

INTERNATIONAL DIVORCE

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We understand that divorce is a very personal and stressful process at the best of times. In Australia, divorce is largely process driven but it is important that you follow the right procedure.

If you are seeking a divorce and you and your spouse live overseas or you are married to a person who is living abroad, there are several issues you need to consider.

IS YOUR MARRIAGE RECOGNISED IN AUSTRALIA?

You will need to check that your marriage is recognised in Australia. This is a fairly straight forward process for couples married in Australia because your marriage will need to have been registered with the registry of births, deaths and marriages in the state in which the ceremony occurred within 14 days.

An overseas marriage cannot be registered in Australia. However, the foreign marriage certificate will be evidence that the marriage occurred.

For the purposes of divorce proceedings, the overseas marriage certificate will need to be translated into English by a registered translator and both the marriage certificate and translation attached to an Affidavit.

An overseas marriage will generally be recognised in Australia:

- If the marriage is recognised as valid under the law of the country where the marriage took place.
- Providing the marriage would have been recognised as valid under Australian law had it taken place in Australia. The following will prevent a marriage from being recognised as valid:
 - If either party is validly married to another person at the time of marriage.
 - Both parties are of marriageable age pursuant to Australian law.
 - A foreign marriage will be prohibited from being recognised if the parties are domiciled outside of Australia and are under the age of 16 years.
 - If the parties are within prohibited degrees of personal relationships or no real consent to the marriage is given.

WHAT ARE THE CRITERIA FOR APPLYING FOR A DIVORCE IN AUSTRALIA IF EITHER YOU OR YOUR SPOUSE IS LIVING OVERSEAS?

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

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

You will need to satisfy the court that you and your spouse have lived separately and apart for at least 12 months. In addition, there must be no reasonable likelihood of resuming married life. It is important to note that it is possible to live together in the same home and still be separated.

WHICH JURISDICTION?

If you are seeking a divorce and you and your spouse are living in different countries, you should take legal advice on the jurisdiction in which is the best place to commence divorce proceedings, as there may be strategic advantages for filing for divorce in one or other country. For example, one country may provide you with limited financial claims whereas the alternative jurisdiction may be more favourable. Parenting disputes may also be considered in that jurisdiction so it is important to consider the wider implications for your case.

Whilst you cannot cherry-pick jurisdictions without having a connection to that country the legal tests which are applied will need to be considered on a country by country basis.

You will need to consider together with your legal representatives the following issues before deciding on the jurisdiction:

- The time it will take to get divorced in a particular country
- The financial implications of getting divorced in a particular country
- Whether the courts in the particular country will have the power to issue injunctive type orders so that assets cannot be transferred out of the country and out of the jurisdiction of the court
- The way in which a court in a particular jurisdiction are likely to deal with parenting disputes
- The cost of obtaining a divorce and other proceedings in a particular jurisdiction
- Any issues relating to the enforceability of overseas orders – such as registering an order or having mirror orders in another country.

DIFFERENT COUNTRIES HAVE DIFFERENT REQUIREMENTS

You should be aware that different countries have different requirements regarding the issue of divorce, for example:

- In Australia, we have a ‘no fault’ divorce system in place. You must however be separated for 12 months and the marriage must have irretrievably broken down.
- In England and Wales, a fault based divorce such as unreasonable behaviour or adultery can be issued immediately or a no fault divorce can be either two years separation by consent or five years separation without consent. There is also a ground of desertion but this is rarely used.

It is worth noting that European countries have laws in place to avoid and resolve jurisdictional conflict. Generally speaking, it's the first person to issue proceedings which will determine the court who will deal with the divorce. This is often colloquially referred to as ‘a race to the court's door’. As a result, you should seek legal advice quickly in order to ensure that you

commence proceedings in the jurisdiction of your choice.

IF YOUR DIVORCE IS GRANTED OVERSEAS, WILL IT BE RECOGNISED IN AUSTRALIA?

A foreign divorce will be recognised as being valid in Australia if, at the date of those proceedings, either one or both spouses had a sufficient connection with the foreign jurisdiction (for example, if they were resident for one year prior to the date of issue, domicile or nationality).

A foreign divorce may be refused recognition if it is contrary to public policy or if a party to the marriage had been denied natural justice (for example, if one of the parties had no notice of the hearing).

If you are considering or you believe your spouse may apply for divorce overseas you will need to seek advice about the implications for doing so and whether the divorce will be recognised in Australia.

WHAT ABOUT DE-FACTO AND SAME SEX RELATIONSHIPS?

Finally, Australian law makes provision for situations where a de facto or same-sex relationship has broken down. Until the law is changed, same sex marriage in a foreign jurisdiction will not be recognised as a 'marriage' in Australia. However, we are able to help you with a divorce for a same-sex marriage in other countries, most notably the UK.

HOW CAN WE ASSIST?

Are you thinking of getting divorced? Does your relationship raise international or cross-cultural issues? Would you like to talk with a lawyer who is an expert in international family law and advise you on the best way forward?

At Barry.Nilsson., we specialise in international family law and are extremely well equipped to assist you with cross border issues.

To find out more, meet the rest of our [Family Law | Wills & Estates team](#) and sign up for our [insights](#). You can also follow us on [LinkedIn](#) or [contact us](#).