

THE SEVEN MYTHS OF DIVORCE

The very mention of the word “divorce” fills many, if not all people, with sensations varying from dread to horror to stigma. Scenes from movies such as “Kramer v. Kramer” and “The War of the Roses” have only added to the feelings many have when faced with the option of staying in a bad marriage or obtaining a divorce. However, much of what people believe to be true regarding divorces has been changed by laws designed to protect the parties, treat them fairly, and, most importantly, look out for the children’s best interests.

Prior to the 1970s, married couples that wanted to get a divorce had to do so on what were known as “fault” grounds – in essence, that one spouse committed an act so horrible that the other spouse deserved to be free from them. Claiming grounds for a divorce based on fault, and the need to actually prove that the other spouse cruelly and unusually abused the other, or deserted them, or was impotent or imprisoned, caused massive damage to families who had to go on after the dust settled from the divorce. Similarly, a wage-earning spouse was often given the benefit of his or her work, leaving the spouse who stayed home to raise a family without a way to support themselves, despite the fact that they may have given up a career or other opportunities to raise a family.

With the advent of no-fault divorce, and the adoption of the Child Support Guidelines and of standards for the equitable – or fair – distribution of property in Massachusetts, the need to show fault in a divorce is eliminated. A “no-fault” divorce is simply that – the marriage has suffered an “irretrievable breakdown” from which there is no reasonable hope of reconciliation. Child support is now calculated based on a simple mathematical formula using the parties’ income and other charges. Property that is accumulated during the marriage is now divided not on the basis of whose name it was in at the time of separation, but based on a number of facts that a court or a practitioner can use to determine to support both families going forward.

Despite these changes in the law, there are still a number of myths that people believe still apply to divorces, support, children, and the division of property. After many years of speaking with individuals regarding their situation and an impending divorce, here are the most prevalent “myths” and the answers that should go to dispel them. Keep in mind that every divorce, like every family, is different; however, many of these questions and issues are common to each case.

1. If I leave the marital home, I lose all rights to it.

Wrong. The law in Massachusetts that deals with property division states that there are eighteen factors to be considered when dividing property between spouses. These factors include the age, health, education, employability, lifestyle (or station) and conduct of the parties, as well as the needs of the children of the marriage and the contribution to the marriage by each party, including to the children and the assets that the divorce is about to divide. Nowhere in this statute does it state that a person who leaves the marital home – the house where you lived while married – loses any and all rights to it. In fact, there is a trend to consider the fact that a spouse who leaves the marital home to avoid fighting in front of the children or to keep the peace in the family some credit for doing so. It certainly is not looked on as a negative provided the spouse

who leaves does so while keeping a relationship with the children of the marriage, if there are any.

2. The house is in my spouse's name. Does this mean my spouse keeps it and we can't divide it?

The fact that a house is titled in only one spouse's name does not matter for the purposes of dividing the marital estate. Generally, any assets that a party has when they get married are considered part of what can be divided for the purposes of divorce, no matter where they came from. This rule applies to any asset, whether it be a house, stocks, retirement accounts, bank accounts, art work, or even a coin collection. That being said, there is an element of fairness that comes into this – someone who is married for a short time will not be able to keep the marital home that the other spouse bought and paid for prior to the marriage; a judge would look at the terms of ownership versus the length of the marriage and likely award that to the original owner. However, if the house went up in value during the time they were married, the non-owner spouse would get credit for a share of the gain. This is something that is addressed in each case and is very fact-specific, but happens very frequently.

The same rule also applies to debt that one spouse brings into the marriage. That spouse will take that debt with them during a divorce, and any additional debt incurred will be divided. The allocation of assets in a divorce is a very fact specific issue and is best discussed with one of our attorneys.

3. I can get alimony if we divorce.

Alimony is one of those phrases that strikes deep with people when they consider divorce. The high-wage earning spouse won't agree to pay it, and the low-wage earning spouse wants to consider it. The purpose of alimony in Massachusetts is not necessarily to serve as a continuing income stream for one spouse, but rather to assist the spouse who needs it to get in a position where it is not required because they are self-sufficient. In addition, the recent amendments to Massachusetts law can often limit the amount of alimony one can receive as well as the duration for which the recipient is eligible to receive it. Please consult with our offices to discuss this issue because there are many issues that are specific to your facts.

4. Once the divorce is done, it's done.

Not exactly. It depends on what you are trying to change. Some terms of a divorce agreement are said to "survive", or they are treated like the terms of a contract and cannot be changed. Other terms, however, are said to "merge", which means they can be changed on a showing of a "substantial change in circumstances". Terms in a divorce agreement regarding children are always subject to change for obvious reasons; as the needs of the children change, the terms under which the parties work should change as well. The process by which these terms are changed is called "modification". Not every change between the parties is subject to modification – it has to be a substantial change, whether it be based on one party moving far away, spending less time with the children, the loss of a job or a large promotion that results in a significant increase in income, or as children get older. If there has been a change in the

circumstances of the family relationship, it is best to talk to a family law practitioner to see what changes are needed to make your support orders, visitation orders or other arrangements fit your circumstances.

5. My spouse said he won't support me or our children because there is someone new.

While the Court does consider the existence of a second family, it will do so only after making sure the first family is taken care of. Child support is not optional in Massachusetts. The legislature adopted the Child Support Guidelines to set out a uniform way to ensure that children are provided with an appropriate amount of financial assistance. The guidelines, which can be found on the Massachusetts Department of Revenue website at www.massdor.gov, are based on a few factors: the gross (not net) income of the parties, the age of the oldest child, whether there is a pre-existing child support order for another child, the cost of child care and the cost of health insurance. The Court can compel the payment to go through the Department of Revenue by wage assignment so the money is taken from their paycheck directly. Should someone refuses to pay the appropriate amount of support that they are ordered to pay, the Court can find the refusing spouse to be in contempt, meaning that they will have to pay not only the past-due support, but interest, penalties and attorney's fees if you retain an attorney to do this work for you. In some circumstances, if a Court finds that the refusal to pay occurs on a regular basis, the non-paying spouse can even be placed in jail.

6. My spouse had an affair; therefore, they don't get anything, right?

Among the factors considered in the equitable distribution of the property in a marriage is the conduct of the parties. This factor, which is one of many a lawyer or judge would consider, is not determinative of how property will be distributed. However, if it can be shown that one spouse spent significant amounts of money on the affair or somehow wasted assets from the marriage, the other spouse would be credited for what was spent on a dollar for dollar basis. In litigation, the fact that one spouse had an affair can be an embarrassment and, sadly, a stumbling block to resolving a case, but it will likely not make a substantial difference.

7. Divorce is always a mud-slinging battle.

As mentioned before, prior to the creation of "no-fault" divorces, obtaining a divorce was a horribly scarring and difficult process for anyone to go through, and many times the parties did not fit into the categories that were needed to obtain a divorce. Even in a "no-fault" divorce, the parties can allow it to become a battle; however, it does not have to be. There is a growing trend among lawyers to offer mediation as a way to bring the parties to an agreement by using a third person who helps guide the process. More recently, some lawyers have started to work together with their clients to find a resolution to their divorce through what is known as collaborative law. Collaborative law includes the use of specialists that both parties agree to work with – and pay for together – that help them deal with issues regarding the children, each other and the allocation of their finances. Both mediation and collaborative law allow the parties to help guide the process along instead of putting in the hands of a third party, and certainly avoids the damage that can be caused through the litigation process.