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2023 Family Law Cases Report

Unlocking the most noteworthy family law cases.

Introduction

Here we bring you our list of the most noteworthy family cases reported in 2023.

Before we do so we should say that there is of course no such thing as a definitive list of the most noteworthy cases for any particular year. Which cases should be included in a list such as this is a purely subjective matter, and one person's ideas will no doubt differ considerably from those of another person.

However, we believe that the cases that follow are 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.

Please note: That this list does not include public law family cases, i.e. cases involving social services.

(This report should be read alongside our Review on High Value Divorce Report, which also contains noteworthy cases reported in 2023.)

The wife who siphoned off money

DP v EP

The case DP v EP began conventionally in 2019 with a petition for divorce, upon which decree nisi was granted in March 2020. Subsequently it transpired that at the date of the parties' marriage the wife was married to another man.

This led to an application by the husband to rescind the decree, and ultimately, in June 2022, an agreement that the wife would not defend the husband's application for a nullity order.

But that rather unusual procedural history is not why the case appears here.

It appears here because the husband, who is illiterate, claimed in the financial remedy proceedings that throughout the marriage the wife was siphoning off joint funds and using them to accrue assets that he knew nothing about.

The husband was therefore running add-back (i.e. that funds taken by the wife should be added back to the matrimonial assets), undisclosed assets, and conduct arguments.

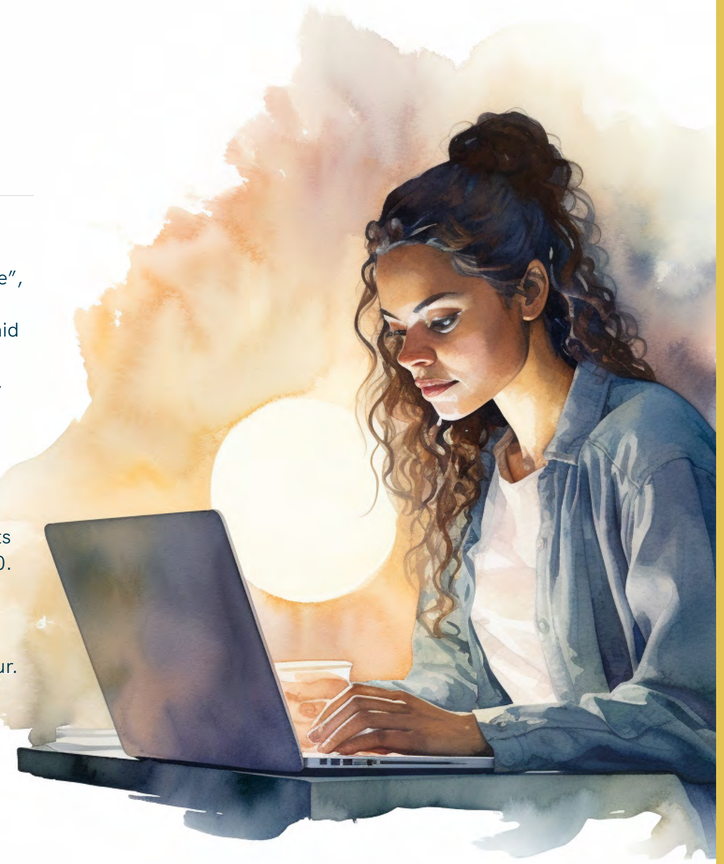
Briefly, the essential facts of the case were that the parties were married in 1994 and separated in 2018. The wife is a property consultant and the husband is a builder. The wife issued a financial remedies application in 2019, but this was delayed due to the issues mentioned above.

A significant feature of the case was that the husband is, or has been until quite recently, functionally illiterate. For the majority of his adult life, therefore, he has had to rely on others to support him with many aspects of day to day life which most people take for granted. For the duration of the parties' cohabiting relationship it was the wife who undertook that role.

The husband claimed that the wife had led a "double life", having conceived a plan to defraud him and ultimately leave him, having enriched herself at his expense. He said that throughout the marriage the wife was siphoning off joint funds to accrue assets that he knew nothing about, exploiting his illiteracy to do so.

The judge agreed, finding that on repeated occasions, and over a period of several years, the wife had sought to remove assets, and to place them where the husband would not be able to access them. The total of the assets siphoned off in this way was found to be some £160,000.

Accordingly, the judge included that sum as part of the wife's assets and, to penalise the wife for her conduct, divided the assets as to 53%:47% in the husband's favour.



Using experts in children cases

Re C

Re C was one of the most important, and certainly one of the most talked about, private law children cases of 2023.

The judgment handed down by the President of the Family Division Sir Andrew McFarlane in February concerned the mother's appeal from a refusal of permission to reopen findings of fact in proceedings concerning the arrangements for her two children, then aged 13 and 11 years old.

The case had a very long history, but the mother's appeal centred upon a judgment in June 2021, in which the judge made a number of significant adverse findings about the mother's behaviour, in the context of potential alienation. In the light of those findings she ordered that the children should move to live with their father.

In coming to her findings the judge relied in part upon the evidence of an expert psychologist, who had concluded that the children had been alienated against their father by their mother.

The mother sought permission to appeal, claiming that the judge was wrong to rely upon the report as the expert was not regulated by the Health and Care Professions Council ('HCPC'), and the evidence of an unregulated expert should not be relied upon. The mother was refused permission, and then appealed against that decision.

The President dismissed the appeal, saying that it was not for the court to prohibit the instruction of any unregulated psychologist. He did, however, give guidance as to the instruction of unregulated experts, including that the court should identify whether a proposed expert is HCPC registered and, where they are not, indicate why it is nevertheless appropriate to instruct them.

The impact of conduct on a financial award

HO v TL

The conduct of the parties is of course one of the factors to which the court should have regard when deciding a financial remedies application. However, in order to have a bearing the conduct must be so serious that it would be inequitable for the court to disregard it.

That was certainly so in the case S v S.

In the case the marriage broke down in 2016, as a result of an incident in which the husband, who was a sergeant in the local police force, was arrested, and subsequently prosecuted for serious offences.

Following a trial in 2018 the husband was convicted of the rape of the wife, stalking her, and perverting the course of justice. He was sentenced to 9 years imprisonment.

Divorce proceedings ensued, and the husband issued a financial remedies application.

Hearing the application, the judge had no difficulty in finding that the husband's conduct was so serious that it would be inequitable for the court to disregard it.

Taking that conduct into account, along with the wife's needs, the judge awarded the wife 85% of the capital assets, plus 66% of the parties' pensions, including the husband's police pension.

Arbitration in children cases

SW v IB

Family arbitration has been available for financial cases since 2012, and for cases concerning arrangements for children since 2016.

The essential point about arbitration is that the arbitrator's decision should normally be final, in the same way that a judge's decision is final. If this were not so then obviously arbitration would be virtually pointless.

We have seen cases challenging arbitral awards in financial remedy cases, but SW v IB was one of the first (if not the first) reported cases in which a party challenged an arbitrator's decision in a case regarding arrangements for a child.

In the case the parents had been trying without success to agree arrangements for their young son. They therefore agreed to refer the matter to arbitration.

The arbitrator made a determination regarding the process of the father's relationship with the child, commencing with overnight contact, then increasing in frequency, to the point that the arrangements would be labelled as shared care.

The mother objected to the determination, arguing that the process should be slower than that decided by the arbitrator. The therefore made an application to the court challenging the determination.

Hearing the mother's application His Honour Judge Willans explained that when a challenge is made to an arbitration determination the court should undertake a similar process to that which arises when permission to appeal is sought – i.e. it should undertake a triage stage to consider whether the challenge has a real prospect of success.

And here Judge Willans was not satisfied the application had real prospects of success. The arbitrator's decision was thorough and reasoned, and she had reached principled conclusions which she was entitled to make.

Accordingly, the arbitrator's determination was upheld, and an order was made in its terms.

The consent order that was not agreed

Cummings v Fawn

Obviously the court would prefer couples to agree financial arrangements on divorce, rather than requiring the court to decide the matter. And the agreement will then be incorporated into a consent court order, to ensure that it is final and binding.

And because the court wants to avoid unnecessary litigation it may even hold the parties to a general agreement, where specific details have not yet been agreed. This is known as a 'Xydhias' agreement, after a 1998 case by that name.

In Cummings v Fawn the parties reached a Xydhias agreement on the 10th of February 2022. On the 22nd of February the wife repudiated the agreement, claiming that it was unfair in not meeting her needs, and that the husband was guilty of material non-disclosure which should act to negate the agreement completely. Remarkably, this was the third time she had repudiated an agreement.

The matter went before the court and the judge held that the agreement was not negated by the husband's non-disclosure; that it was fair; and that it should be made an order of the court.

The wife appealed.

Hearing the appeal, Mr Justice Mostyn found that the judge had failed to properly assess how the wife's financial needs could be met through the agreement, and that she had erred in her approach to the husband's non-disclosure of an inheritance worth at least £4 million net.

Accordingly, the judge's order was set aside, and the wife's claims for financial remedies for herself would have to be retried.

A husband makes amends

CG v DL

The case CG v DL would perhaps have been a fairly unremarkable financial remedies case, but for one matter.

The parties had married in 1998 and separated in 2020. Divorce proceedings ensued, and the wife issued her financial remedies application.

The chain of events that make the case stand out began in 2017 when the husband had a short-lived affair. He ended it after about six weeks and told the wife.

That commenced a period of acute stress for the family because the husband's former girlfriend began a campaign of public and private harassment and stalking of both the husband and the wife. The effect of this was difficult for the husband, but unsurprisingly it was acutely traumatic for the wife.

During 2017 the husband was told by the woman that she was pregnant by him and had been advised that he would be likely to have to pay £1 million if she applied for financial provision for the child. In the light of this the husband transferred that sum to the wife.

In fact, the woman was not pregnant.

The parties did not agree as to how the court should treat the payment in the divorce settlement.

The wife argued that she should keep it, contending that it was a gift to her expressly to use as she wished and made by way of partial amends for the husband's misbehaviour, and that it would be inequitable if she should be required now to share it with the husband.

The husband argued that it should be treated it as one of the resources available to the wife, and that it should be shared along with the other matrimonial assets.

Hearing the case, Sir Jonathan Cohen agreed with the wife, saying that whilst the money was a matrimonial asset, the circumstances of its giving were highly relevant. There was no need for the husband to share in it, and it was fair to both parties that the wife should be entitled to keep it in its entirety, as was intended when it was given to her.

Must needs be met in a needs case?

Butler v Butler

When a judge considers a financial remedies application he or she must decide what the most important factors are bearing upon their decision.

And in many cases the most important factor is the financial and housing needs of the parties. These are often referred to as "needs cases".

In Butler v Butler the judge had concluded that it was a needs case, including specifically in relation to the wife's housing needs. However, having come to that conclusion he did not then make an order that would enable the wife to purchase a home for herself.

The wife appealed.

Hearing the appeal, Mr Justice Moor explained that the real issue that he had to decide was whether, having come to the conclusion that this was a needs case, the judge had to make an order that did, indeed, provide for the housing needs of the wife.

Mr Justice Moor concluded that the fact that a judge rightly concludes that a case is a "needs" case does not mean that they must then make an order that satisfies both parties' needs. For one thing there may simply be insufficient assets to satisfy the needs of either party, let alone both. And for another thing there may be other factors that the court should take into consideration.

In this case awarding the wife sufficient to rehouse herself would have made the husband homeless, and the judge was entitled to take the view that he should not make such an order, taking into account such factors as that the husband had inherited his assets, the length of time that had elapsed since the separation of the parties in 2009, and the age of the husband (he was aged 64).

Accordingly, the wife's appeal was dismissed.

The penalty for recording children proceedings

HM Solicitor General v Wong

It is, or should be, well known that there is a prohibition against publishing information relating to private court proceedings concerning children. There is also a prohibition against the use of recording equipment in court, without the permission of the court.

Notwithstanding these prohibitions, in HM Solicitor General v Wong the Defendant chose to covertly record a private adoption hearing in relation to his child, who had been made subject to a care order. A few days later he disposed of the recording to someone else, with a view to its publication on YouTube.

His Majesty's Solicitor General issued contempt proceedings against the Defendant.

Mr Justice Cobb found the contempt to be proved, stating that it was in his judgment a most serious contempt of court to defy the long-established principle of privacy in adoption cases by covert recording of a hearing. The Defendant knew that he was not permitted to record the proceedings, and deliberately defied the law.

In the circumstances Mr Justice Cobb imposed an immediate four month prison sentence, finding that the contempt was too serious for the sentence to be suspended.

A cautionary tale.

Getting a second expert opinion

GA v EL

Expert evidence as to valuation of assets is obviously commonly required in financial remedy cases. But expert valuations cost money. And each party instructing their own expert and then arguing over the different valuations of each expert is the last thing the court wants.

It is therefore normal practice for the court to order that a single expert be instructed jointly by the parties, on the basis that both parties will be bound by the expert's valuation.

But what if one of the parties disagrees with the joint expert's valuation?

That was the situation in the case GA v EL, in which the wife disagreed with the joint expert's valuation of a business, and instructed a second expert of her own, who provided a higher valuation.

The wife therefore applied to the court for permission to introduce the valuation of her second expert into evidence, known as a 'Daniels v Walker' application, after a case of that name decided by the Court of Appeal in 2000.

The wife argued that the joint expert's valuation was deficient in that it undervalued the business, which would result in her receiving a smaller award.

Hearing the application Mr Justice Peel held that it should fail for several reasons, including that it would be unfair to the husband as it had been brought too late in the day (just three weeks before the final hearing), and that in any event the effective difference between the two valuations was relatively small.

Making pejorative comments about the other party

HO v TL

The final case in this report is not included here for the subject-matter of the case (you can find that in our Review on High Value Divorce Report), but rather because of a judicial exhortation that will stand as a warning to parties, and also no doubt resonate with practitioners.

There were two judgments in the case HO v TL: the main judgment dealing with the final hearing of the financial remedies application, and a second judgment dealing with the issue of costs following the main judgment. It is the latter judgment to which we refer here.

Towards the end of the costs judgment the judge, Mr Justice Peel, set out three particularly relevant considerations. The second of those is what merits inclusion here.

He said that whilst the wife in the case did not formally claim that the husband's conduct was such that it should have a bearing upon the outcome of the case, she did include in her documents personal criticisms of the husband.

This led him to state:

"This practice of making pejorative comments about the other party which have absolutely no relevance to the outcome of the financial remedy proceedings and are probably hurtful, must cease.

"Apart from anything else, it is unfair to the party who has refrained from making personal criticism to be met with a litany of complaints about their own personal behaviour. The court's function is not to pick over the bones of the marriage and attribute moral blame. I doubt this in fact added significantly to the costs, but it is not appropriate to make unnecessary allegations, and ordinarily this too might justify a costs order."

Obviously, when a marriage breaks down feelings are running high, and one party may well want to publicly air their views on the behaviour of the other party. But financial remedy proceedings are not the place to do this, and the party making such comments may well find themselves penalised by having to contribute towards the other party's costs.

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