



## Serving Family Court documents when your ex lives overseas

When starting a legal case, you must 'serve' the party against whom you are proceeding with the necessary documents.

Service is an important first step in any legal matter to ensure the other party is provided the information relevant to the case, and an opportunity to respond. It is particularly important when the person served is not required to attend Court, which is often the case for a divorce hearing.

In family law matters it can be difficult to serve documents when the other party resides overseas, cannot be located, or deliberately avoids service.

This article sets out how documents may be served in foreign jurisdictions and explains how to proceed with your family law case when your ex-partner cannot be served.

### **How is overseas service affected?**

Most family law documents are served by post or by hand if the recipient lives in Australia. However, there are special requirements for serving documents overseas.

The manner of service depends on whether the country in which the other person resides is a party to the Hague Service Convention (the Convention).

The Convention was introduced to create a more simplified approach (rather than going through diplomatic channels) to serve legal papers between contracting states and to ensure that documents are promptly brought to the attention of the intended recipient.

There are presently 73 contracting states to the Convention including various Asian, European, American, Pacific and Commonwealth countries. Each contracting state designates a central authority to receive documents for service from other participating states. Standardised forms are recognised between participants and the process is usually cheaper and more efficient.

Generally, an application is made to the relevant Registrar of an Australian Court for service of the documents to the foreign country's designated authority. The application includes a letter of request, a list of documents to be served, the certificate of service for the foreign court to complete, a certified translation if necessary, and an undertaking as to costs.

The documents are then transmitted to the designated authority which arranges service in accordance with the manner prescribed in that country. If service is successful a

certificate of service issues. If service is unsuccessful, a certificate of non-service stating the reasons why service was not possible, is returned. A certificate of non-service is usually sufficient grounds for substituted service (see below).

The Convention does not apply when the address of the person to be served is not known.

Australia is also a party to various other bilateral treaties which provide assistance for service of documents in countries that are not members of the Convention.

If your ex-partner resides overseas, your lawyer can advise on whether his or her country of residence is a party to the Convention and the appropriate way to serve documents.

### **What if I don't know where my ex-partner lives or service is unsuccessful?**

If you do not know where your ex-partner currently lives or, after having made reasonable attempts, are unable to serve documents, you may apply to the Court for an order of substituted service or dispensation of service.

Substituted service allows you to serve documents on a third party in circumstances where the Court is satisfied that those documents will be brought to the attention of your ex-partner.

Dispensation of service allows you to avoid service altogether, after having satisfied the Court that you have made all reasonable attempts to serve your ex-partner.

### **How do I apply for substituted service or dispensation of service?**

The Family Court and the Federal Circuit Court may order substituted service or the conditional or unconditional dispensation of service upon application by a party. The Rules of each Court differ slightly, however the following factors are generally relevant:

- whether reasonable steps were taken to affect service on the person;
- whether the person to be served could reasonably become aware of the existence and nature of the documents by advertisement or another form of communication that is reasonably available;
- the likely cost to the party serving the document and the means of that person;
- the nature of the proceedings.

If you wish to apply for substituted service or dispensation of service you need to file an Application and supporting Affidavit. The Affidavit is a sworn document explaining to the Court the attempts you have made to locate your ex-partner or to serve him or her with the documents. Relevant matters include:

- the whereabouts (or last known whereabouts) of your ex-partner;

- the efforts you have made to communicate with your ex-partner or to find out where he or she lives including the last conversation you had;
- your communications and enquiries with your ex-partner's family, friends and social network and any replies you received;
- the place of employment of your ex-partner and any enquiries you have made of that workplace;
- any other searches you have carried out in trying to locate your ex-partner;
- your attempts to serve your ex-partner;
- details of joint property, bank accounts or partnerships;
- details of any current child support or maintenance arrangements or orders;
- the costs you have expended in trying to serve your ex-partner and any financial difficulties you may be facing.

In an application for divorce, documents on overseas respondents must be served at least 42 days before the Court hearing.

If you have applied for substituted service or dispensation of service with respect to a divorce application, then you should attend Court on the day of the hearing as you may need to give further evidence supporting your application. Your family lawyer will guide you through this process and assist in preparing for your hearing.

## **Conclusion**

It is important that a respondent to family law proceedings is served with relevant documents or that reasonable attempts of service are made.

Service can be especially difficult if your ex-partner resides overseas and the Court recognises that in some instances, a party to the proceedings cannot be located or may be avoiding service.

If satisfied that all reasonable efforts have been made to locate and serve your ex-partner, the Court may order substituted service or dispensation of service allowing you to proceed with your family law matter. Your lawyer can explain the steps required to show that reasonable attempts to serve documents have been made.

If you or someone you know wants more information or needs help or advice, please contact us on 03 9387 2424 or email [info@rrrlawyers.com.au](mailto:info@rrrlawyers.com.au).