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Four Myths of Family Law

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Family lawyers are often cornered in taxis, elevators and supermarkets by people who seek advice or who want to express strong opinions. Their opinions include myths and generalizations. In this context, a “myth” is a story which may have a grain of truth, but which otherwise is inaccurate. Here are four of those myths and my responses to them.

(1) Family Disputes “Go to Court”

This proposition is like saying “sick people have brain surgery.” A few do, but the vast majority do not.

In Australia, there are about 51,000 divorces each year, and (guessing) perhaps another 8,000 de facto couples separate each year. About half of these people do not even hire lawyers and about one quarter fill in court forms. However, less than 5% use a judge to make decisions about their lives. That is, more than 95% of Australian families who separate or divorce either abandon any claims (“lump it”), or reach an agreement.

Hollywood images of courtroom dramas unfortunately give some people a false image of the normal and less glamorous work of negotiating within conflicted families.¹

In a democracy, courts remain important for many reasons including:

- To provide guidelines for others who negotiate.
- To protect those who are clearly being exploited.
- To effect change when legislators are slow and unmotivated.
- To apply the rules without bias or motivation to be re-elected.

(2) Mothers Always “Get” the Children

This myth needs to be reworded - “mothers in Australia tend to be responsible for more overnight care of children each year than fathers do!”

This reworded statement is correct. However, it is not correct for the reason that is usually implied - namely that the judges of the Family Court are biased in favour of mothers when there is a dispute over a child. For twenty years, the Family Court and the High Court has stated consistently that there is no legal presumption that children should be physically cared for by their mothers.²

However, there are many sociological reasons in Australia why the majority of children will continue to spend more time with their mothers than with their fathers. These reasons include:

- During a marriage, children tend to spend more time with mothers than with fathers. These pre-separation patterns tend to continue post-separation.
- Women tend to have more part-time jobs than males. Accordingly, they are more “available” to care for children who are sick or on school holidays.
- Conversely, more fathers have full-time employment than do mothers. It is usually foolish for a father to reduce his employment (or threaten to do so) in order to “look after” his children, when the family needs stable income.

(3) Property is Always Divided Equally

This myth again is usually wrong! Remember, less than 5% of separating couples who formally file a claim for a share of property in the Family Court, actually obtain a judge’s decision. That is, more than 95% give up or settle by agreement.

Of the few couples who reach a judge, it is rare for a judge to award 50/50.³ Where the property is valued at less than \$1 million, and one party is caring for children, it is common for the homemaker parent (usually the mother), to receive between 60-70% of the assets.⁴ The case-law interpreting s.79 of the Family Law Act provide a rough set of guidelines which help lawyers to negotiate property settlements.

Equal division of property may appear easy and “fair”, but often is not, particularly where one spouse has few employment skills, or is sick, or is caring for children. That partner’s “human capital” has been depleted by marital responsibilities. Equal division of property rarely leads to restoration of equal earning capacity. This economic reality has been recognized by s.75(2) of the Family Law Act, and by case law interpreting that section of the Family Law Act since 1976.⁵

(4) Wives End Up After Divorce Wealthier Than Males

This proposition is no doubt correct for a small minority of separating Australian families. However, repeated studies have shown that it is not true for the majority of Australian families.⁶ Men tend to recover from separation more quickly economically; more slowly emotionally.

This is probably because more separated husbands than their wives have:

- existing full-time jobs.
- more superannuation accumulated.
- more time free from child-care responsibilities to work in paid jobs.
- a network of employment contacts which enable them to gain salary increases or second jobs.

Conversely, more separated wives than their husbands have part-time or no paid employment; have less superannuation accumulated; have less flexibility due to child-care responsibilities; have lower pay scales and fewer promotion opportunities as females; and have accumulated fewer employable skills, job networks and confidence than their ex-spouses.

The reality is that family separation causes financial stress for all members of the family unless they are super-wealthy. Two households cannot live as cheaply as one. Two households spend at least 30% more than one household on items such as rates, electricity, rent, food, holidays, travel and insurance. Accordingly, most separating families must either reduce their expenditures, or increase their net income substantially in order to avoid the pain of debt.

When changing family laws in Australia, there has been a

tendency for the “squeaky wheel to get the grease”. Both male and female lobby groups quote horror stories to Federal Parliamentarians to try to induce law reform on the basis that “we are suffering economically more than they are”.

In the last 15 years, there have been changes in Australian society which have given more economic power to wives in separating families. These include:

- The enactment and enforcement of child support legislation that has substantially increased child support payments made by fathers to mothers who are caring for children.⁷
- The slowly increasing percentages of property paid to mothers in both negotiated property settlements and in the few property disputes that are actually litigated.⁸
- The increasing number of males who are retrenched from full-time employment and are unable to find further full-time employment.
- The increasing number of women who delay marriage and child bearing until they have job-skills, networks, superannuation and employment.
- The existence of female role models, anti-discrimination laws and workplace protocols which provide more opportunities for females to be employed, be promoted, and take maternity leave.
- On 28 December 2002 amendments to the Superannuation Industry (Supervision) Act 1993 and the Family Law (Superannuation) Regulations 2001 will come into operation. This important legislation will enable a divorcing couple to agree to divide the superannuation expectancies by notifying the superannuation trustee of the terms of their agreement. If they cannot agree, a Family Court or Federal Magistrate’s Court can order the superannuation trustee to divide the divorcing couple’s superannuation expectancies into separate funds, to await collection upon their respective retirements or reaching 55 years of age.

Conclusion

In Australia, as elsewhere, there are various myths, anecdotes and gossip around about how the legal system has affected separating families. Although these myths have a grain of truth in them, they are mainly false. However, they are dangerously attractive to sensationalist newspapers, and short-term politicians who are seeking quick solutions to complex social situations. “To every complex social question there is a simple answer - and it is wrong.”

Discussion Points

1. Which types of disputes in a family really need to be decided by a judge, rather than at a negotiation or mediation? Why?
2. About 40% of your friends at school will have a mother and father who do not live together. What suggestions do you have so that children can comfortably see more of both their separated parents, especially their dads?
3. Write out at least eight ways that may reduce the cycle of economic hardship which follows divorce or separation for the majority of mothers in Australia. What are the strengths and weaknesses of each of your suggestions?

1 J.H. Wade “Don’t Waste My Time on Negotiation and Mediation: This Dispute Needs a Judge” (2001) 18 *Mediation Quarterly* 259-280.

2 eg *Gronow* (1979) FLC 90-716; overruling earlier cases like *Epperson v Dampney* (1976) FLC 90-061 (mothers are innately better parents than fathers).

3 S. Bordow & M. Harrison “Outcomes of Matrimonial Property Litigation: An Analysis of Family Court Cases (1994) 8 *Australian Journal of Family Law* 264.

4 eg *Clauson* (1995) FLC 92-595 (wife caring for small children received extra 25% of the property as compensation for her past and future role as homemaker).

5 eg *Dench* (1978) FLC 90-466 (60% of property to parent caring for children); *Best* (1993) FLC 92-418 (100% of \$300,000 pool to parent caring for children); *Clauson* (1995) FLC 92-595 (50% of \$1.5 million pool plus child support to parent caring for children).

6 eg P. McDonald (ed) *Settling Up: Property and Income Distribution on Divorce in Australia* (1986); K. Funder, M. Harrison and R. Weston *Settling Down - Pathways of Parents After Divorce* (1993).

7 *Child Support (Assessment) Act 1989* (Cth); *Child Support (Registration and Collection) Act 1988* (Cth). This legislation, drafted by the Federal Tax Department, is incomprehensible to anyone but a few family law experts!

8 eg A. Dickey *Family Law* (2002) chapters 37-38.