

Discussion Includes

- Requirements and process for initiating a divorce application
- Jurisdictional requirements
- Irretrievable breakdown of relationship
- Effect of infidelity in a marriage
- When can a divorce application be contentious?
- When does an order for divorce take effect?

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Discussions on Family Law: Applications for Divorce

1. In this edition of BenchTV, Giles Stapleton (Barrister, 9 Selborne Chambers, Sydney) and Tijana Petkovic (Director, Blanchfield Nicholls Partners, Sydney) discuss the key principles relating to applications for divorce.

Initiating a Divorce Application

2. There are two requirements for a divorce application: first, that the relationship has irretrievably broken down for a period of 12 months or more immediately prior to the application; and second, that an application for divorce is made to the court.
3. An application for divorce ordinarily operates in a different stream to an application for property or parenting orders, and tends to be more administrative. Occasionally divorce is contested, however the contentious issue is usually the date of separation, rather than the occurrence of the divorce.
4. As a threshold issue, the court must also determine whether there was in fact a marriage. Issues can arise when a marriage ceremony has taken place overseas, and the court will need to determine whether the marriage is recognised in Australia. Expert evidence may need to be led in relation to the overseas marriages.
5. In order for a divorce application to be determined in Australia, jurisdictional requirements must also be met, namely one of the parties must be an Australian citizen, domiciled in Australia or living in Australia for at least 12 months.
6. It should be noted that a divorce application is only in relation to the divorce itself, and is not a vehicle for agitating parenting or child support matters.

Irretrievable Breakdown of Relationship

7. In some circumstances, the parties may separate but still be living under the same roof. When a divorce is applied for in these circumstances, the court will still need to consider the

fundamental question: was there an irretrievable breakdown of the relationship, proven by a separation for more than 12 months?

8. Separation does not necessarily require that the people in the marriage live separately. However, the issue then becomes one of proof: how do you prove to a court that you are separated if you remain living in the same house? Ms Petkovic advised that appropriate evidence of the marital breakdown will include sworn affidavit evidence going to when the relationship broke down and how the relationship has changed, including evidence from a third party substantiating an applicant's claims, such as a family member.
9. It is important to note that Australia has a no-fault divorce system, and therefore infidelity in a marriage is not relevant to the court's consideration.

Issues in Divorce Applications

10. One of the more common contentious issues arising in divorce applications is the date of separation. The date of filing of the application is the relevant date for determining whether the marriage has been broken down for 12 months, and so it is not relevant if the marriage has been broken down for 12 months at the time the matter is listed for hearing. If the parties were not separated for 12 months at the date of filing, this cannot be remedied simply because, by the time the matter comes on for hearing, the 12 months has elapsed.
11. Moreover, the court can refuse to grant the application for divorce if there is a reasonable likelihood of cohabitation being resumed.
12. A divorce order does not take effect until one month and one day after the date it was made. The divorce order can be rescinded upon application within that one month period. However once the one month has elapsed, a couple would have to remarry if they wish to be a married couple again.

BIOGRAPHY

Giles Stapleton

Barrister, 9 Selborne Chambers, Sydney

Giles Stapleton was admitted as a solicitor in 2005 before being called to the NSW Bar in 2012. Prior to coming to the Bar, Giles held executive positions in public companies in the Australian property funds management industry. His primary practice is in property ownership, development, investment management, financing arrangements, corporate/family asset structures, and directors' duties.

Tijana Petkovic

Director, Blanchfield Nicholls Partners, Sydney

Tijana has worked in family law for 10 years and was appointed Director of Blanchfield Nicholls Partners in July 2016. Her experience includes property matters involving significant asset pools, complex business structures and spousal maintenance claims, as well as child-related matters including abuse and overseas relocation. Tijana is a member of the Family Law Section of the Law Council of Australia and the Women Lawyers Association of NSW, and is on the committee of Women's Nexus.