

THE 2021

DIVORCE

REPORT



A SURGE IN DIVORCES AND COURTS IN CRISIS
THE CURRENT STATE OF FAMILY LAW

Austin Kemp



A picture of family law

In November the Office for National Statistics ('ONS') published its latest statistics for divorces in England and Wales, for the year 2019, and in December the Ministry of Justice ('MoJ') published the latest set of quarterly statistics for the Family Court in England and Wales, for the period July to September 2020.

Between them these statistics paint a picture that gives a useful impression of the current state of family law in England and Wales.

And the picture is both noteworthy and concerning, with at least one record being broken, and serious challenges facing the Family Court.

Austin Kemp are one of the prominent family law companies based in England. Austin Kemp work with high net worth individuals, specialising in divorce and separation, finances, children and international cases.

Austin Kemp

Introduction



Largest increase in divorces

Divorce is, in a sense, the cornerstone of family law. Family law is all about couples separating and, even today, most couples are married. And divorce gives rise to disputes over arrangements for children and finances. Divorce statistics are therefore highly relevant when considering the state of family law.

Divorce statistics are always published a year behind, so the most recent statistics are for 2019. They tell us that there were 107,599 opposite-sex divorces in that year, an increase of 18.4% from 90,871 in 2018. This is the highest number of opposite-sex divorces recorded since 2014 when 111,169 divorces were granted in England and Wales, and the largest annual percentage increase in the number of divorces since 1972.

That last point needs a little explanation. Prior to 1972 it was much more difficult to get divorced. However, in that year divorce law was reformed. The reform made it much easier for couples to divorce, and so there was then a substantial increase in the number of divorces. In other words, the increase in 2019 was the largest since we have had a 'modern', one might say liberal, divorce law.



Increase in opposite sex divorces by

18.4%
2019 compared to 2018

This is the highest number of opposite-sex divorces recorded since 2014.

No-fault divorce

At this point it is appropriate to step away from the statistics for a moment and point out that in 2020 divorce law underwent its first major reform since 1972, with the passing of the Divorce, Dissolution and Separation Act, which will introduce a system of no-fault divorce, expected to happen this autumn.

After it is introduced it will no longer be necessary for anyone seeking a divorce to attribute the blame for the breakdown of the marriage to the other party (at least where the parties have not yet been separated for two years), whether because of that party's adultery or 'unreasonable behaviour'.

Supporters of no-fault divorce hope that it will reduce acrimony between separating couples, and therefore increase the chance of them sorting out arrangements for children and finances by agreement. However, those opposed to the change argued that no-fault divorce means easier divorce, and could therefore lead to an increase in the divorce rate. We will have to wait and see whether they are proved right.



Backlog of petitions

Back to the statistics, the important question, of course, is: what is behind the huge increase in the number of divorces? Have many people suddenly become disillusioned with the institution of marriage? Well, not exactly. As the ONS explains:

“The size of the increase can be partly attributed to a backlog of divorce petitions from 2017 that were processed by the Ministry of Justice in early 2018, some of which will have translated into decree absolutes (completed divorces) in 2019. This is likely to have contributed to both the particularly low number of divorces in 2018 (the lowest since 1971) and the increase seen in 2019.”

And although the number of divorces increased in 2019, there has been an overall downward trend in divorce numbers since the most recent peak, which was in 2003, and opposite-sex divorces remain 30% lower than the 2003 figures. The fall in the number of divorces since 2003 is broadly consistent with an overall decline in the number of marriages between 2003 and 2009 - since then, the number of marriages has fluctuated, while the number of divorces continued to decline overall.

The ONS suggest that changes in attitudes to cohabitation as an alternative to marriage or prior to marriage are likely to have been a factor affecting the general decrease in divorce rates since 2003.



Same-sex divorce increases

Same-sex marriage was introduced in March 2014, so it is too early to read much into the figures for same-sex divorce.

However, the ONS report that there were 822 divorces among same-sex couples in 2019, nearly double that in the previous year, when there were 428 same-sex divorces. The number

of same-sex divorces has increased each year reflecting the increasing size of the same-sex married population since 2014, while females accounted for the majority of divorces among same-sex couples each year.



822 

Divorces among same-sex couples in 2019.

The grounds for divorce



Technically, there is only one ground for divorce: that the marriage has irretrievably broken down. However, under the present divorce law it is necessary to prove irretrievable breakdown by showing that the other party has committed adultery, that they have behaved unreasonably, or that the parties have been separated for a certain time. For the sake of clarity, we will refer to adultery, unreasonable behaviour etc. as ‘grounds’.

The ONS tell us that in 2019 the most common grounds for opposite-sex divorce was once more unreasonable behaviour, with 35% of all husbands and 49% of all wives petitioning for divorce on these grounds. Unreasonable behaviour has

consistently been the most common ground for wives petitioning for divorce since the late 1970s. However, it has only been the most common ground for husbands petitioning since 2006 - in the 1980s and 1990s adultery was generally the most common ground for husbands petitioning, while between 1999 and 2005 it was separation (two years with consent). The ONS say that “there are likely to be a range of behavioural, cultural and financial reasons for these trends.”

As to same-sex divorce, unreasonable behaviour was also the most common ground for divorces among same-sex couples in 2019, with 65% of same-sex couples divorcing for this reason (70% of male same-sex divorces and 63% of female same-sex divorces).

The majority of divorces of opposite-sex couples in 2019 were once again commenced by the wife (62%), the same proportion as the previous year. (Wives have consistently petitioned the majority of opposite-sex divorces in England and Wales since 1949, but the proportion has fallen by 10 percentage points since the peak in 1992, when 72% of divorces were petitioned by the wife.)

35%

of all husbands petitioning for opposite-sex divorce stated unreasonable behaviour was the reason for divorce.

49%

of all wives petitioning for opposite-sex divorce stated unreasonable behaviour was the reason for divorce.

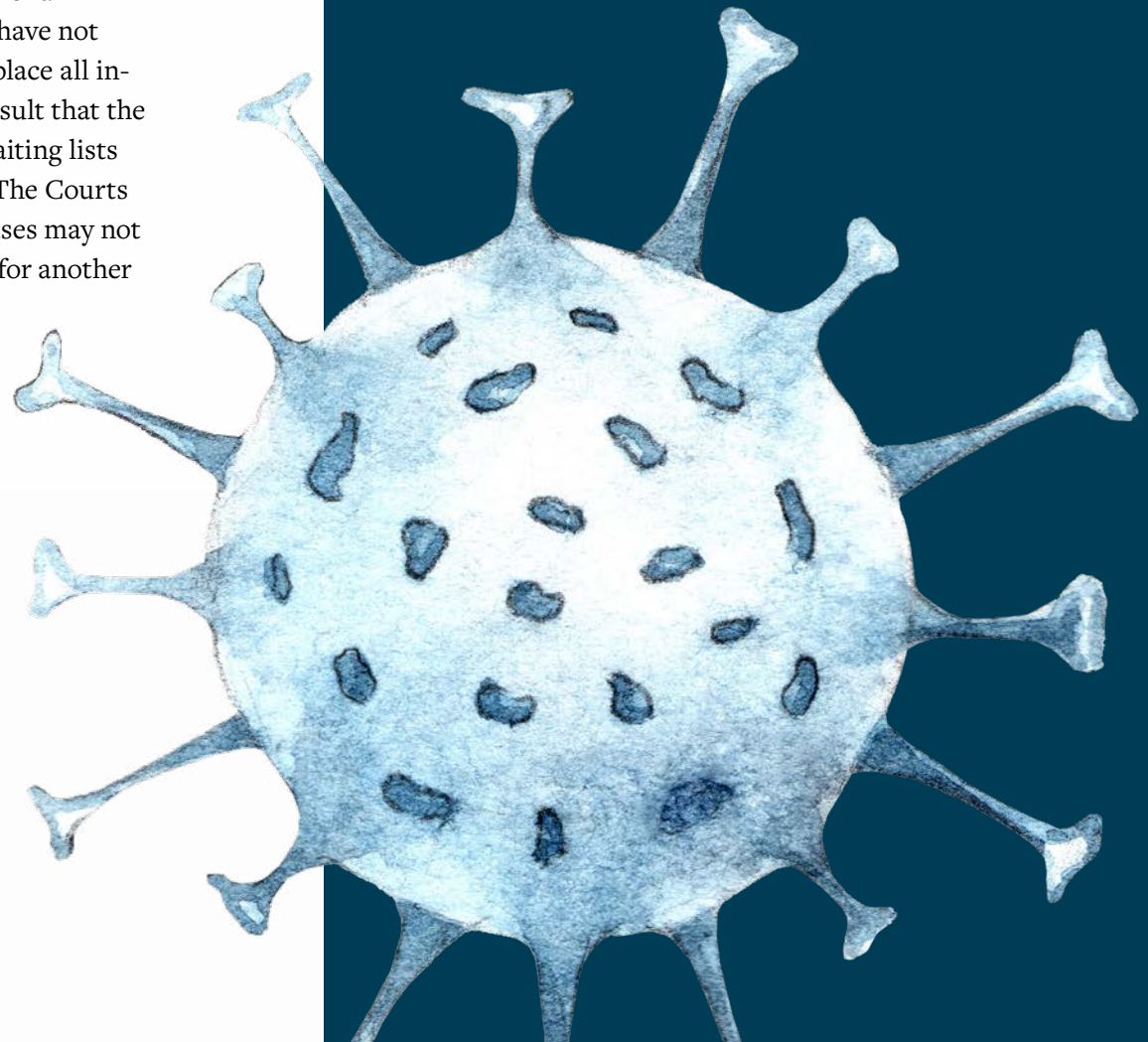
The impact of Covid-19

Before we move on to look at the Family Court statistics we must first mention the impact that the Covid-19 pandemic has had upon the courts.

In response to the pandemic social distancing rules were introduced. These meant that most courts had to close, and many court hearings had to be cancelled.

The family courts did not cease to operate, however. Instead of being conducted in court, hearings took place remotely, via telephone or internet link.

But despite the best efforts of all involved, remote hearings have not been able to completely replace all in-court hearings, with the result that the (already strained) court waiting lists have become even longer. The Courts Service has warned that cases may not return to pre-Covid levels for another three years.



No change in new cases, but fewer disposals

The good news coming from the latest Family Court statistics is that there was little change in the number of new cases started. The MoJ state that in July to September 2020, 68,805 new cases started in family courts, similar to the equivalent quarter in 2019. They say that this is a combination of decreases in adoption (12%) and matrimonial (10%) case starts and an increase in domestic violence (26%), private law children (8%) and financial remedy (5%) case starts.

But the news is not so good when it comes to the numbers of cases disposed of by the courts, and this is where the effects of the pandemic can be seen. There were 55,942 case disposals in July to September 2020,

down 10% on the equivalent quarter of 2019. This was due to decreases in most case types: adoption (16%), financial remedy (6%), and private law children cases (1%).

However, there was an increase in domestic violence (42%) case disposals, reflecting the increased number of domestic violence cases during the various lockdowns (more of which in a moment), and the urgency of the courts dealing with such cases.



68,805

new cases started in family courts from
July to September 2020.

Care cases taking longer

The courts are in crisis, made worse due to the effect of the pandemic. One of the areas where the crisis has been most deeply felt is public law, i.e. cases in which local authorities institute proceedings (usually care and supervision proceedings) to protect children. In many of these cases it has not been appropriate to hold remote hearings, adding to the delays.

In 2014 the Government introduced a 26-week time limit for care proceedings to be dealt with. However, the MoJ tell us the average time for a care and supervision case to reach first disposal was 40 weeks in July to September 2020, up 7 weeks from the same quarter in 2019 and the highest average since mid-2013. Just 29% of these care proceedings were disposed of within the 26-week limit, down 12 percentage points from the same period in the previous year.

There were 7,910 individual children involved in new public law applications in July to September 2020, up 1% on the same quarter in the previous year. The damage caused to these children by the delay in these cases can never be measured.



7,910

individual children involved in new public law applications in July to September 2020



1%

increase in new public law applications in July to September 2020



More, longer, private law cases also

Things are not much better when it comes to private law children cases (i.e. cases in which the parents are in dispute over arrangements for their children).

The number of private law cases started increased by 8% in July to September 2020 compared to the equivalent quarter in 2019 to 15,344, the highest since mid-2013.

And the average time for private law cases to reach a final order, i.e. case closure, was 34 weeks, up 6 weeks from the same period in 2019. The MoJ says that this continues the upward trend seen since the middle of 2016, where the number of new cases overtook the number of disposals, creating a greater number of outstanding cases.

So the number of new private law children cases is increasing, the time taken for the cases to be dealt with is increasing and the number of outstanding cases has been increasing for over four years. It is a recipe for disaster, unless drastic action is taken to remedy the situation.

The Family Justice Board, which oversees and directs the family justice system, recently published a plan to deal with the backlog of cases, but whether it will be enough, we will have to wait and see.



15,344

private law cases started in July to September 2020.

Some good news on divorce

One piece of good news contained in the statistics was that divorce cases were quicker, perhaps reflecting that many of them are now dealt with digitally, and that they do not usually involve any court hearings that require attendance by the parties.

There were 27,803 divorce petitions made during July to September 2020, down 10% from the same quarter in 2019, and there were 22,097 decree absolutes granted in July to September 2020, down 24% compared to the same quarter in 2019.

For those granted decree nisi in July to September 2020, the mean average time from the date of petition was 29 weeks, down 1 week from the same period in 2019. The mean average time from petition to decree absolute was 53 weeks, down 1 week from the equivalent quarter in 2019. This

continues the downward trend from a peak of 59 weeks in January to March 2019. The MoJ say that the increasing share of divorce cases processed digitally is likely to reduce the average time of divorce proceedings.

The MoJ say that for digital divorce cases (i.e. those dealt with the Courts and Tribunals Service Centres that are digital at all stages), there were 16,008 petitions made during July to September 2020 (58% of the total, up from 30% in the same period of 2019). The average time to decree nisi for July to September 2020 was 10 weeks, and 18 weeks from petition to decree absolute.

Clearly, digital divorce is the future, particularly as the introduction of no-fault divorce will do away with contested divorces, and therefore the need to attend court.



27,803

divorce petitions made during July to September 2020.

22,097

decree absolutes granted in July to September 2020.

Pandemic affects financial remedy cases

The Covid-19 pandemic has had a clear effect upon financial remedy cases (i.e. where a party seeks a financial order, such as a maintenance order, a lump sum order or an order relating to family property).

The statistics provided by the MoJ include a graph which shows a dramatic decrease in financial remedy applications when the pandemic struck, followed by an equally dramatic rise back to previous levels, at least until September.

In terms of numbers, there were 10,602 financial remedy applications made in July to September 2020, up 4% from the same period in 2019, while there were 10,528 financial remedy 'disposals events', down 8%. During this period, 67% of applications were uncontested, and 33% were contested.



Huge increase in domestic violence applications

As mentioned above, the statistics show a huge increase in the number of domestic violence remedy order applications and orders made.

Domestic violence remedy orders take two forms: non-molestation orders, requiring one party to refrain from molesting the other, and occupation orders, which regulate the occupation of the parties' home, for example by requiring an abuser to leave the home.

In July to September 2020 there were 9,944 applications made for a domestic violence remedy order, up 26% on the same quarter in 2019, and the highest quarterly number of applications since the present records began at the start of 2009.

Most of the applications were for non-molestation orders (82%) compared to occupation orders (18%). Applications for non-molestation orders in July to September 2020 were up 27% compared to the same period in

2019, while occupation orders applications increased by 22%.

There were 10,505 domestic violence orders made in July to September 2020, up 18% from the same period in the previous year. 94% were non-molestation orders and 6% were occupation orders, with non-molestation orders up by 19% and occupation orders down by 3% compared to the equivalent quarter in 2019.

As to the reasons behind the increase, the MoJ had this to say:

“The lockdown situation as a result of the covid-19 pandemic brought warnings about an increase in domestic violence, with victims having less opportunity to leave abusive partners. The recent increased trend supports this assertion.”

They went on:

“Longer term, police forces have been using a power to release alleged perpetrators without bail conditions, referred to as ‘released under investigation’, since 2017. This is a possible driving factor behind the rise in domestic violence remedy cases, as victims seek protective orders through the courts. The publicity regarding the Domestic Abuse Bill (draft published January 2019 and completed in the Commons stages July 2020) may have also impacted levels.”

In family law terms, the increase in the need for protection from domestic violence and abuse is surely the most serious direct consequence of the pandemic. And with a new national lockdown just started, we fear that there will be much further need for protection of victims.



Legal representation



The last area of the statistics we want to look at is that for legal representation.

In 2013 the government abolished legal aid for most private law family matters. This measure had the instant effect of drastically reducing the number of family litigants who had legal representation. The result of this is still being felt today, with many family litigants having to manage without proper legal help.

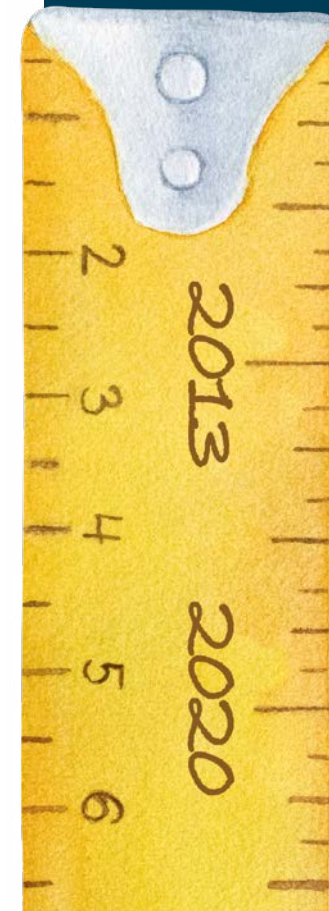
The statistics tell us that in July to September 2020, the proportion of case disposals where neither the applicant nor respondent had legal representation was 36%, increasing by 23 percentage points since January to March 2013, and down 2 percentage points from July to September 2019.

Correspondingly, the proportion of cases where both parties had legal representation went from 41% in January to March 2013 to 21% in July to September 2020, up 2 percentage points compared to the same period in 2019.

The MoJ go on to say that the change seen in the pattern of legal representation is also demonstrated in private law children cases, with at least one hearing where the proportion of parties with legal representation stood at 59% in 2012 compared to 31% in July to September 2020. The proportion of parties with legal representation in cases with at least one hearing varies by case type and range, from around 76% for financial remedy cases to 2% for adoption cases.



Proportion of cases where both parties had legal representation



41%

21%

Conclusions

With the Covid-19 pandemic still raging, the problems facing family law seem relatively trivial. But the vaccination programme is taking off, and the pandemic will eventually subside. When it does, we will all have to address the issues it has left behind.

One of those issues will be the crisis in the family courts. Even before the pandemic the courts were over-worked and under-funded, with court lists getting ever longer. By the time the pandemic is over we will see a much worse crisis – one from which the system will take years to recover.

And perhaps the most tragic effect of the pandemic on family law has been the huge increase in the number of people seeking protection from domestic abuse, after being forced by lockdowns to share their homes with their abusers.

But it is not all bad news. For some time now there have been calls to streamline the courts by making use of remote hearings wherever possible. The vast experience of such hearings during the pandemic will no doubt be used to ensure that remote hearings remain a feature of the family courts in the future, where appropriate. This should

help to reduce case backlogs, and also make the courts more convenient for many.

And what of marriage and divorce? Both have been in a gradual decline for many years, and that decline shows no sign of stopping. And maybe the no-fault divorce naysayers will be proved right, with marriage in the future being regarded as just a transient state, which can be discarded with little thought or consequence.

Well, perhaps not little consequence.

Summary



Links

The ONS divorce statistics for 2019 can be found [here](#), and the latest MoJ Family Court statistics are [here](#).



Austin Kemp | By Your Side

austinkemp.co.uk