



Children and the division of property in divorce

separation and divorce are traumatic for children

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Recent statistics indicate that 49.9% of marriages in Australia end in divorce. Half of the divorces granted in Australia in the past ten years involved children.

Projections of divorces, and divorces involving children, indicate that the statistics are unlikely to decrease in the future. Such changing trends in society have made it necessary to review and amend legislation governing family law.

Perhaps the most significant change has been what many people refer to as shared care, or equal care of children.

Other recent legislative changes are those involving child support, and in particular, the introduction of the new formula to calculate the amount of child support payable by one parent to the other. These have been welcomed by some and criticised by others.

Separation and divorce are traumatic for parents, but children are particularly affected. The uncertainty that follows a separation can cause feelings of despair that causes people to act out of character, or even irrationally. These feelings may be exacerbated in cases where the family has experienced domestic violence. It is often

in these circumstances that one parent is accused of attempting to “trade” children, perhaps with a view of protecting them, for assets of the marriage. In other cases, a parent may be accused of the opposite, offering to give up any contact with the children in exchange for more assets or no child support being payable. Those parents who fail to resolve their disputes amicably find themselves with no other option but to seek a resolution through the Courts.

The *Family Law Act 1975* provides that the living arrangements of children can affect the division of property. However, the purpose of this provision was to ensure that parties obtained a fair and equitable division of assets. The Courts would condemn parents who evidently use this provision to alienate children from the other parent, or to obtain a higher division of assets.

A number of matters must be considered when determining how the assets of the parties are to be divided. These include the assessment of the parties’ respective contributions to these assets (whether financial or by way of the efforts of a home maker) and any matters that affect the parties’ future needs. For example, these include the age and health of the parties, the income they earn or are capable of earning and their other financial resources. Another factor is whether either party has the primary care of a child of the marriage.

For these reasons, a 50/50 division of assets may not necessarily be fair or equitable.

This can be illustrated by a parent who remains at the former matrimonial home with, for example, four young children. The

parent may have been their primary carer and out of work for some years, therefore with limited possibilities of gainful employment. The parent who left the home may be earning minimal income, therefore resulting in low (if any) child support being payable. Although there are various Government benefits available through the social security and taxation systems, as well as the public health system, these may be insufficient to meet the daily living costs of a single parent with four young children.

A parent in these circumstances would be awarded more of the matrimonial assets. The fact that the cost of raising children is currently in the vicinity of \$276,707 for one child, or \$448,000 for two children, is

perhaps further evidence that such a parent should receive more assets.

Numerous cases with similar facts have been decided by our Courts, with the Judges making various adjustments in favour of the party that has the majority of the care of the children and where other factors warrant such a division. Therefore, the consensus is that living arrangements of children should affect the division of property between separating parents.

Our legal system strives to protect all parties in legal disputes, and, although it is not a perfect system, the principles adopted do, in most cases, result in a fair and equitable division of assets between separating couples.