

## **Tips & FAQ's for Family Law Clients**

### **The 3 most important things people need to know when first separating**

**Separation is a PROCESS. It takes time and does not necessarily progress as you expect or plan.** It takes a good deal of resilience and perseverance. You may embark on the process expecting an amicable resolution and be shocked to discover the level of bitterness and hurt in the other party. People are often at different stages on the emotional roller coaster. Some people are locked in the grieving process or denial indefinitely. Rationality can disappear. Whereas the criminal courts feature bad people on their best behaviour the family courts are full of good people showing their worst behaviour.

**Get support - there is lots available.** Now is the time to reconnect with family and friends. Vent the issues with them. They will have lots of advice as well as being able to provide comfort and reassurance. There are resources online and in books but the human contact is really important. There are many community based organisations that can help with information and counselling. Visit them if only to take away some of their very helpful and free publications. Organisations such as the Family Relationships Centres and related bodies (such as Interretate, Anglicare and Unifam to name a few), the Child Support Agency and community legal centres can be very helpful. In fact there is so much information and so many resources it can be overwhelming. So many people will have their own stories and there will be lots of informal advice. You are not alone.

**It is important to get a good lawyer.** A lawyer can assist you in refining the large amount of information that is in the market place and that well intentioned people provide you so as to make it relevant to your own unique set of circumstances. They can help you to plan the best outcome in the most expedient and economical way. The law changes often and so does the way it is applied. A lawyer can evaluate the best process for resolving your dispute as there are a number of options.

### **How can people make it easier for their solicitor to help them during the divorce process?**

It is important to feel confident and comfortable with your solicitor. Most solicitors don't mind if you bring along a support person to an initial interview to help you assess whether your solicitor is a good fit for you and whether you understand what is being explained to you. It is very difficult for a solicitor to act for you if you do not trust him/her.

A solicitor will ask you to do things such as, collect documents or information, complete forms, provide information and check the drafts of letters and documents before they are sent. These things should be done in a timely fashion. If you don't understand something then ask.

Generally solicitors contact you when they need to and especially if they receive a letter or telephone call that calls for action. At other times they rely on you to keep track of time. If a solicitor for instance sends a letter on your behalf to the other solicitor asking for certain information within a set period of time failing which court proceedings will commence then it is a good idea to check with the solicitor at the expiration of that time. Remember that you are not the only client. If you do not follow it up, then the solicitor may assume that you have decided not to proceed or have lost interest or that you are working things out informally. On the other hand if a solicitor provides a time frame for the supply of materials, try to comply with that time frame as non compliance can be disadvantageous to your case.

## LAWYERS

### **What do you feel prevents people from being able to reach an out of court settlement and what advice could you give people regarding this?**

There are many combinations of circumstances that can make settlement difficult to finalise. There may be violence or abuse. There may be a serious imbalance of bargaining power. One party may feel intimidated or threatened. There may be mental health issues or serious physical health problems that preclude even handed negotiations. There may be underlying sentiments of revenge especially if there are new partners on the scene. There also people who really want to have the opportunity to tell their side of the story via a court hearing.

What people should know, however, is that the opportunity to have your day in court is not only very costly but is fraught with risk and the delays are considerable.

A settlement on the other hand is reached consensually and can be tailored to your specific requirements and there is no appeal.

The other problem with litigation is that once you are on that slippery slope, you increasingly lose control. The matter is managed by solicitors and barristers. You cannot anticipate how you will present in the witness box. An unusual or unexpected question in cross examination may elicit an answer that totally changes your case or the judge's perception of you and perhaps to your detriment.

### **What options are there for people to achieve an out of court settlement?**

There are a range of ways to move from separation to having parenting and child support arrangements in place and a property settlement finalised and documented.

#### **An informal settlement worked out by the parties.**

Both parties may communicate well. After getting some legal advice as to their rights and entitlements, the parties may well resolve the issues themselves. Any such agreement in relation to property should be then be incorporated formally by a lawyer into consent orders or a financial agreement so as to ensure enforceability and finality.

Provided they are working effectively, informal parenting and child support arrangements often do not need to be formally documented.

#### **Mediation.**

The parties discuss their positions before a neutral mediator who facilitates a resolution. The mediator, however, does not give legal advice and encourages people to get their advice before hand. The process works well for people who have roughly the same bargaining power and communication skills. Some clients have lawyers present to redress any perceived imbalance of bargaining power. The outcome is not binding but if it is acceptable then usually a lawyer will formally draw up the orders or agreement if property is involved.

#### **Lawyer initiated round table conference or negotiation.**

It is mandatory to attempt dispute resolution before you litigate. For it to be effective there needs to be a full disclosure of each party's assets and liabilities. Lawyers are

able to drive the process of disclosure which then forms the basis of the informed advice you receive. At that point depending on the compatibility of the lawyers and the willingness of the parties, a round table conference with lawyers present can often resolve all issues and result in final orders or an agreement. At times, a physical meeting is not required and the exchange of correspondence between the lawyers acting on their client's instructions can achieve the required outcome.

### **Collaborative Practice**

Collaborative Practice is a process that helps people in conflict resolve their differences in a humane, dignified and respectful way in private without going to Court.

Collaborative Practice was pioneered in the early 1990's and there are now a number of collaborative models and you ultimately decide the best one for you. When you commit to a collaborative process you agree to maintain open communication and share information.

You are represented by your collaborative lawyer who works together with you to tailor the process to address your specific needs and issues. You take control of the process to find solutions that suit you.

Other professionals, including accountants, financial advisors, counsellors and children's experts can be brought into the process to provide specific advice where the circumstances require it.

Collaborative Practice has been used mainly for separating couples and in the area of family disputes but has application for all kinds of disputes especially including contested Wills and Estates.

### **The court.**

Going to court is not necessarily a negative outcome, rather, if a lot of time and money is being expended in exchanges of correspondence which are not advancing the matter then the commencement of proceedings can magically galvanise activity and an outcome.

Once you commence a matter in court then you simply open up the door to well-developed and excellent court initiated and based mediation and conciliation services. A parenting dispute will have the input of a child consultant at the court. A property matter will be referred to a conciliation conference conducted by a skilled registrar or referred to private mediators. There are timetables set by the judicial officer so that your matter moves forward with as little delay and expense as possible. Most matters settle using these court based dispute resolution mechanisms.

For those that don't settle then there is obviously no other option. One of both parties is either mad, bad or sad. In short, the situation is too dysfunctional to be resolved without a final decision maker. The judges, coming from a variety of backgrounds, are usually very skilled and incisive. The decision will be just but not necessarily tailored to a person's particular circumstances. A decision, however, injects order in the chaos and enables the parties and the children to move on irrespective of whether they are happy with the outcome. Judicial determinations can be really so valuable.

The greatest drawback of all is the delay that is encountered in getting a hearing date. For this category of cases where a determination by a court is essential, the delay can cause not just frustration but totally exacerbate the situation. Children caught up in court processes can see their entire childhoods absorbed in litigation. For a parent denied the opportunity to see his or her children, to have to wait for up to 18 months to while the court decides, can be devastating for all involved. The courts try to put in place interim arrangements but the waiting time for even an urgent interim hearing has stretched out to months. Meanwhile community based services, counsellors, social workers, doctor and lawyers try to deal with the chaos and uncertainty that continues in people's lives while they await an outcome. Justice delayed so often is justice denied. Properly resourced courts that can dispense justice speedily where appropriate have much potential and it is an issue of resources and give and take. The focus has been to take from the courts and give to the Family Relationships Centres. Both are deserving of substantial resources

## LAWYERS

### **My property settlement – can I do anything if don't know what the assets are?**

It is an incorrect perception that some people have, that they need to understand the financial affairs of their spouse before they can do anything. Some people search through drawers, filing cabinets and wallets to glean information, take copies and then return the documents. If there is a real issue about the other party's honesty then such self help measures don't hurt but for the most part, this is unnecessary as the law requires that parties make full and frank disclosure.

Lawyers are obliged to tell their client of that requirement and urge compliance. Financial agreements or orders concluded in circumstances where there has not been full and frank disclosure are at risk of being set aside if non-disclosure becomes apparent later. If a matter reaches a hearing and one party is still complaining that there has not been full disclosure, the offending party will be penalised by the court by a reduction in non disclosing person's entitlement.

When you see your lawyer and advise that you have no knowledge of your spouse's affairs, your lawyer will ask your spouse or his lawyer to produce tax returns for the last 3 years and all financial statements relating to companies, trusts, superannuation statements, bank accounts etc. If there is non-compliance you might start proceedings and the court will then direct production of the documents within a time frame. Costs can be awarded if there is ongoing non-compliance.

With the benefit of financial statements, there is enough information to issue subpoenas, if necessary, to banks and accountants for example. Searches of the various legal entities can also be carried out. Over time the true financial picture will emerge.

Overseas assets, however, are very difficult to track down and to value. If you have suspicions or know that there are overseas assets, you should find out as much as possible using contacts in those overseas countries. To track assets through overseas official channels can be very time consuming and costly.

So in short, so long as you can tell your lawyer about your own situation, your lawyer has the skills to use the law to elicit and understand the financial situation of your spouse.

### **Dividing the smaller and personal assets of marriage**

It is the second hand garage sale value of furniture and chattels in the home that is relevant for the purposes of a property settlement. That amount is generally fairly minimal even though the replacement value might be rather high. The sentimental value is incalculable and therefore irrelevant.

If you intend to leave the home then it is sensible to take all your personal effects with you and what you consider a fair distribution of furniture. If there are children then you should take nothing that disadvantages them if you are leaving them behind, for example, the family computer. If you are taking the children then you could take their personal effects as well such as clothes, toys and school books. That is a self help measure reserved for urgent or dire circumstances.

Otherwise you and your spouse are encouraged to reach a resolution about the furniture between yourselves. Most people do. Failing that then one party can draw

up 2 equal lists and the other party selects one. For instance one list might have the dining suite and the other list will have the lounge.

If a matter goes to hearing with a dispute about furniture, then a valuer will formally value the item of furniture. The judge will then give it to the party that wants it at that price or make an order that it be sold and the proceeds divided.

Personal items can result in difficult problems. How do you divide the wedding photos and the holiday videos? Some parties make copies.

And there is always the problem of the missing jewellery or personal papers. The law can only do so much.

So if you are considering separating, an item on your to do list should be to retain any personal items, papers, jewellery etc that you may have trouble retrieving at a later date.

### **What is the biggest mistake people make when it comes to negotiating their parenting arrangements?**

People often focus on what they perceive is the **fairness** of the arrangements and their own rights and entitlements. In fact the focus ought to be at all times on what is in the best interests of the children.

For instance, it may not seem "fair " that a father who is paying no or very little child support should be entitled to see his children.

It also may not seem "fair" that a parent who was not very involved with the children while the parties lived together, is now wishing to spend time on weekends and on week days with the children. In reality this may be a positive by product of the marriage breakdown that the child now has 2 parents focused on him/her. It is certainly in the child's interests that he/she spends meaningful time with both parents. If the breakdown means that the formerly "disinterested" parent has realised what he/she has been missing or decides to put new priorities in his life then that is a positive outcome

Another common mistake is that parents underestimate the impact of conflict on children. Changeovers should be structured so that there is minimal or no negative exchanges between the parties. Parents (or their families and new partners) should not denigrate the other parent in the presence or hearing of the children.

Parents find it hard to accept that different parenting patterns and behaviours are acceptable. Children are adaptable and resilient and modify their behaviours to adapt to the different rules of each household. It does not matter too much that in one household junk food is permitted and in the other it is prohibited. Of course serious questions of abuse or neglect are not included in this general observation.

Parents can impose huge emotional burdens on their children if for instance they do not positively encourage time with the other parent and load the children with guilt for instance

“I will miss you every moment that you are away and will be worrying about you”, “I won't be happy until you get home” and so forth..

Generally with some counselling and over time, well motivated parents can gain insights into these negative and destructive behaviour patterns and put in place the necessary changes.

### **What happens regarding parenting arrangements if one parent wants to move interstate or overseas?**

These are known as “relocation cases” that impact on one parent's ability to spend meaningful time with the children.

If a party is escaping violence or abuse the outcomes are easier to predict but often they involve a contest between 2 equally loving parents. In recent times, the shared parenting legislation appears to have made it more difficult for parents to move . The more involved the non-live with parent, the harder it is for the other parent to move. Relocations within Australia are easier than overseas as we have reliable transport and telecommunications systems. It is possible to work out creative solutions especially with school age children. The best interests of the children remain the dominant consideration.

Ultimately the court has to consider all the advantages and disadvantages of the relocation proposal. It also has to consider whether it is reasonable for the person opposing the relocation to move closer to the child. Will a move impact on the attachment of the child to the other parent? The age of the child is relevant. The court also has to consider the impact of not granting the application on the parent proposing the relocation. For instance a mother pregnant to her new interstate partner will have a more compelling reason to move than a mother wishing to move closer to her relatives and live in a cheaper state.

Ultimately these can be the most difficult decisions for the court with cases balancing 2 imperfect options and with judges bringing to these cases their long experience and wisdom using a combination of intuition, perceptions and guesswork.

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