

Divorcing in Australia: All about Irretrievable breakdown and Separation

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It was recently reported in the Canberra City News that a couple would divorce one another if the Federal Parliament was to pass any amendment to the *Marriage Act 1961* (Cth) recognizing marriage equality. However, it is unlikely that this couple would be granted a divorce by the Family Court of Australia, and this article explains why that may be the case

Requirement for Divorce

Section 48 of the *Family Law Act 1975* (Cth) ('FLA') sets out the only ground for granting a divorce, being that the marriage has broken down irretrievably.¹ To establish the fact that a marriage has broken down irretrievably, applicants must prove that the parties separated, and lived separately and apart for a continuous period of at least 12 months before making an application.² Additionally, a divorce shall not be granted unless the Court is satisfied that there is no reasonable likelihood of parties resuming cohabitation.³

What Does Separation Mean?

Section 49 of the *FLA* provides a helpful guide to determining whether a married couple has separated for the purposes of Section 48. However it is the case law which offers a greater insight into the meaning of 'separation' in the context of Family Law.

In the early decision of *In the Marriage of Falk*,⁴ the Full Court examined the notion of 'separation', noting that it is not purely a physical requirement, since it is 'a departure from a state of things rather than from a particular place'.⁵ The legislation anticipates situations where parties are separated but continue to reside in the same residence.⁶ This was expanded upon by the Full Court in *In the Marriage of Clarke*,⁷ where Lindenmayer J highlighted the importance of the 'mental element' of separation, in that it is imperative that at least one of the parties possesses the necessary state of mind to sufficiently establish their separation, being an intention to 'terminate the marital relationship'.⁸

¹ *Family Law Act 1975* (Cth) ('FLA') s 48(1).

² *Ibid* s 48(2).

³ *Ibid* s 48(3).

⁴ (1977) 3 Fam LR 11,238.

⁵ *Ibid* 11,243 (Evatt CJ, Fogarty and Bulley JJ).

⁶ *FLA* s 49(2).

⁷ (1986) 11 Fam LR 364.

⁸ *Ibid* 370 (Lindenmayer J).

The position was effectively summarized by Watson J in *In the Marriage of Todd*,⁹ where his Honour stated that:

“separation” means more than physical separation — it involves the destruction of the marital relationship ... where one or both of the spouses form the intention to sever or not to resume the marital relationship and act on that intention; or, alternatively, act as if the marital relationship has been severed.¹⁰

Conclusion

In light of what is outlined above, it becomes clear why the Canberra couple’s application for divorce may not be granted. According to the Canberra City News report, the couple will continue living together as husband and wife in a religious sense, notwithstanding their anticipated divorce. Unfortunately, this would not sufficiently establish the irretrievable breakdown of their relationship, as firstly, there would be no physical separation, and secondly, there would be no intention to terminate the marriage. Alternatively, even if they separated for a period, the Court might still reject their application on the basis that there was a reasonable likelihood of the resumption of cohabitation.

If you require any further information about divorce laws in Australia, see [our page about divorce](#) or feel free to contact one of our [Family Law specialists](#) on 02 9222 8000.

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⁹ (No 2) (1976) 1 Fam LR 11,186.

¹⁰ Ibid 11,188 (Watson J).