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Family matters

Spring 2008

Quick bites

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www.divorce.co.uk

Editorial

Spring has sprung: the time of birth, rebirth and expanding families is upon us all. Here at Mills & Reeve, our own family has grown. We are proud to present to you our new additions in Leeds and Manchester: in Yorkshire a team of seven family specialists and a trainee, and in the North West a team of five family specialists and a trainee. They come fully-formed and ready to help, as do our teams in Birmingham, Cambridge and Norwich, which also continue to expand as new solicitors join the ranks. In fact, the end of last year saw two newly-qualified solicitors join our family team in Birmingham (Emma Flisher and Rachel Walker), one in Norwich (Jessica Harrison) and two in Cambridge (Laura Brodie and Danielle Bennett, who is currently working with our Manchester team). Further, we are thrilled to announce that Caroline Dresden has joined as an associate in Birmingham from another local firm.

Totalling over 40 family lawyers now, that makes us the biggest family law practice in Europe. Supported by unrivalled trusts and tax, property and commercial expertise, and as part of a firm investing heavily in private client services, we like to think we're also one of the very best.

The last few months have been a busy time for us all, with the expansion, our continuing high volume of work and the launch of our specialist family advice website www.divorce.co.uk. This is the premier internet resource for free information on divorce and separation. We are particularly proud of it and hope that you, your clients and your colleagues find it useful.

In my new capacity as head of family law at Mills & Reeve, I have taken over the role of editor of this newsletter from Nick Stone, who is focusing on heading up our wider private client group. I hope you enjoy reading this summary of what's going on in the family law world. If you have any comments on what you have read, or what you would like to see covered on the website or in a future issue of *Family Matters*, please do get in touch.



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Marriage out of fashion?

The most recent statistics show that the number of marriages in England and Wales has fallen to the lowest level on record. There was a 10 per cent fall in people getting married in 2005. In London, marriage rates were down by 35 per cent, although commentators are suggesting that this follows a change in the law to make it more difficult for non-Europeans to obtain leave to stay in the UK by marrying. For the first time, the number of marriages taking place in non-religious venues other than register offices was greater than those in places of worship.

There were 18,000 civil partnership ceremonies in the first year of the new law, and two-thirds of these were male.



Suspended sentence for civil partnership "bigamist"

A mother of five children has been sentenced to eight months in prison, suspended for two years, and 100 hours of community service for making a false statement to a registrar in connection with a civil partnership. She entered into the partnership while she was still married to her husband. Some commentators have suggested that the sentence was unduly harsh but other groups have welcomed the sentence, saying that it sends the right message about taking civil partnerships seriously.



Quick bites

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Mamma mia!

A poll by research institute Eures has shown that the Italian divorce rate is soaring and that mothers-in-law are bearing the brunt of the blame. It has been suggested that three out of ten Italian marriages fail because of the unusually close relationship between Italian men and their mothers. These "mammoni", as they are known, cling to their mothers' apron strings even after they are married, and their mothers see new daughters-in-law as rivals. A 45 per cent rise in the divorce rate in Italy between 2000 and 2002 is being taken to indicate that Italian wives are no longer happy playing second fiddle in their own homes.



Divorce and bankruptcy

A recent court decision has finally clarified the law relating to bankruptcy after the conclusion of ancillary relief proceedings, after a significant period of uncertainty. The Court of Appeal in the case of *Haines v Hill* has decided that a property transferred to a wife in ancillary relief proceedings should, in the absence of fraud or collusion, remain safe even in the swift event of her former husband's bankruptcy. The trustee in bankruptcy's case was that Mrs Haines had not given "consideration" for the transfer of the property to her, and therefore it was a transaction at an undervalue and should be set aside. The Court of Appeal held that there had been good consideration: parties to a divorce have a right to apply under the Matrimonial Causes Act 1973 for financial relief (standard practice in divorce cases) and the compromise of this right can amount to consideration. The court made it clear that it could not have been Parliament's intention for asset transfers on divorce to be overturned after the event on the basis of an ensuing bankruptcy, and it would run contrary to the Matrimonial Causes Act to allow it.

Since you've been gone – post-separation accrual of assets

There has been a run of cases in the courts recently where wealthy parties who have been separated for many, many years have finally decided to initiate divorce proceedings and divide their wealth. These cases have raised fundamental questions about what constitutes family wealth and where the interests of one party in the financial success of the other should end even though the marriage technically subsists. This article aims to set out the current state of the law where there has been a significant upward shift in the fortunes of one party between separation and divorce.



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First, a reminder of some basic principles to set the scene. When the court is called upon to consider the division of finances on divorce, its first consideration is the welfare of any children. Thereafter, there is a statutory checklist of matters to be taken into consideration:

- the needs and resources of the parties;
- their ages;
- the duration of the marriage
- the standard of living; and
- the contributions made, etc.

The court will assess the division of assets along the lines of what it considers fair in its discretion and then will measure it against the “yardstick of equality” as a final check. In most cases, where there is not enough money to go round, the parties’ needs are the most important factor. However, the law tends to be made on the “big money” cases. Where there is enough to go around, the excess is more likely to be fought over.

Further, a current area of significant discussion is the distinction between matrimonial and non-matrimonial property (further considered by Peter Baughan in this issue). The law is developing so that the yardstick of equality applies forcefully to the former, and less consistently to the latter, so that characterisation of an asset as “non-matrimonial property” may be a big step towards keeping it safe.

Where delay between separation and divorce is short

The discussion started in earnest in 2004, with the case of *M v M (Financial relief: substantial earning capacity)*. In this case the parties had been separated for only two years, but their assets had risen by 43 per cent – to about £5.5 million – in that time due to the husband’s hard work. The court held that, because the parties had been financially linked throughout that time and had made an equal contribution to the marriage, the wife should be entitled to share in the accrual.

Subsequently, and by way of contrast, Lord Mance in the House of Lords in the case of *Miller* (2006) looked at the huge uplift in value in the husband’s shares since the parties’ separation and decided that the wife should have no claim on that, as it had been down to the husband’s independent efforts, and the assets should thus be assessed at the date of separation.

There were no children in the *Miller* case and therefore the wife was making no continuing contribution to the marriage. It is entirely possible that there would have been a different outcome if there had been children.

Where significant time has passed

In the case of *Rossi* (2006), the court was faced with a marriage that lasted 20 years but ended in the mid-1980s, when the parties began living in different countries. The wife did well in a business venture subsequently and the husband issued his application for financial relief in 2004, more



than twenty years after their effective separation. The court dismissed the husband's claims against the wife and laid down the following guidance in relation to assets accrued after separation:

- Assets are to be valued at the date of trial.
- Those assets acquired by one party after separation by virtue of personal industry, rather than by use of a pre-existing asset, may be considered non-matrimonial property.
- Where the asset is a bonus or suchlike, if it relates to a time when the parties were cohabiting then it cannot be non-matrimonial. In fact, a bonus should not readily be called non-matrimonial unless it relates to a period commencing more than 12 months after separation.
- When considering whether a non-matrimonial post-separation accrual should be shared and in what proportions, the court will look at things such as whether the applicant has diligently

proceeded with their claim, whether he/she has been treated fairly during the period of separation and whether the money-maker has the prospect of making further gains.

Subsequently in the case of *S v S (Ancillary relief after lengthy separation)* (2006), the court approved what had been said in *Rossi*. In that case, the wife had delayed her ancillary relief claims for seven years and the husband's shares had increased massively in value due to his own hard work during that time. The court said that the wife should not be entitled to share in whatever liquidity would at some point be released from his shareholding and made the point that it was less fair, year on year, that she should do so.

There was slight dissent against the *Rossi* principles in the case of *H v H* (2007). The Court of Appeal in the case of *Charman* last year side-stepped the issue, saying that it did not have enough bearing upon the outcome of the appeal to be dealt with in

detail, although it endorsed the opinion that the sharing principle might apply with less urgency to non-matrimonial assets. Since then, another High Court judgment by yet another different judge has shown that the line cannot be so clearly drawn between matrimonial and non-matrimonial property in the context of assets acquired since separation. In *P v P* (2007), Mr Justice Moylan was very clear that post-separation accrual is a matter for the discretion of the judge, and that it can simply be illustrative of an imbalance in earning capacity, something which is specifically set out for consideration in section 25 of the Matrimonial Causes Act. It seems tolerably clear that the line is less easily drawn the shorter the period between separation and the determination of financial proceedings.

The Court of Appeal has indicated that it would be willing to review the issue if an appropriate case comes before it. Until then, we'll just have to keep watching to see how the law develops.



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Our friends in the North

On 1 February 2008, Mills & Reeve got bigger. We welcome, and introduce to you, our family law teams in Leeds and Manchester, who were formerly part of Addleshaw Goddard.

Mills & Reeve is illustrating its commitment to private client services by opening two new offices in the North of England. Although currently they are inhabited exclusively by family lawyers, it is our aim to expand our renowned private tax, trusts and agriculture services into the North before too long, making the quality and expertise that is synonymous with Mills & Reeve's private client legal work even more accessible.



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Our new nationally acclaimed family teams – led by David Salter and Philip Way in Leeds and Nigel Shepherd in Manchester – consist of ten solicitors and one barrister. They advise a wide range of clients nationally and internationally on all aspects of family breakdown, with particular emphasis on the higher value, complex financial settlements arising on divorce.

All members of our Northern teams belong to Resolution, an organisation of specialist family lawyers committed to a constructive approach to the practice of family law. As a result of our commitment to the Resolution Code of Practice, the overwhelming majority of our cases achieve a settlement agreed by both

parties without the need for an expensive final hearing. Nigel Shepherd, Philip Way, Nicola Criscione, Andrew Meehan and Karen Hughes are fully qualified in collaborative law. We also have close links with the International Academy of Matrimonial Lawyers, of which David Salter is President of the European Chapter.

We're expanding our other offices too. In Birmingham, Caroline Dresden has joined as an associate, having previously been a partner at Benussi's. Emma Flisher and Rachel Walker have come into the Midlands team on their qualification as solicitors, bringing the total number of lawyers in Birmingham to ten. Jessica Harrison has qualified into the team in Norwich, and Laura Brodie and Danielle

Bennett have qualified into the Cambridge family team. This makes five lawyers in Norwich and brings the Cambridge total to ten, despite temporarily seconding Danielle to Manchester.

The team now numbers over 40 family lawyers – by far the biggest family law practice in the country and in Europe. Our partners are key players on the national and international stage, and our strength is in the breadth and depth of our personnel: men and women, from their twenties to their fifties, spanning the country. Mills & Reeve is the only law firm with a truly national family practice, and we look forward to welcoming you in our new and existing offices.

Looking ahead to the end

Everyone hopes and expects their relationship will last forever. But what if it doesn't? Recent press coverage of London being the "divorce capital of the world" and of the contrasting lack of rights for unmarried couples has led to more awareness of the consequences of relationship breakdown. People are realising the usefulness of planning ahead to try and minimise the risks of litigation.



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Enquiries about protecting assets from the fallout of relationship failure tend to fall into three categories:

- people about to move in with their partner;
- couples about to marry; or
- parents who would like to gift money to their children but want to protect it in the event of divorce.

Planning ahead is not cynical. It may help to limit the emotional and financial damage caused by relationship breakdown. Being aware of the legal framework and addressing its implications can have huge benefits if a relationship ends.



Cohabitation

People starting their first serious relationship are more likely to cohabit than to marry. More people live together outside of marriage than ever before. There is no such thing as a “common law” husband or wife and there is no right to support on relationship breakdown simply because people have lived together for a length of time.

The Law Commission, the Government's advisory body on law reform, has just published recommendations that cohabitants should have limited rights in certain circumstances – summarily, where they are needed to redress an imbalance arising from the relationship – but legislation in this area is still some years off.

Under the current legal system the starting position is that unmarried couples have no claim against each other's property or assets. However the law is complex and there are caveats, such as, where a couple has a child, the person with whom the child lives has claims for child maintenance and possibly housing. If a couple buys or transfers a house into joint names, they may each own 50 per cent of the value of the property, even if one person made a much larger financial contribution than the other (or always pays the mortgage). If a home is owned by one person, their partner can potentially make a claim against the property if they make a financial contribution to the property or if it was agreed that they should acquire an interest in the property. The position is clearer in respect of savings, investments and other assets. It is very difficult to make a claim against these assets if they belong to your partner.

Planning for cohabitants

Couples who want to live together should complete a declaration of trust, a document that spells out who owns the house (and in what shares). This is likely to be 100 per cent binding (although if they subsequently marry, or register their civil partnership, the courts can ignore it). If they purchase a property together, the conveyancer should set this out in the transfer document.

Partners can also prepare a cohabitation agreement, which can cover all sorts of arrangements, such as who will pay which bills, ownership of possessions and what should happen if the relationship ends. This would not be binding on relationship breakdown, but would hold great sway with the court in the event of a dispute.

Marriage and civil partnership

On divorce or dissolution, the court acquires very wide-reaching discretionary powers to adjust a couple's finances. Assessing what

the court may do is an art rather than a science and the goalposts move regularly. The typical settlement awarded by a court ten years ago could be totally different to the award made to the same couple today.

In this situation, the court retains ultimate control. This is the flip side of a system that benefits from the discretion to tailor a settlement to a family's needs. The court has a statutory duty to ensure children's welfare comes first and it will also step in to ensure fairness if necessary (which typically means applying the “yardstick of equality” to any settlement). It is impossible to shut the courts out but there are some measures you can take to influence their discretion.

Premarital agreements are not strictly binding, but increasingly the courts are taking them into consideration on divorce. A postmarital agreement might be useful to deal with a change of circumstances during the marriage, such as receiving a large gift or inheritance. Protective trusts can be useful for families, but must be approached with caution. A trust set up because of an upcoming marriage can be altered by the court. An established discretionary settlement may provide protection against claims, but the court will look at the reality. If a couple has enjoyed a comfortable lifestyle supported by the trust, the court is likely to assume that this resource will continue to be available in the future.

The courts are presently developing the concepts of separate “matrimonial” and “non-matrimonial” assets: what is really part of the family pot, and what has been kept separate or has arisen before or since the marriage. However, this distinction will never override the importance of financial “needs”, which (after the children's welfare) is the overriding factor in each case. Problems lie in separating out the assets where they have become intermingled over the years. A premarital agreement can help by defining these assets in advance. The recent case of *Crossley* has shown that a premarital agreement can serve to reduce the court time allotted for dealing with financial proceedings, and therefore both parties' legal costs, even if one party seeks to overturn the agreement for some reason.

Thinking about separation is not easy. It is an uncomfortable subject. But awareness of the legal framework can and should play a crucial role in financial planning. Perhaps more importantly it can help limit the chances of emotionally and financially damaging litigation between people who are already dealing with the breakdown of a relationship.

The vagaries of variation

As we all know, financial orders in divorce can include a provision for spousal maintenance (also known as a periodical payments order). A maintenance order is inherently variable, that is, either spouse can apply to increase or decrease the payments paid by one to the other. It is also possible to ask the court to capitalise the maintenance payments, giving the recipient a lump sum in lieu of future payments and a clean break between the parties.

It is worth mentioning that maintenance will come to an end automatically on the remarriage of the receiving party, or upon the death of either party. Recent cases are now putting more weight on the cohabitation of the receiving spouse as a good reason to reduce or to end spousal maintenance payments.

But what if one party wants to vary the maintenance payments? That party will need to show that circumstances have changed since the making of the original order. This could be, for example, redundancy of the paying party leading to a drop in income so payments are no longer affordable and need to be reduced, or the receiving party losing their job so that they can no longer manage on the previous maintenance and need to increase the payments.

If an application to vary is made, the court must consider:

- 1) what (if any) change to make to the amount;
- 2) when the new level of payments will commence; and
- 3) whether it would be appropriate to capitalise the maintenance order so that it is paid as a lump sum and the parties' ongoing financial connection is ended. This method for dealing with variation applications was set out by the Court of Appeal in the case of *Pearce* (2003) and will be applied by any judge dealing with an application.

Two recent cases have, rather unhelpfully, given slightly differing guidance on dealing with variation applications.

The case of *Lauder* (2007)

When Mr and Mrs *Lauder* divorced in 1988, Mrs *Lauder* was awarded maintenance of 35 per cent of her husband's income and a share of the matrimonial home. However, the order was never put into effect and the parties agreed instead that the wife should remain in the home with the children while the husband would meet the outgoings on the property and provide the wife with £50 per week. She continued to earn a modest income as a secretary, then sold the home and applied to the court for a variation and capitalization of her spousal maintenance. Her former husband's financial position, by this stage, was significantly improved.

Following the House of Lords' guidance in *Miller and McFarlane*, the judge said that the wife's needs should be generously interpreted. Further, the capitalisation award should contain an element of compensation since this wife had been put at a severe disadvantage in the labour market as a result of the decision that she would stay at home and raise the children. The concept of sharing was not relevant, as capital claims had already been dealt with – there is no second bite of the capital cherry. The judge awarded the wife capitalised periodical payments of £725,000, which would provide her with net income in the region of £65,000 per

year – a similar proportion of the husband's income to that which she was awarded upon divorce.

The case of *North* (2007) (previously discussed as *N v M*)

Confusingly, without any reference to the *Lauder* case, the Court of Appeal has just decided an appeal by the husband in the case of *North v North* (2007). This case was discussed in detail in the last newsletter. You may recall that the wife was awarded a capital sum on divorce in 1981 and ground rents from some of her husband's properties. She was also awarded nominal maintenance, ie, her maintenance rights were not dismissed but no substantive maintenance payments were ever made. The three children of the family stayed with the husband.

The years went by and the husband prospered, but she chose not to work. Recently, she sold her house and settled in Australia, investing her money in shares. She lived a lavish lifestyle in Sydney, but some of her investments failed and she applied to increase her maintenance from nominal to £40,000 per year to make up the shortfall. The lower court awarded her the sum of £202,000. The husband's first appeal against that sum failed.

The Court of Appeal however allowed his appeal. It drew a distinction between the financial consequences of those misfortunes of which the wife could be said to be her own author, namely her refusal to work

and her lavish lifestyle, and those such as her failed investments, which she could not. The court said that, although the wife's needs were the dominant factor in the award to be made, the husband was not liable for the needs created by the wife's mismanagement, extravagance or responsibility and should not be called upon to pick up the financial pieces. The wife's award was reduced to £3,000 per year maintenance, and the court invited capitalisation by agreement for no more than £50,000.

Final thoughts

So where does this leave us? The differences in the decisions seem to rest on the differences in the post-divorce behaviour of the wives. Mrs Lauder cared for the children and earned what she could. She was compensated for her reduced earning capacity and her needs were looked at generously. Mrs North neither raised the children nor worked and, although the court considered her needs, they certainly were not generously interpreted and there was no lost career

for which to compensate her. There is one matter of which we can be sure: ongoing spousal maintenance, whether substantive or nominal, can be a recipe for a substantial shock years down the line when a variation application is made.



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