

It's a "no fault" system

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There are many misconceptions about Family Law. Two common ones are that the family law process is a forum to air your grievances about the behaviour of your former partner; and that the conduct of a party to a family law matter has relevance to divorce, property matters, spouse maintenance or parenting arrangements. In most circumstances, both of these are untrue.

Since 1975, when the Family Law Act was enacted, the family law system has been a “no fault system”. That means it is not necessary to prove whose fault it was that the relationship ended.

The previous “fault provision” for divorce was replaced in the Family Law Act with the sole ground for divorce being that the marriage has “irretrievably broken down”. This is proven by 12 months of separation.

However, the “no fault” philosophy has a wider influence to family law with respect to property, spouse maintenance and parenting matters and influences the court’s reluctance to entertain an evaluation of conduct during a marriage or de facto relationship.

The court takes the view that parties are human participants in need of expert assistance not moral agents deserving of blame or credit.²

Some people may come to solicitors wanting vengeance and to air in public (in court) the injustice they may have faced. However, the system is not designed to entertain such grievances.

Parenting

In parenting matters, many clients believe that their ex-partner, the party to an affair for example, should not be able to spend as much time with their children because they may not morally be a good influence on the children.

In parenting matters the court’s paramount consideration is a child’s best interests and in deciding what is in a child’s best interests, the court considers:

- the benefit to the child of having a meaningful relationship with both of the child's parents; and
- the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

There are some 14 additional considerations including:

- any views expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's views;
- the nature of the relationship of the child with each of the child's parents and other persons (including any grandparent or other relative of the child);
- the extent to which each of the child's parents has taken the opportunity to participate in making decisions about major long-term issues in relation to the child;
- spend time with and communicate with the child;

- the extent to which each of the child's parents have fulfilled their obligations to maintain the child; and
- the likely effect of any changes in the child's circumstances, including separation from either of his or her parents, another child or person.

The court will consider the conduct of the parties when required to make a determination about whether a child needs protection from physical or psychological harm (a primary consideration). The most common situation where conduct is relevant to the protection of a child in parenting matters is where allegations of domestic violence are made.

While the final “additional consideration” is “any other fact or circumstance that the court thinks is relevant”, it is highly unlikely that infidelity, as an example, will be a relevant factor in considering what is in the best interests of a child. It may inform the child’s views about spending time with that parent, but this would be weighed against the primary consideration of the benefit to the child of having a meaningful relationship with both of the child's parents.

There have been a number of court decisions where it has been made clear that parents have an obligation to shield a child from “adult issues”: a term commonly used by family lawyers to define the reason for a relationship breakdown, or the very existence of proceedings between parents which a child need not be aware of.³

Becoming too bogged down in blame and fault often overflows onto children themselves. The parent who involves the children in these “adult issues” or denigrates the other parent’s conduct is more likely to be the one criticised by the court for doing so.

Property

Some people may also believe that they are entitled to a larger share of the property pool to compensate for their partner’s conduct during the marriage or de facto relationship.

Family law, however, is not punitive. This means that it is not the job of the court to impose punishment for conduct in a relationship.

In considering what order (if any) should be made in property settlement proceedings, the court takes into account factors set out in section 79(4) (married parties) or section 90SM (de facto parties) of the *Family Law Act 1975*, including:

- the financial contribution made directly or indirectly by or on behalf of a party to the acquisition, conservation or improvement of any of the property of the parties;
- the contribution made by a party to the marriage/relationship to the welfare of the family constituted by the parties and any children of the marriage/relationship, including any contribution made in the capacity of homemaker or parent;
- the matters referred to in section 75(2) (married parties) or section 90SF(3) (de facto parties), which are detailed below.

There is provision for the court to consider “any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account”. Only in very limited circumstances would this include conduct of a party during a relationship.

In that regard, there have been a number of attempts to argue that domestic violence by one party to another should be taken into account in the consideration of the contributions of the parties to the relationship. In *Fisher and Fisher*⁴ this argument was rejected by the Full Court commenting that:

“it is the existence of the respective contributions and needs which is the primary subject of investigation and not the causes thereof”.

However, since *Kennon v Kennon*⁵ there have been cases in which domestic violence, and therefore the conduct and fault of one party, has been considered. In *Kennon* it was said that:

*“...where there is a course of violent conduct by one party towards the other during the marriage [or de facto relationship] which is demonstrated to have had a significant adverse impact upon that party’s contributions to the marriage, or...to have made that party’s contributions significantly more arduous...a trial judge is entitled to take it into account in assessing the parties’ respective contributions...”*⁶

The Full Court continued, however, to clarify that it will only be in exceptional cases where such conduct is relevant and indicated it was not advisable to routinely raise matters of conduct.

Spouse Maintenance

Similarly, in matters involving spouse maintenance, parties sometimes take the view that they should be paid some sort of compensation to provide “justice” and perhaps alleviate feelings of mistrust and betrayal. Again, some will be disappointed to learn that it is not the role of the court to punish a party by providing the other party with financial support.

The test for the court is:

- whether a party has a “need”, being where their expenses are more than their income; and
- if that is the case, whether the other party has a capacity to pay, that is, whether after payment of their own expenses such as child support, they have any surplus income.

In considering whether this threshold is met and in coming to a decision regarding the amount of spouse maintenance payable, the court considers the factors set out in section 75(2) (married parties) or section 90SF(3) (de facto parties) which include:

- the age and state of health of each of the parties;
- the income, property and financial resources of each of the parties and the physical and mental capacity of each of them for appropriate gainful employment;
- whether either party has the care or control of a child of the relationship who is younger than 18;
- commitments of each of the parties that are necessary to enable the party to support himself or herself; and a child or another person that the party has a duty to maintain; and
- the eligibility of either party for a pension, allowance or benefit.

As in the parenting and property provisions, there is a coverall provision providing the court with discretion to take into account any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account. In spouse maintenance matters, the court is looking at the financial needs of a party and the capacity for their former partner to provide for those needs. The parties’ conduct during the marriage is, typically, just not relevant.

For further discussion or more information, please contact HopgoodGanim Lawyers' [Family and relationship law](#) team.

2. Family law and its discontents Inaugural professorial lecture John Dewar* J Dewar - International Journal of Law, Policy and the Family, 2000 - Oxford Univ Press
3. *Andrews & Grant (No.2)* [2015] FCCA 953
4. (1990) FLC ¶92-127 at p 77,847
5. (1997) FLC ¶92-757
6. (1997) FLC ¶92-757 at pp 84,294 – 84,295

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