Overview

Contributed by Suzanne Todd, Partner, Withers LLP

Economic Climate: A good year for wives?

As anticipated, 2008-09 has seen an increase in applications to vary financial orders, and lawyers are increasingly keen to secure copper-bottomed assets for their clients. It is even harder to actually overturn an order, as emphasised by the Court of Appeal in Myerson v Myerson [2009], where a 90% fall in share value was not enough to qualify for relief. The natural processes of price fluctuation, whether in houses, shares or other assets, do not satisfy the Barder test.

It came as some surprise that, just 13 months after the House of Lords judgment in McFarlane v McFarlane [2009], an application for variation came from the former wife for maintenance increase. For many, it came as an even bigger surprise that she succeeded: the Court of Appeal increased the amount, from one third to 40% of the husband's net income, to more than £300,000 pa – though her annual needs were put at £150,000. A term of six years was ordered to try to facilitate a deferred clean break.

Transparency: A confusing year for the media?

Can they or can't they report what they hear in ancillary relief proceedings? Jack Straw announced in December 2008 that the media would be allowed to attend all family proceedings from April 2009. With a flurry of excitement, the new rules were ushered in on 27 April 2009, accompanied by a Practice Direction and judicial guidance but without any legislative reform of reporting restrictions (which Jack Straw has promised in the next Parliamentary session). After a frenzy of interest from media bodies and panic from clients, it became evident that the legalities surrounding the new era of transparency were in fact very unclear. Munby J, in the case of Spencer v Spencer [2009], clarified matters to a degree in finance cases, while President shed light on the child's position in Re: Child X [2009]. Practitioners will have to wait and see how cases unfold, but there are many issues to be addressed – including the doctor/patient and CAFCASS officer/child relationship, where the child would have no reason to believe that their evidence would be available to anyone outside the courtroom. The clear assumption is that a media presence is permitted, and that when both parties join in an application to exclude, it is more likely to result in failure than in success. Significantly, it is also assumed that S12(1)(a)(iii) is unlikely in the extreme to apply to ancillary relief cases and does not protect the anonymity of the parties. An increase in applications for injunctive relief imposing reporting restrictions and anonymity orders in ancillary relief hearings may well be anticipated in 2010.

A disappointing year for cohabitants.

Two years have passed since the Law Commission recommended reform of cohabitation law. Lord Lester's Cohabitation Bill (a joint venture with Resolution) was given a second reading in March 2009. At the committee stage in April, Baroness Butler-Sloss fought valiantly in favour of the Bill, but it ran out of time. As a result there is no real likelihood of any imminent changes in the law, since there appears to be no political will to drive this much-needed reform forward.

A good year for those wanting prenups and an even better one for those signing post-nups?

The position of cohabitees may not have been clarified, but for those choosing to marry or to enter into a civil partnership, developments over the past twelve months concerning prenuptial and post-nuptial agreements have been significant. However, the courts have made it clear that it is a matter for Parliament and note that the Law Commission is due to report in 2012.

In MacLeod v MacLeod (2008), the Privy Council held that there is nothing to prevent a married couple entering into contractual financial arrangements governing their life together, and these agreements will have legal efficacy if terms are entered into by deed following legal advice. The 'old rule' that post-nuptial agreements were contrary to public policy has been abolished, along with the enforceable duty of husband and wife to live together and for the husband to enforce his 'conjugal rights'. The result, of course, is that post-nuptial agreements are valid and are capable of variation. This led to a mini post-nup bonanza and considerable uncertainty about the interaction between post-nuptial and prenuptial agreements.

Some clarification came from the Court of Appeal decision in Radmacher v Granatino [2009] in July 2009, confirming that although prenuptial agreements are not contractually binding under English law, they are highly influential and can be given decisive weight in divorce cases.

When Mr Granatino argued that he had signed the prenuptial agreement without the benefit of legal advice, the Court of Appeal responded that he had fully understood the terms he was agreeing to when he signed the marriage contract. It stated that Granatino had had the opportunity to seek independent legal advice and to request financial disclosure from his spouse – both conventional safeguards – but he had chosen not to. This contrasted with the Privy Council's stance in MacLeod.

Putting the trust back into Jersey

2008 saw another instalment in the long-running case of Mubarak v Mubarak [2008]. This decision reinforces the independence of the Jersey Court, which can no longer be assumed to enforce English divorce orders against Jersey trusts. The Jersey Court will only give effect to an English divorce order if the terms of the trust permit it, or if the trustees have submitted to the English court's jurisdiction, or if all beneficiaries consent. The Court will not permit changes (here termed 'alterations') to trusts which require the trustees to act outside their powers.

Collaborative law process given major boost

Collaborative law, the burgeoning ADR method which aims to resolve divorce proceedings without involving the courts, is increasing in popularity. To give couples an even greater incentive to use this measure, Mr Justice Coleridge established a short-cut procedure in S v P [2008]. This allowed courts to approve collaborative law settlements within a day or two.

And in Europe...?

Rome III was formally shelved in June 2008, although the European Parliament approved the draft regulation with some amendments later in the year, and the Commission is reportedly looking at alternatives. Their results in this matter remain to be seen.

In the meantime, Lord Justice Thorpe has clearly warned against isolation in Granatino. His view is clear: "As a society we should be seeking to reduce and not to maintain rules of law that divide us from the majority of the states of Europe."