THE MOST NOTEWORTHY

FAMILY LAW

CASES OF 2021

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A picture of family law

The year 2021 can perhaps be described as a year of consolidation for the family courts. The shock of the pandemic and the resultant switch to remote hearings are now accepted facts, and the courts have continued to operate within the new reality.

It may have been hoped by many at the beginning of the year that by its end the pandemic would be behind us. Sadly, that has not happened, and many hearings continue to take place remotely. But remote hearings are not necessarily a bad thing. In fact, the President of the Family Division Sir Andrew McFarlane recently indicated that he expected them to continue to be used after the pandemic, at least for less important hearings.

So what noteworthy decisions have the courts handed down in 2021?

There is, of course, no definitive list of the most noteworthy decisions for any particular year.

Which cases should be included in a list is a purely subjective matter, and one person's ideas will no doubt differ considerably from those of another person.

However, the cases that follow are, it is suggested, all noteworthy, in the sense that they should be of interest to anyone concerned with family justice, whether they make a point of law, offer guidance on a particular subject, or are interesting for some other reason.

So here, in chronological order, are some of the most noteworthy family law cases in 2021. (Please note that this list does not include public law family cases, i.e. cases involving social services.)

Introduction

This really helpful, user-friendly document guides to some of The most noteworthy Family Law cases of 2021 and The 2022 Divorce Report at a time of change and provides an excellent introduction to some of the most important cases decided in the family courts over the past year, and a fascinating insight into the facts and figures surrounding relationship breakdown just as we are about to see the end to fault based divorce.

Whether your interest is in financial remedies or children cases, there this is something here of interest for everyone. Helpfully concise case summaries, and succinct outlines of what was decided, provide an excellent practical introduction which will point you in the right direction and keep you up to date.

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Derhalli v Derhalli: The question of occupation rent

It is of course not unusual that when a married couple separate one of them will remain living in the former matrimonial home. In the short term that may not be an issue, but if they remain there for any length of time then the issue may arise as to whether they should pay occupation rent to the party who left. After all, the party who left will otherwise be receiving no benefit from their interest in the property.

The issue arose in the case Derhalli v Derhalli, which went before the Court of Appeal in February.

The case concerned a couple who had lived in a property in Kensington, which was owned by the husband. The marriage broke down and the husband left the property in 2014.

In 2016 the couple agreed a divorce settlement, whereby the wife was to receive the sum of £11.5 million. She received an initial £6.5 million and was due to get the balance when the house was sold. However, the sale was delayed, and did not take place until 2019.

The husband demanded that the wife, who continued to occupy the house until it was sold, pay him £600,000 in back-dated rent. The wife refused, claiming that she had the right to live in the property rent-free, until it was sold.

The husband took the matter to the court and the High Court ruled in favour of the wife. The husband appealed against that decision, to the Court of Appeal.

The Court of Appeal ruled that the matter turned solely upon what the consent order, setting out the agreed settlement, said. The consent order mentioned nothing about occupation rent, and therefore the wife was not obliged to pay any, despite the fact that it the sale had taken so long. The husband's appeal was therefore dismissed.

WX v HX: The treatment of matrimonial and non-matrimonial property

When a couple divorce the court, when considering a financial settlement, can take into account all of the financial assets of both parties. However, assets that are not considered to be 'matrimonial' may be treated differently from assets that are considered to be 'matrimonial.

Briefly, assets acquired during the marriage as a result of the efforts of the parties will generally be considered to be matrimonial. Other assets, such as assets owned prior to the marriage, gifts to one party and inheritances will be considered to be non-matrimonial.

The difference in treatment is that the non-matrimonial assets may be left out of the 'pot' for division between the parties, and therefore remain the property of the owning party, unless they are required to meet the financial needs of the other party.

The case WX v HX was an example this different treatment in action. The High Court found that certain assets, mainly inheritances, were non-matrimonial, and should therefore remain the property of the party who received them. The needs argument did not arise, as there were sufficient matrimonial assets (some £38 million) to meet the needs of both parties.

H-N And Others: The importance of coercive behaviour

Sadly, children disputes between parents often involve allegations of domestic abuse by one or both of the parents. Where such allegations are made Practice Direction 12J ('PD12J') requires the court to investigate the allegations, usually at a fact-finding hearing.

It is estimated that at least 40% of child arrangements cases now involve allegations of abuse.

It is therefore welcome that the Court of Appeal has provided some guidance upon the approach that the Family Court should take to allegations of domestic abuse when dealing with disputes between parents over arrangements for their children.

The guidance was handed down in the case H-N And Others (Children) (Domestic Abuse: Finding of Fact Hearings), which concerned four linked appeals by mothers involved in proceedings relating to their children, in which the mothers had raised issues of domestic abuse.

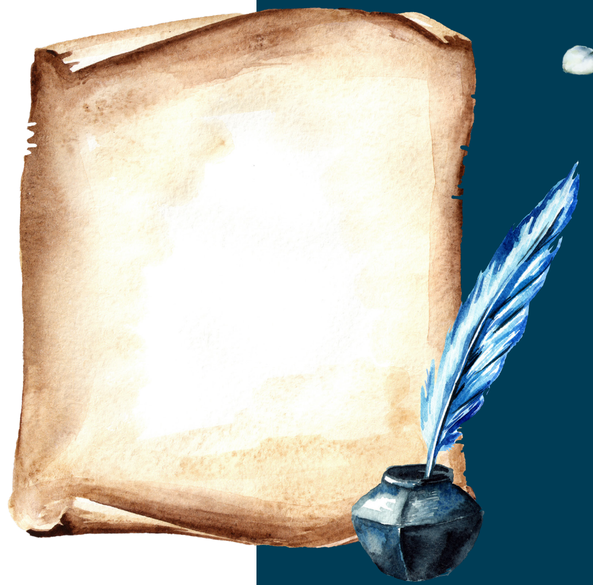
The guidance focussed primarily upon the issue of coercive and controlling behaviour, where one party seeks to restrict the other over a period of time, for example by stopping the other party from spending time with their friends and family, or by restricting their access to money.

The Court of Appeal emphasised the importance of such behaviour, and said that the courts should prioritise consideration of whether a pattern of coercive and/or controlling behaviour is established, over and above the determination of any specific factual allegations.

The Court of Appeal stated:

"Where one or both parents assert that a pattern of coercive and/or controlling behaviour existed, and where a fact-finding hearing is necessary in the context of PD12J … that assertion should be the primary issue for determination at the fact-finding hearing.

Any other, more specific, factual allegations should be selected for trial because of their potential probative relevance to the alleged pattern of behaviour, and not otherwise, unless any particular factual allegation is so serious that it justifies determination irrespective of any alleged pattern of coercive and/or controlling behaviour (a likely example being an allegation of rape)."



Potanina v Potanin: London's biggest divorce case?

Sometimes a case is noteworthy for some other reason than its legal niceties. An example of this was Potanina v Potanin, which hit the headlines in the national media in May simply because it was claimed to be 'London's biggest divorce case'.

Whether that is so is a matter for debate, but the husband in the case Vladimir Potanin, a Russian oligarch, is reported to be in possession of a £15 billion fortune, so it is certainly not the smallest case in the world.

Mr Potanin and his wife Natalia Potanina were married in Russia in 1983, where they lived throughout their married life. The marriage broke down and they were divorced in Russia in 2014. The Russian court awarded Ms Potanina some £30 million.

In 2014 Ms Potanina purchased a property in London, where she has lived since 2017. Considering that she should be entitled to far more than she was awarded by the Russian court, she applied to the High Court in London for financial relief following an overseas divorce. (For those who don't know, the English court can, in certain circumstances, award financial relief after an overseas divorce, notwithstanding that an order for financial relief has been made in a country outside England and Wales.)

Initially Ms Potanina was granted permission to proceed with her application, but permission was subsequently set aside, on Mr Potanin's application. Ms Potanina appealed against this decision, to the Court of Appeal.

The Court of Appeal allowed her appeal, and she can therefore proceed with her application. We await the outcome with baited breath...

A v A: Challenging an arbitration award

It is trite to say it, but Alternative Dispute Resolution ('ADR') is becoming ever more important in the field of family law. Just in November the new Lord Chancellor Dominic Raab stated that he wanted to make better use of ADR and mediation, in order to keep more family disputes out of court.

And one of those methods of ADR is of course arbitration. For the uninitiated arbitration can be used to resolve both financial disputes and disputes concerning children. It involves the parties entering into an agreement under which they appoint a suitably qualified person (an "arbitrator") to adjudicate their dispute and make an award that will be binding upon them.

The important word there is of course 'binding'. Unlike other types of ADR, arbitration does not rely upon the parties reaching agreement. It relies upon them accepting the decision of the arbitrator.

Now, there may of course be occasions when an arbitral award merits challenge, but generally speaking these should be few and far between. In A v A Mr Justice Mostyn set out guidance, with the approval of the President, on challenging a financial remedy arbitral award. Space does not permit a detailed examination of the guidance, but essentially a challenge to a financial remedy arbitral award should be dealt with in the same way, and subject to the same principles, as a financial remedy appeal in the Family Court from a district judge to a circuit judge, and Mostyn J clarified the procedure to be used.

In the case itself the husband challenged the arbitration award on various grounds, but his challenges were dismissed, and the award stood.

Re B (A Child): Unnecessary children applications

A short judgment, and not from one of the higher courts, but nevertheless making a very important point, applicable to all too many children cases.

Disputes between parents over arrangements for their children throw up all sorts of issues, some significant, and some quite trivial. The trivial issues should of course be resolved between the parents, but sadly the relationship between parents often breaks down to such an extent that they are not able to discuss matters between themselves. And if the parents can't sort the matter out, they expect the court to do it for them.

But as His Honour Judge Wildblood QC explained in Re B (a child) (Unnecessary Private Law Applications), the court is not there to resolve every trivial dispute between parents. Such applications, he said, clog up court lists that are already over-filled.

Judge Wildblood gave examples of the sort of applications he was referring to (all of which arose before him in the previous month):

"i) At which junction of the M4 should a child be handed over for contact? ii) Which parent should hold the children's passports (in a case where there was no suggestion that either parent would detain the children outside the jurisdiction? iii) How should contact be arranged to take place on a Sunday afternoon?"

He concluded his judgment with a warning for all parents involved in children disputes:

"...the message in this judgment to parties and lawyers is this, as far as I am concerned. Do not bring your private law litigation to the Family court here unless it is genuinely necessary for you to do so. You should settle your differences (or those of your clients) away from court, except where that is not possible. If you do bring unnecessary cases to this court, you will be criticised, and sanctions may be imposed upon you. There are many other ways to settle disagreements, such as mediation."

A and B: The harm of parental alienation

Just as allegations of domestic abuse crop up frequently in child arrangements proceedings, so does the issue of parental alienation. It was therefore no surprise that the four judgments of Mr Justice Keehan in Re A and B (Parental Alienation) were considered sufficiently important to be published on the Courts and Tribunals Judiciary website.

The case concerned two children, now aged 15 and 12. The parents separated in 2012 and in 2014 a shared care order was made by consent, providing for the children to spend equal times with each parent.

Sadly, in the following year a series of allegations were made by the mother against the father, which involved the police and/or the local authority. The allegations were investigated and ultimately no action was taken.

In 2018 further allegations were made by the mother against the father in relation to the children and then the mother made an application to suspend the shared care arrangements. The applications was refused. Shortly thereafter, the younger child refused to go to his father's home, and then contact began to fail.

In March 2019 the father applied for a child arrangements order.

Expert evidence was obtained from a child psychiatrist and a renowned psychologist in the field of parental alienation. The experts agreed that the mother had alienated the children from the father, and one of them said that the children were at grave risk of physical and emotional harm if they continued to suffer parental alienation and splitting from their father.

In the light of this evidence Keehan J found that the mother had caused both of the children serious emotional harm in alienating them from their father, and decided that he should transfer residence from the mother to the father.

The matter didn't end there. At a subsequent hearing Keehan J severely restricted the mother's contact with the children, due to her lack of engagement, and lack of acceptance of her past role.

A salutary lesson upon the harm and consequences of parental alienation.

Crowther v Crowther: Nihilistic litigation

The family law reports regularly include tales of seemingly endless litigation, prompting judicial warnings of the cost to the parties, both emotionally and financially. Sadly, these warnings are rarely heeded, but that should not stop us from publishing them, in the hope of preventing couples from repeating the mistakes of those who have gone before.

Crowther v Crowther concerned the final hearing of a heavily contested financial remedies claim. The case involved no fewer than 34 court hearings, and 6000 pages of evidence in the court bundles. The judge, Mr Justice Peel, commented that the parties had argued about almost every imaginable issue, no matter how trivial.

Unsurprisingly, the legal costs were enormous. The wife's costs were about £1.4 million and the husband's costs some £900,000. The total costs were therefore some £2.3 million.

And these costs were utterly disproportionate to the value of the assets that the parties were arguing over, which Mr Justice Peel calculated to be worth just £738,000.

Those assets were divided substantially in the wife's favour, in view of the husband's conduct in the litigation, and his much higher earning capacity.

But what was particularly noteworthy was the last paragraph of Mr Justice Peel's judgment. He said:

"The only beneficiaries of this nihilistic litigation have been the specialist and high-quality lawyers. The main losers are probably the children who, quite apart from the emotional pain of seeing their parents involved in such bitter proceedings, will be deprived of monies which I am sure their parents would otherwise have wanted them to benefit from in due course."

A warning that should surely be considered by anyone tempted to conduct family litigation in the disastrous way that these parties did.

Siddiqui v Siddiqui: A most unusual case

Lastly, family law can cover the full panoply of human actions and interactions. A regular reader of family law reports must therefore be prepared for anything, as the unique case of Siddiqui v Siddiqui demonstrates.

One cannot fault the applicant in the case for his optimism and tenacity, in the face of overwhelming odds. His own description of his applications was "novel", and Sir James Munby, hearing the case at first instance, commented: "I suspect that the initial reaction of most experienced family lawyers would be a robust disbelief that there is even arguable substance to any of it."

So what were the applications?

The applicant, who was aged 41, was seeking financial provision for himself from his parents.

The obvious question is: on what basis? The applicant tried three avenues of attack: Section 27 of the Matrimonial Causes Act 1973, which provides for financial provision orders in the case of neglect by a party to a marriage to maintain the other party or a child of the family; Schedule 1 to the Children Act 1989, which provides for certain persons to seek financial provision for children; and what Sir James described as "that branch of the recently rediscovered inherent jurisdiction which applies in relation to adults who, though not lacking capacity, are "vulnerable.""

Briefly, the background to the case was as follows. The parents, who are said to be "very wealthy", are and have at all material times been married. Their son is a solicitor, but has various difficulties and mental health disabilities. His parents have supported him financially down the years and continue, to some extent, to do so. They have permitted him to live in a flat in central London that they own. Unfortunately, the relationship between parents and son has deteriorated recently, with the result that the financial support the parents are prepared to offer has significantly reduced, hence the application by the son.

It will come as no surprise that the son's applications failed. Section 27 only applies where there has already been an order in the child's favour applied for by one of the parties to the marriage; no order can be made under Schedule 1 at a time when the parents of the applicant are living with each other in the same household; and there was no scope for recourse to the inherent jurisdiction. Accordingly, Sir James dismissed the son's applications.

Undeterred, the son appealed, to the Court of Appeal. But it will again be no surprise that Lord Justice Moylan, giving the leading judgment, found the appeal to be "completely without merit."

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