

20 Common Misconceptions about Family Breakdown

Arrangements for the children

1. Children always stay with the mother, don't they?

Statistically this is the most common outcome. However, in some cases the children stay with the father rather than the mother. This can be for a number of reasons but ultimately the decision is based on the welfare of the children and what is in their best interests. In deciding what is in a child's

best interests, the Court will look at such factors as: -

The wishes and feelings of the child concerned, depending on the child's age and level of understanding

The child's physical, emotional and educational needs

The likely effect on the child of any change in circumstances

The age, sex, background and any characteristics that the Court considers relevant

Any harm which the child has suffered or is at risk of suffering

How capable each of the parents is of meeting the child's needs

2. Children can choose. Let's ask them what they think

Although the Court can take into account the wishes and feelings of a child, this is more important when the child is older. There is no set age at which a child's wishes are taken into account.

It is very much dependent on the individual child and how well they understand the situation. However, what a child says he wants is only one factor that the Law takes into account.

Family breakdown is a distressing time for all parties concerned, in particular the children involved. They may be feeling very confused. They may even think they are responsible for their parent's separation. They need to know and be constantly reassured that they are loved and supported by both parents.

It can often be seen as putting too much pressure on a child to simply ask them who they would prefer to live with. They will have divided loyalties and will not wish to have to choose between their parents.

If the parents cannot decide, and the issue goes to Court, a Court Welfare Officer is very often appointed and he or she will be able to discover what the child's wishes really are, without a child having to make a direct choice.

3. I heard that if you pay maintenance, you get contact, and if you don't pay, you don't

The issues of contact between parents and their children and that of contributing towards their financial support by paying maintenance, are entirely separate, and are not dependent on each other.

Contact with a parent is the right of the child and the Law does not deprive the child of that right simply because their parent cannot or will not pay maintenance.

Conversely just because a parent pays maintenance does not give that parent the automatic right to contact with the child.

Contact must be in the child's best interests.

4. I reckon that the parent who has contact should be able to pop in to see the children at any time they like

This can create considerable problems not least between the parents. Such visits can be disruptive particularly if they come at an inconvenient time. It is far better to have pre-arranged times when contact should take place. These times should, as far as possible be convenient to both parents and the children.

This is also important as it means that the children know exactly when they are due to see the parent again. Random unplanned visits can often be very unsettling for the children.

5. Someone told me that the children will be forced to see the other parent, even if they don't want to

This is always a very sensitive area and depends on each individual case.

It is usually for the parents to determine whether or not the children genuinely do not wish to go.

The children should be encouraged and persuaded, but forcing a child who, for whatever reason, does not wish to see their other parent, can be damaging to that child.

On the other hand, gentle persuasion to help a child to see his or her parent in an effort to break the ice may be beneficial for the child in the long term.

Divorce Proceedings

6. A legal separation is more or less the same as a divorce, isn't it?

Separation can be dealt with in one of four ways, and there are important differences: -

1. Divorce: Divorce proceedings either immediately or sometime in the future. These proceedings will result in the marriage being dissolved, and each partner being free to marry again.

2. Judicial Separation: The procedure for a Judicial Separation is the same as for Divorce, except for the Decree Absolute. The important difference is that it does not result in the dissolution of the marriage. However, the Court pronounces that the parties while remaining married are not expected to live together. This is what many people think of as a legal separation.

3. Formal Separation Agreement, or Deed of Separation

If no Court proceedings for either Divorce or Judicial Separation are to be commenced, the parties to the marriage can still settle other matters by reaching an agreement on their financial affairs and the arrangements for the children. A Separation Agreement can be drawn up and signed by both parties. This is a legal document.

4. None of the above: Depending on the individual preferences of the parties an agreement can be reached either with or without the assistance of the court or solicitors to regulate their affairs.

7. I suppose you have to register a separation?

No. If you become separated but do not wish or do not have the grounds to commence Divorce or Judicial Separation proceedings immediately you can wait until you have been separated for 2 years and, if the other party agrees, a divorce can be granted on that basis.

It is not necessary to register the date of separation, simply make a note of it for future reference. Court proceedings can then be commenced after the second anniversary of the separation.

8. Divorce is automatic after 2 years' separation, isn't it?

This is not the case. The statutory fact of two years' separation with consent is simply one of the five facts available in the law governing divorce procedure. Once this fact is available to you, (in other words, when you have been separated for over two years,) you can commence the divorce process by issuing a petition, and going through the several stages. The process is the same, whichever fact you plead as the reason for the irretrievable breakdown of the marriage.

9. A divorce takes years, doesn't it?

Usually a straightforward undefended Divorce with no delays or hold ups caused by either party will take approximately 4 to 5 months from start to finish. If there are no other outstanding issues between the parties (for example regarding the children or the family finances) or if these issues can be resolved within that time it need not take longer. However, where negotiations continue with regard to other matters they can take longer to resolve. That very much depends on how difficult it is to reach an agreement.

10. I suppose I can oppose a divorce, can I?

Yes. It is possible to oppose a Petition for Divorce commenced by your spouse. However statistically it is very rare for Divorces to be opposed. It is often best to check before commencing proceedings, if there will be any opposition.

Opposing a Divorce can be an expensive exercise in legal costs, with questionable benefit resulting from the outlay! It is important to consider very carefully what you have got to gain by defending the action and whether it's worth the expense.

11. I can go to any solicitor

Strictly speaking, you can. However, you should consider one main factor. Is the solicitor a divorce expert? Divorce is a very delicate situation - not only personally but also legally. A "general" solicitor does not always have the scope of knowledge and experience that a specialist divorce solicitor has. Mistakes can be made. You should always seek a specialist divorce solicitor. And despite what people think - going to a specialist doesn't hurt you in the pocket!

12. Everyone says you start paying as soon as you see a solicitor

Unfortunately, there are still many solicitors who will charge you as soon as you walk through their front door. And they don't give any free advice. On the other hand, more caring solicitors will give you half an hour of free advice and others even more. It is important you find a solicitor who is prepared to give you free initial advice for three reasons...

You can get an overview of your current situation - good or bad.

You can find out what your options are and what the consequences could be.

You can decide without any financial pressure or obligation if the solicitor is right for you.

13. The papers say it costs an arm and a leg to see a solicitor

Of course this depends upon your situation, but in many cases the costs you pay are much less than you would expect. For a divorce costs can range from £1,100 - £3,500 or more. It is disputes and arguments that pushes up the total. This is why it's important you seek a solicitor who is prepared to offer free initial advice. This initial advice will include some guidance as to likely costs.

14. I've heard that you never know until the end of the divorce how much it's going to cost

This, of course, is a major worry for many people. And rightly so. What you need to know is how much your divorce is going to cost. Or at least an approximate figure on what the anticipated costs could be, depending on what you decide to do. Find a solicitor who is prepared to tell you in advance how much your costs are likely to be.

15. Do you have to pay your fees up front or all in one payment

Many solicitors will charge you either up front for the initial anticipated costs, or will charge you the total fee at the end of the divorce.

Both these methods may not be practical for you.

Try and use a solicitor who bills you monthly for the work they do for you. That way it's easier on your budget and you won't have to worry about paying one large fee at the end.

Money, houses, all those financial matters

16. I think everything I paid for is mine

When married partners separate, they have to agree how to separate their finances. If the marriage is very short, say, less than 3 or 4 years, and there are no children, it is possible that the court would look at who paid for things, and who brought sums of money into the marriage, such as a large deposit on the home.

But if the marriage was longer, or there are children of the marriage, this would not generally be the right answer.

Marriage is a joint venture, and it is generally accepted that all the assets are joint property, regardless of who actually paid for them. Similarly, when sorting out the family finances on separation, debts and other liabilities would be considered joint, whichever name actually appears on the documentation.

So if you have a family car, which is being paid for on a loan in the name of one of you, it will usually be regarded as a family asset, and a family liability.

In a recent important case, the courts firmly showed that equality must be the presumption. The partner who earns most of the money, and the partner who earns less, but makes the home and looks after the children, are held to be equal. It is no longer the case that one is the 'Senior Partner' with a greater claim on the family assets than the 'Junior Partner.' Marriage is a partnership of equals. Even unmarried households should be separated in a fair and balanced way.

17. I daren't leave the house, because I'll lose my interest in it if I do

If the house is owned in joint names, you will still own it whether or not you are physically living there. That will not change by your leaving.

If it is simply intolerable for you to stay, for example if you are suffering violence, you should look to your safety. The ownership of the house can be dealt with in due course in sorting out all the financial aspects of your separation.

If the house is not in your name, the situation is a little more complicated. A person who is married to the owner of the family property has a right to live in it. As long as you are married, this remains the case. If you become divorced, you will lose that right. Therefore, it is important to conclude negotiations about your financial relationship before you finish the divorce. In a case where a couple live together but are not married, a jointly owned property is still jointly owned, even if one leaves. However, if the property is in the sole name of one partner, the other probably will not derive any interest in it at all.

There is an exception here. If the non-owning partner actually pays towards the purchase of the property, there could be a claim for a share of the value of it. In some cases, if the non-owning partner has contributed to other household expenses such as council tax or fuel bills, that partner might be able to claim an interest in the property itself.

You need legal advice about this situation.

The same applies to same-sex couples. If you register a Civil Partnership, the separation of your interests in property is likely to be dealt with in the same way as divorce. If you do not register, and are simply living together, what we said above about cohabiting heterosexual couples will probably also apply to you. This is a very new area of law, of course, and has not yet been tested in case law to any helpful extent.

18. A 'Common Law' husband or wife gets half of everything, just like a proper married one

No, this is not the case. The laws covering divorce do not recognise 'Common Law' partners at all. If you are not married, however long you have lived together, you will have difficulty claiming any interest in each other's property, possessions and investments.

This is particularly true when you consider pensions and other investments. For example, only a wife can become a widow, so the benefits which would be paid out by a pension fund to a widow will not usually be paid to an unmarried partner.

19. All the debts are in the other one's name, so I needn't worry

From one point of view, this is true. For example, if the car loan is in your husband's name, the finance company can only sue him for the money, not you. However, if they decide to repossess the car, you may be the one with the problem of getting the children to school.

Or, looking at it from another angle, if they sue him, and he still doesn't pay, there could be a County Court Judgement (a CCJ) recorded against him at your address. This could affect your credit.

In the proceedings to settle the ending of your marriage, all the debts will have to be taken into account, regardless of whose name they are in.

It is a matter of the family situation as to assets and debts, and trying to sort out the fairest way to separate everything.

20. Well at least my pension's all mine

No, not necessarily. Your pension funds are part of the family assets. You have accumulated these funds during the marriage, at a time when the two of you anticipated growing old together and enjoying the fruits of your labours.

When you separate or divorce, and negotiate ideas about how to separate your family finances, you must consider the pensions along with the other assets. There are three different ways in which pension funds can be

dealt with in divorces now: -

- **Setting-off**

This is by far the most popular solution. If there are other assets, such as a house or significant investments, it is usually possible to reach an agreement where the person without a pension fund (or with a much smaller one) should receive a larger proportion of the value of other assets instead of part of the other one's pension fund.

- **Pension-sharing**

Part of the pension-member's pension fund can now be split off from the fund and used to create a pension fund for the other person. The split-off section becomes the other person's own pension at the time of the split. In this case, the ex-spouses can get on with their lives with their separate pension funds, building them, or not, as they like, and no longer dependent on each other at all.

- **Pension Attachment**

This is an option which has been used only rarely since it became available in 1996. It means that the person without a pension will receive a proportion of the pension-member's pension when that member reaches the pension age. For example, if a husband will start to collect his pension at age 65, the ex-wife will wait until the ex-husband is 65 before she receives her share of the pension fund.

Pension sharing is the only element in sorting out family finances which **MUST** be done by court order. You can deal with all the other elements by agreement, if you can, but if you want to include an order either attaching or sharing a pension fund, you must do this within divorce proceedings.

Need Advice?

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