

Family matters

*Miller & McFarlane –
what it means*

Summer 2006

Darling, let's run away together!

**Who pays the lawyers?
New costs rules in
ancillary relief proceedings**

**Beating the system – working
with and against the CSA**

Editorial

Welcome again to *Family Matters*, the newsletter produced by the Mills & Reeve family law team. We aim to inform, interest and entertain you with the latest developments in all aspects of the law relating to families – marriage, civil partnerships, divorce, children, ancillary relief and cohabitation, to name but some.

In this issue the popular *Quick Bites* section, found opposite, covers the development of civil partnership practice, a change of emphasis on the division of income from pensions on divorce, how the Government and the courts are dealing differently with the abomination that is forced marriage, and new clarification on obtaining trust or business documents from overseas.

We move then to this season's big news – the decision of the House of Lords in *McFarlane v McFarlane* and *Miller v Miller*, which was released at the end of May after months of speculation. The decision is somewhat less than clear and is creating more problems than it has solved, according to Roger Bamber. He tries to make sense of what it means on pages four and five.

On a lighter note, Nicola Rowlings takes a look at what you need to think about before getting married abroad, and the implications of doing so if you later want to divorce in England and Wales, on pages six and seven.

There have been big changes in the costs rules for conducting ancillary relief claims this year. I set out briefly what these are, and what the implications might be, on page eight. Nicola looks at what's going on with the CSA and strategies for dealing with it on page ten. Finally, I am pleased to announce further growth in the team as it goes from strength to strength. Katherine and Claire take our total number of fee earners in Birmingham to six, while George increases the number in the Cambridge family team to eight. Watch this space for further developments coming soon!

I hope you enjoy this season's features. Please do send me any comments!



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Third party disclosure

The recent case of *Charman* dealt with the issue of obtaining information from third parties in relation to ancillary relief proceedings. Judgment in the main suit has only just been given but a preliminary issue arose between the Charmans as to whether the husband had effective control of a Bermudian Trust holding some £67 million in assets. The wife sought disclosure from the trustee company in Bermuda and also the husband's accountant in England. The Court of Appeal upheld the wife's requests and gave useful guidance on when orders will be made requiring third parties to disclose documents and attend court to give evidence.

An order will be made so long as it does not facilitate a "fishing expedition", ie, it must be a search for evidence to support an existing allegation rather than looking for material to enable a party to raise an allegation.

In this kind of case, the wife is not expected to know of the existence of and request specific documents; it is sufficient that she know what sort of documents might exist and ask for any documents meeting that description to be produced.

The court must also consider whether it is necessary to order an inspection appointment in order to dispose fairly of the application or for saving costs.

Pensions

In the recent case of *Martin-Dye* the Court of Appeal decided that pensions in payment should not be treated as capital assets but rather that the income stream they generate should be divided in line with the percentages applied to the other assets. In this case the wife was awarded 57 per cent of her ex-husband's income from his British Airways pension and the husband was awarded 43 per cent of his ex-wife's more modest pension payments. The capitalisation of those payments led to Mrs Martin-Dye complaining in the national press that she would be forced to sell her country mansion to pay off her former husband.

Quick bites

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Forced marriages

Following the recent consultation paper recommending that forced marriages are not criminalised and that no new specific offence should be created for those facilitating them (a Government u-turn), a High Court judge has denounced them as an "abomination", as he annulled the wedding of an English-born teenager to her Pakistani cousin.

Mr Justice Munby described forced marriage as "a gross abuse of human rights. It is a form of domestic violence that dehumanises people by denying them their right to choose how to live their lives. It is an appalling practice." He added: "No social or cultural imperative can extenuate and no pretended recourse to religious belief can possibly justify forced marriage. Forced marriage is intolerable. It is an abomination."

The woman was emotionally blackmailed and held against her will in Pakistan until she agreed to go through with the ceremony. She lived with her husband for a short period before returning to England with her parents. The marriage was never consummated and he admitted to her that it was just a "ploy" to allow him to enter Britain. The judge held that the woman's consent had not been validly given and that the woman was entitled to the decree of nullity she sought.

Civil partnership update

The first dissolution of a civil partnership looks set to take place next February. Daphne Lighthart and Liz King celebrated their civil partnership ceremony on 11 February in Ashford Register office. Their relationship collapsed three months into their union after Ms King began spending time with another woman. The petition for dissolution is likely to be brought on the grounds of unreasonable behaviour.

Meanwhile Celia Kitzinger and Sue Wilkinson have just heard that the High Court has ruled that their marriage, celebrated in Canada, should not be recognised as a valid marriage here. It will be categorised instead as a civil partnership, which they view as discriminatory.

Since the Civil Partnerships Act came into force last December, 6,516 civil partnerships have been formed in England and Wales (as at 31 March 2006). Male couples formed 4,311 civil partnerships and female couples formed 2,205.

Miller & McFarlane – what it means

On 24 May 2006, the members of the House of Lords gave their long-awaited opinions on the appeals of Mr Miller and Mrs McFarlane against their treatment by the lower courts in the financial aspects of their divorce proceedings. Mr Miller – a wildly rich investment manager – lost his case for a reduction of the £5 million awarded to his former wife Melissa after their two and three quarter year marriage failed. Julia McFarlane won her case to receive the £250,000 per year maintenance awarded to her by the Court of Appeal for the rest of her life, rather than for a five year extendable term.

Unfortunately, the opinions of the House of Lords have caused significantly more confusion than enlightenment. This is mainly because the five Lords purported to be in general agreement when in fact there are real differences of substance between the two main opinions delivered by Lord Nicholls and Baroness Hale.

Practitioners have been frustrated that, just as the system had settled down after the upheavals of the *White* and *Lambert* cases – which fundamentally changed the way we practised – there has been another wholesale rearrangement of the principles which guide us. There has never been a time when it has been more difficult to advise a client; there has never been a time when it has been more important for a client to receive specialised and detailed advice.

Rising to the challenge, however, we believe that the practical changes ushered in by the House of Lords in this instance can be grouped into four main affected areas: inherited wealth, maintenance, businesses and conduct/contributions. It may be true, however, that at the moment we have more questions than answers.

Inherited wealth

Before the decision of the House of Lords in *Miller/McFarlane*, the fact that one party to the marriage came with wealth from his or her own family background was a potential reason for departure from equal division. In most cases it would lead to the non-inheriting party leaving the marriage with, say, 35-40 per cent of the capital rather than 50 per cent. The Lords have gone so far as to divide the family capital into matrimonial property and non-matrimonial property, inherited property which has not been pooled for family purposes being non-matrimonial, and suggest that matrimonial property only should be subject to division as long as needs can be met. More controversially there is the suggestion – already being heeded by some judges – that the matrimonial home should always be matrimonial property, no matter how short the marriage, which of the parties owns the home or how the home was acquired.

So – if, for example, the Duchess of Cornwall were to walk out on the Prince of Wales after a marriage of just over a year, she might prima facie be entitled to half of the value of Highgrove (assuming it is in the Prince's name!), an estate which has been in the Royal Family for generations. One can see instantly that the application of this new rule is likely to have unfortunate and undesirable consequences.

In terms of inherited wealth, the key is to encourage people to keep their inheritances separate from the family pot as far as possible when they marry. Anything used for the family has potential to become matrimonial property, notwithstanding generations of previous ownership. It really is best for those Ming Dynasty vases to stay in the bank vault

rather than being displayed on the mantelpiece.

Maintenance

The House of Lords has really made new law here by inviting an element of compensation into financial proceedings after divorce. Compensation – apparently for loss of opportunities due to the marriage or childbearing/childrearing etc, and for no longer sharing in the continuing financial rewards earned by the breadwinner – is not overtly mentioned in the divorce statutes. However, the law lords believe that compensation permeates the principles in an unstated way. Well, it's news to us, but it was what led Julia McFarlane to her £250,000 per year for life so it must permeate quite powerfully.

The concept of compensation is particularly hard to grasp when one tries to make it fit with the established requirement that a judge should try to achieve a clean break between the parties at the earliest point. How can this be done when compensation for the loss of a share in the spoils of the marriage is an ongoing thing? There are also consequences for applications to capitalise maintenance at a later date, in a lump sum. How can the compensatory element of maintenance be capitalised? Surely it is not fair that entitlement should taper, as in a *Duxbury* fund where the idea is that the fund should be exhausted at the end of normal life expectancy?

There is likely, too, to be an effect on wives who feel they have been short-changed by previous maintenance awards and who wish to obtain some of this compensation, leading to an increase in variation applications. It may also be much less easy to argue for term maintenance, commonly used as a stop-gap while the



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wife gets back on her feet and improves her earning capacity. The impetus has been thrown back on the husband to show that the wife will be able to be independent at the end of the term, where previously the wife would have had to show clearly that she could not be expected to be.

Businesses and careers

In an unexpected and – let's face it – strange move, Baroness Hale said that if one party had built up a business by him or herself without the other, that business might not be matrimonial property. This is peculiar as family law has worked on the basis of non-discrimination for nearly six years since *White*, carrying forward the principle that work inside and outside the home is of equal value. How does this new principle sit if the wife bears and raises the children and keeps the house while the husband works all hours building his business? Is the wife not entitled to share in the fruits of that business on divorce when, if her husband had earned his money as an employee, she would be entitled to do so? This cannot be right.

Lord Mance made the unfortunate suggestion that the relevant date for the valuation of assets should be the date of the parties' separation. The accepted date of valuation has, until now, been the date of trial. If this suggestion is taken into practice the results will unfortunately be chaos, necessitating valuation both at the date of separation and inevitably also at the date of trial, not to mention difficult arguments about what has happened to the money between those dates (which may be many years apart). Those of you who value businesses may be in even greater demand!

So what happens if both parties to the marriage have kept their finances separate and have run their own careers throughout their union? According to Baroness Hale, they should simply be left with their own pots. This principle runs the risk of causing severe injustice and simply cannot be taken to override the requirements of statute to assess at divorce each party's needs, resources, capacities and abilities.

Already, the High Court has had cause to interpret the words of the Lords in the case of *Rossi*, where judgment was handed down on 26 June. Interestingly, the judge hearing the case was Nicholas Mostyn QC, sitting as a deputy High Court judge – he was counsel for Mrs Miller in the earlier case and perhaps, it can be argued, should have a better grasp on the decision of the Lords than the rest of us, as he heard all the arguments which led to it.

In the *Rossi* case, where the elderly parties first started to cohabit in 1964 and married in 1968 but separated at the latest in the mid-80s, the husband was claiming a share in the business which the wife had operated with her son (from a previous relationship) for 20 years. The issue of post-separation accrual, and what is a non-matrimonial asset, takes up most of the judgment. Indeed, dismissing the husband's evidence completely, the judge found that the profits of the business were entirely due to the post-separation efforts of the wife and son and that in the context of the long separation and the delay on the part of the husband in bringing proceedings, he should not be entitled to any financial award.

Conduct and contributions

The door has finally been closed on the issue of conduct: the conduct of either spouse cannot be raised by the other to increase the size of their award unless it is 'gross and obvious'. This issue had come back to the forefront as Melissa Miller had raised the point that it wasn't her fault the marriage had ended, it was because her husband had found a new partner, and therefore she said she should not be penalised because the marriage was a short one. The House of Lords has dismissed this approach in clear terms.

Also, the notion of special contribution – that spark of 'genius' in business – has been restricted to circumstances in which it is also 'gross and obvious'. Whether this adds anything to the previous body of law as stated in the recent case of *Sorrell* is a matter of debate, but at least the principle was clearly and homogeneously expressed!

Conclusions

These are the main aspects of the *Miller/McFarlane* decision. We are entering the compensation age, where matrimonial and non-matrimonial property sit separately in our bank accounts and are divided accordingly. These new rules will take a while to bed down as uncertainty and, in fact, disbelief among practitioners grows. Everyone is watching the judges, but none are watching them so keenly and so closely as the solicitors at Mills & Reeve!

Darling, let's run away together!

Fancy jetting off to a tropical island to get wed? Or perhaps you'd like a winter wonderland for the backdrop to your wedding photos? Either way, if you're planning to get married abroad you'll be pleased to know that overseas marriages are completely legal provided that you comply with the marriage laws of the country you are getting married in.



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It is important to find out the legal requirements (for example, is there a minimum period of stay in the country in which you are planning to get married?) and which documents you need to take with you before making any travel arrangements. You can check at the relevant embassy or consulate. Otherwise, if you are using one of the specialist tour operators who organise overseas weddings, they will be able to tell you.

Most countries will require birth certificates and passports as well as evidence of single status if you have been married before, for example, a decree absolute or a death certificate relating to a former spouse. There are also usually minimum residency requirements before a couple can marry, usually between one and seven days. Some countries have extra requirements – for example, some states in America request that the bride and groom have blood tests before the wedding can proceed (to indicate whether they have any sexually transmitted infections, usually) and in Bali couples have to belong to one of five religions recognised by the Government.

There is no need for overseas marriages to be registered here in the UK. Provided that you or your newlywed is a British citizen and your wedding has taken place in one of the countries from which the General Register Office (GRO) can accept formal notification, a "record" can be created for your overseas marriage by depositing the marriage certificate (along with translations if necessary) in the GRO if you so wish.

This record can be created at any time after your ceremony. You will need to contact the GRO in the UK and the British Embassy in the country you were married in as this is not an automatic process. You will need to provide the British Embassy with a certified copy of your marriage certificate. They will then forward it to the GRO and then, if in the future you need a copy of your marriage certificate, you can contact the GRO and they will provide a copy to you.

But what if things go wrong?

It is a sad fact of life that many marriages end in divorce. So, can you divorce in

England and Wales if you married overseas? The short answer is yes, provided that you can show one of the following:

- you and your spouse are habitually resident in England or Wales;
- you and your spouse were last habitually resident in England or Wales insofar as one of you still resides here;
- your spouse is habitually resident in England or Wales;
- the spouse applying for the divorce has resided in England or Wales for at least a year immediately before applying for the divorce; or
- the spouse applying for the divorce has resided in England or Wales for at least six months immediately before applying for the divorce and is domiciled in England and Wales.



Habitual residence – effectively means where the spouses live on a day to day basis. There should not normally be any difficulty in showing twelve or six months habitual residence if one or other spouse has been living in England for business, education, health or family reasons.

Temporary absences from England will not prevent an individual establishing habitual residence and even prolonged absences may not disrupt this.

It is irrelevant that an individual's real home may be outside England or that they intend to live outside England in the future.

Domicile – is a legal concept to link an individual with a particular legal system. Domicile and nationality are quite separate concepts. Neither are habitual residence and domicile the same thing. Every person has a domicile and it is not possible to have more than one domicile at a time although it is possible for domicile to change as an individual's personal circumstances change. There are three types of domicile:

- Domicile of origin: where the law attributes a domicile to every new-born baby. This is retained throughout life and remains a person's "default" domicile.
- Domicile of choice: once 16, a person can acquire a domicile of choice by living in another country with the intention of permanently residing there or at least indefinitely.
- Domicile of dependence: until a child is 16, if their parents' domicile changes, so does theirs.

Checklist for getting married overseas

If you are contemplating getting married abroad then go through the following checklist before you fly out and say "I do".

- Allow plenty of time to gather all the correct documentation needed to get married abroad.
- Check you have a valid ten year passport.
- Find out if there is a minimum residence stay before you can get married.
- Ensure you have a list of all the required documents you will need. Contact the local British Embassy or the relevant foreign embassy in the UK for confirmation.
- Check if you need to deliver documents to the appropriate authorities in person before the wedding day.
- Check whether any documents will need to be translated into the local language.
- Ensure any tailor-made wedding ceremony is legally recognised (think Mick Jagger and Jerry Hall!).
- If you are planning a church wedding abroad, you will need to seek permission from the church authorities where you wish to marry. You may need to allow extra time as you may be asked to attend pre-nuptial consultations in your chosen country.
- If your wedding is to be preformed in a local language you do not understand, ensure you have an interpreter present to translate the proceedings.
- If your marriage certificate is written in a foreign language you do not understand, ensure it is translated on your return to the UK.

For extra information see the General Register Office website at www.gro.gov.uk and the Foreign and Commonwealth Office at www.fco.gov.uk.

Who pays



the lawyers?

New costs rules in ancillary relief proceedings



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Practitioners and clients alike have long been accustomed to the system of 'Calderbank' letters – tactical inter-solicitor missives which set out terms of settlement on a 'without prejudice save as to costs' basis in ancillary relief cases. The aim was to make the receiving party feel that, if they did not accept the offer, it was likely that the trial judge would make an order similar to that offer and subsequently would order that they should pay the costs of the other party from just after the offer was made. All this has now been swept away for ancillary relief claims issued after 3 April this year.

The general rule in ancillary relief cases is now that there is no order for costs between the parties. A judge does, however, have a discretion to order one party to pay the costs of the other if that party has been guilty of litigation misconduct. We do not yet know how bad this has to be. It will of course depend on the circumstances, but it is possible that failure to accept a reasonable offer made early on in open correspondence may be considered sufficiently bad, and failure to disclose assets or co-operate with the court process will almost certainly be so.

The end result is effectively that costs will come out of each party's pot. This will mean that carefully-crafted orders will no longer be destabilised by crafty Calderbanks, but it does also mean that greater pressure will be brought to bear by an early and reasonable open offer. Perhaps also the parties, wives in particular, will be more cost-conscious as they now know they are unlikely to be able to rely on the other to pick up the tab at the end of the day. Also, one wonders if this will further fire the growth of mediation and collaborative law as the cost-conscious decide that litigation is just too expensive if they can still be civil to each other?

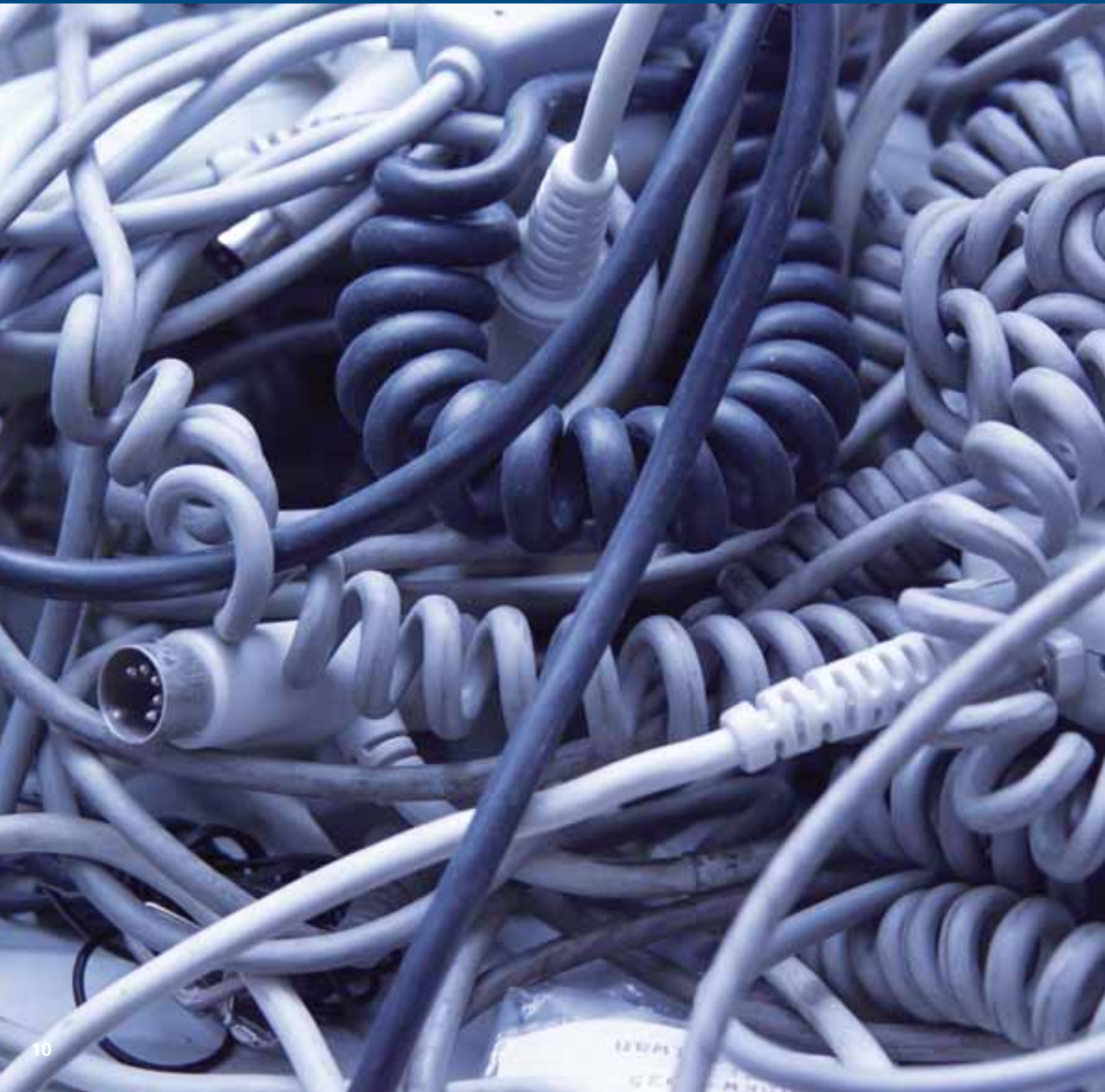
One other development in the costs arena has come in the recent cases of *Moses-Taiga v Taiga* and *TL v ML*, which have spelled out what needs to be proved when one party, usually the wife, seeks an allowance for legal fees in a maintenance pending suit action. A legal fees element should be allowed where it is a 'big money' case if there is no other available source of funding – if the wife has insufficient assets in her own name, cannot get her solicitors to agree to a Sears Tooth type agreement, and if she cannot obtain a litigation loan. The court's role is to address an imbalance in the asset base which may cause injustice.

Calderbank – an offer to settle made by one party to the other on a 'without prejudice' basis. The trial judge cannot see it during the hearing but it can be produced after judgment has been given to encourage the judge to make a costs order against the party who rejected the offer, if the offer was reasonable in the context of the eventual settlement.

Maintenance pending suit – maintenance payable by one party to the other to tide him/her over until the financially weaker party's ancillary relief claims are satisfied. Also called interim maintenance.

Beating the system – working with and against the CSA

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Recent months have again seen the Child Support Agency (CSA) hit the headlines for all the wrong reasons. Earlier this year, the Government announced a "root-and-branch redesign" of the ailing child support system and has just decided that it will be scrapped in 2008. This still leaves at least two years of suffering for those already in the system. So what can be done in the meantime?

The CSA now has a backlog of some 300,000 cases, with an estimated £3.5 billion in uncollected debt. Reforms costing £540 million have failed to improve matters and the National Audit Office estimates that the CSA spends 70p to collect every £1 of child maintenance. One in four of all new applications received since March 2003 are still waiting to be cleared and there is a one-in-five chance that payments are inaccurate. A third of non-resident parents are paying nothing at all despite their maintenance being assessed.

Practical guidelines for dealing with the CSA

It can therefore seem a somewhat daunting task to actually have to deal with this plainly failing organisation. But, until the new system (whatever it will be) comes in during 2008, that is precisely what we and our clients have to do. Taking on the CSA often proves costly – but it is not impossible to achieve results.

Whilst the CSA's method of calculating maintenance is mandatory, many of its powers relating to assessment and enforcement are discretionary. When seeking to persuade the CSA to take action, reference should be made to the likely impact upon the welfare of the children.

The CSA also has vast powers to gather information, which are rarely used without pressure being applied because of cost constraints. It can require a non-resident parent to disclose details and statements for any bank or building society account held in his name. If the finances of a non-resident parent are in dispute, then the CSA should be asked to obtain copies of bank statements. Consider judicial review action if the CSA refuses to use its powers.

Whenever there is any concern about the accuracy of an assessment, a parent with care should be urged to appeal. The appeals process is simple but is infrequently used. The only ground for an appeal is that the assessment is wrong in law, but this covers situations where the CSA has not taken into account all of the income available to the

non-resident parent. Given the fact that so many assessments are incorrect, it is difficult to see why more appeals are not lodged.

The CSA also has extensive powers when it comes to enforcement, including being able to obtain third party debt orders, orders to commit to prison, being able to use bailiffs as well as applying to disqualify the non-resident parent from driving. If a parent with care is owed substantial arrears, a letter should be sent to the CSA asking for an application for a liability order to be made and directing it to the most appropriate enforcement remedy.

Unless the CSA obtains a liability order, they cannot use their other enforcement powers. Even with a liability order, the CSA cannot enforce arrears which have arisen more than six years after the day on which notification of the assessment was sent to the non-resident parent. This is, in practice, a situation that is more common than one might hope.

As a last resort, complaints about CSA maladministration can be made via the Office of the Chief Executive of the Department of Work and Pensions and may lead to compensation. The CSA may admit "maladministration" if it is clear that it has failed to take enforcement action for many years. If the CSA declines to pay compensation, its decision can be challenged by judicial review. Approximately £3 million is paid out in compensation each year.

With the situation apparently worsening by the day, parents are clearly best advised, wherever possible (and it may not always be possible), not to get into the system.

New joiners help cement Mills & Reeve's leading position



Katherine Kennedy joins our Birmingham office as a solicitor. A Brummie from an early age, she studied European law and spent

one year in Germany and one in Australia before finally settling into practice as a family lawyer back home in Birmingham.

Her practice is characterised by a strong but sensitive approach: she believes that mediation and collaborative law are useful tools in the family law armoury but also that there is a real and continuing place for litigation in solving disputes between former spouses. She is passionate about helping people to find an appropriate resolution to their difficult situations and loves the variety that working in family law offers.

Katherine is a keen windsurfer and at weekends is often lured away by the waves of the south coast. The vibrant jazz scene of Birmingham keeps her entertained when she is not at sea. If you meet her, don't forget to ask about her encounter with the undercover police officer...



George Sprague has just qualified as a solicitor into the family team in Cambridge. George is a Devon boy originally but

came to the Fens to pursue his legal ambitions. Before joining the firm, he gained a helpful understanding of social policy and the emotional aspects of family disintegration by working with the Child Support Agency for six months. The experience also paid for him to take a trip round the world to recover!

George was drawn into family law by a general interest in people, and by the variety of work inherent in practising in this area. He believes in listening carefully to what motivates his clients and responding to their needs, providing guidance and parameters as necessary and appropriate in order to manage expectations and limit costs.

George is a gregarious chap and organises events for Mills & Reeve in his spare time. He also helps run FLAG, Cambridge's free legal advice centre, and is on the committee of the Cambridge Young Professionals' Group. In order to keep a rein on the undesirable effects of being so sociable, George is a football referee in season and plays cricket when the weather is nice.



Claire Piggott has also just qualified into the family team as a solicitor in the Birmingham office. She originally hails from

Hertfordshire and came to Mills & Reeve specifically to pursue her burgeoning interest in family law, first in Norwich and latterly in Birmingham where she has settled.

Enjoying in particular the client contact involved in family practice, Claire is notably cost-conscious on behalf of her clients, and is strongly focused on finding workable solutions to clients' cases. She is especially interested in children cases and is working closely with Helen Bowns.

Claire runs for fun, occasionally in wacky costumes, for example she ran the Great North Run dressed as a nun last year, and is shortly to become a member of a running club in Birmingham.

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