Top Ten Myths of Family Law - Solved

We often hear from clients that they know what to expect because a friend/colleague/family member went through a divorce or separation. More often than not, the “advice” that they have been given is incorrect or misleading. Every family law matter is different and it is important that people facing such a situation seek specialist advice to enable them to make informed decisions about their family and their future.

MYTH 1. All marriages/relationships end in a 50/50 property division.

This is perhaps one of the most common misconceptions in family law. There is no rule or presumption that parties have to divide their assets evenly at separation.

The percentage outcome depends on many different factors including:

- The length of the relationship;
- The financial contributions of either party;
- The non-financial contributions of either party; and
- The current and future needs of either party.

The reality is that 50/50 is actually rare.

MYTH 2. Assets within companies or trusts are protected from a property settlement or The Family Court ignores trusts.

The definition of ‘property’ within the confines of Family Law is wide. The issue of whether trusts and/or companies are included in that definition is a commonly debated issue. More often then not, trusts and companies do come within the definition of property and therefore do form part of the asset pool.

Even if a party to the marriage is not a trustee of the trust or a director of the company, but they have control over the trust or company, it is still an asset of the marriage and the Court has the power to deal with that asset. The important word here is “control”.

MYTH 3. “You broke it, you buy it” i.e. Where separation is the other party’s fault, they should have to pay for it.

Unlike some jurisdictions such as the United States, Australia has a no fault jurisdiction. Questions of morality do not come into play in terms of property settlement.

Infidelity, for example, has no impact on the division of assets or who the children live with. The family law is not there to punish parties for separating.

MYTH 4. “Possession is nine tenths of the law”.

Whether you or your partner are the registered owner of a property is irrelevant for the purposes of family law. The property of one or the other, or of both parties to a relationship is considered property of the relationship. For example, if an investment property is in the name of the wife, for tax purposes perhaps, in Family Law the asset is still considered to be an asset of both parties, regardless of who is the registered owner. The same principle applies for a vehicle or a bank account.

Similarly, just because a spouse is in possession of an asset, for example, if they live in what we call the former matrimonial home, it doesn’t necessarily mean that they will end up with that asset at settlement.

MYTH 5. I’m entitled to 100% of what I put into the relationship.

There is no rule that people are reimbursed all of the earnings or assets they put in. A person will not necessarily get half of everything, or be able to keep those things that they brought into the relationship for paid for during the relationship. It all depends on each person’s overall contribution to the relationship (including non-financial contributions) and their future needs.

It may be that, in very short relationships, say less than 5 years, the Family Law Courts are more likely to give greater weight to the direct financial contributions of one party compared to the other which may result in that party being awarded an asset that they brought into the relationship.

The Courts have very wide powers to divide the property in whatever way it thinks is fair. No two cases are the same and each person should get independent legal advice on their case from a lawyer who specialises in family property law. The Courts consider two broad factors when making decisions on property – first, the contributions each person has made to the marriage, both financial and non-financial and secondly, their future needs.

MYTH 6. All family law disputes go to court.

The vast majority of people who separate are able to come www.macdonnells.com.au
to an agreement about the division of their assets, without going to Court. Court is the last resort in family law. We always encourage our clients to attempt to reach an agreement with the other party before proceeding to court. Agreements can be made through mediation or through negotiations in writing between the parties and their solicitors. Most matters are able to be settled through the process of negotiation, thereby saving both parties in legal fees.

Of those matters that end up in court, only 4% of those matters go to a final hearing (trial) where the Judge determines who is entitled to what assets. Most matters that go to Court settle along the way through negotiation or a mediation.

**MYTH 7. If you agree on the property division, you don’t need to involve lawyers.**

There are many benefits of formalising agreement such as tax exemptions, certainty, protection of rights and entitlements, estate planning and simplicity.

If parties do reach an agreement, it is very important that they finalise their agreement by Consent Orders or a Binding Financial Agreement (BFA). If they do not finalise it in this way, they are exposing themselves to the risk of the other party later claiming an additional piece of the pie, or even later acquired assets, such as an inheritance, down the track. There are also other benefits to finalising agreements by way of Consent Orders or BFAs such as Capital Gains Tax exemptions.

**MYTH 8. Males come off “second best” in property settlements.**

One of the steps in the process of dividing assets is colloquially called, “Future Factors”. This is effectively where the Court considers which party will be better off financially in the future and makes a percentage allocation in the financially weaker party’s favour. For example, if Party A’s income earning capacity is more significant than Party B’s, Party B is likely to receive a higher percentage of the assets than Party A to reflect this disparity. Another example is where one of the parties have the lion’s share of parenting or the “primary care” of the children. The party that has the primary care of the children may not be able to go back to work until the children are school age and even then they may be constrained by school hours and parenting commitments.

In traditional families where the male is the primary income earner and the female is the primary carer of the children, the female is likely to receive a greater share of the asset pool. This is probably where the idea has taken shape of “Males coming off second best in property settlements”. However we are seeing more and more families where both parties have similar income earning capacities and both parties are contributing significantly to parenting. Ultimately, it’s about the job description, not the gender.

**MYTH 9. And in Parenting Matters too!**

Similarly, in parenting matters we often hear that the Family Law favours mothers over fathers. There is no legal presumption that children should be cared for by their mothers. It is the case however, that mothers tend to have more overall care of children than fathers do. This is not always Court ordered but rather frequently it is agreed between the parents. There are a number of reasons why children tend to spend more time with mothers than fathers. A common reason is that the arrangements that were in place before separation tend to be continued after separation. The arrangements prior to separation reflect the roles that each party played in their partnership or marriage. Again, its about the job description, not the gender.

**MYTH 10. You have to be divorced to do a property settlement.**

Parties do not have to be divorced in order to divide their assets in a property settlement. In fact, more often than not, divorce comes well after the property division has been finalised.

Parties must be separated for 12 months before they can apply for a divorce. A lot can happen in 12 months. We encourage our clients to commence the property division process as soon as possible. The sooner the property settlement has occurred, the sooner each party can move on with their lives both financially and emotionally.

**Conclusion**

The important point to remember, is that no two cases are the same and the Courts have a very wide discretion to make decisions, which gives rise to what appears on face value to be wildly different outcomes. It is therefore important to obtain independent legal advice about your particular circumstances.

For more information, please contact Don Macpherson at familylaw@macdonnells.com.au, phone 3031 9706 or visit http://www.macdonnells.com.au

This is general information only, and you should take specific legal advice on your circumstances.