

**THE JERSEY LAW COMMISSION**



**CONSULTATION PAPER**

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**DIVORCE REFORM**

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The Jersey Law Commission was set up by a Proposition laid before the States of Jersey and approved by the States Assembly on 30 July 1996.

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## 1 Introduction

- 1.1 The purpose of this report is to consider divorce law in Jersey and to look at whether the current divorce law meets the needs of society in the 21st century. The report seeks to:
- (a) give a brief background to the development of the law relating to divorce in Jersey;
  - (b) set out the current legislative framework in respect of divorce and ancillary matters indicating particular areas which may be anachronistic or otiose today;
  - (c) provide reasons for the need for reform;
  - (d) make proposals for reform, the most significant proposal being a move to no fault divorce in all cases, so that the basis for a divorce would be the irretrievable breakdown of the marriage making it unnecessary for the petitioner to prove adultery, desertion or unreasonable behaviour by the other spouse.

## 2 Background

- 2.1 Divorce is a matter of great significance to many people in Jersey – typically between 240 and 260 couples a year petition for divorce (see Appendix 2). Private family law affects more than just those couples involved in divorce proceedings as petitioner and respondent. The children and wider families of separating and divorcing spouses are inevitably caught up in the process and affected by outcomes, especially where there are contested court proceedings. There is also an impact on wider society in terms of housing, welfare benefits and calls on the health and education services. Divorce can affect people's incomes, wealth and emotional well-being, detrimentally. Divorce reform (including dissolution of civil partnerships) itself is a discrete matter, but inevitably also needs to take into account financial remedies on divorce and dissolution and separation. This report will concentrate on divorce reform but the breakdown of relationships between unmarried cohabiting couples is another area of private law which should also be looked at with a view to reform of the current system. The law relating to children in Jersey has been subject to statutory change relatively recently and applications can be made in respect of children independently of divorce or dissolution proceedings.
- 2.2 The law relating to divorce in Jersey is contained in the Matrimonial Causes (Jersey) Law 1949 (as amended) and the Matrimonial Causes Rules 2005. The date of 1949 would suggest that divorce law in Jersey is indeed in need of reform, but in fact the 1949 Law is a much amended law<sup>1</sup> and in some ways is more modern in its approach than the corresponding legislation in England and Wales, notably the provision in Jersey for divorce being available on the basis of separation for one year with consent. Unfortunately, not all the helpful amendments to the English law have been replicated in Jersey. Also, with a much amended Law inconsistencies creep in and the grafting of new

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<sup>1</sup>See Appendix 1 - Chronology

concepts in one area of a statute which are not carried through across the board leads to corresponding difficulties with other areas. More significantly, the 1949 Law harks back to an era long gone, where the social mores of the time were very different and there was far less equality in society. Family life has changed considerably since 1949 and wholesale changes to the current law on divorce are needed to reflect this. However, rather than continuing the pattern of amending the 1949 Law, the time has perhaps come for a more radical change, to move to "no fault" divorce by way of a new Family (Jersey) Law.

### 3 **No Fault Divorce**

- 3.1 England and Wales is one of the few legal systems to retain fault as the basis for divorce. In England and Wales attempts were made to change the law on divorce to remove the elements of fault in the 1990s with the passing of the Family Law Act 1996. That legislation was innovative and forward thinking, but in the context of the political landscape at the time, was amended to such an extent during its passage through Parliament that when there was a change of government in 1997 it was put aside, never brought into force and was repealed by the Children and Families Act 2014. But the issue of fault-based divorce remains a live one in England and Wales. The 2013 Grant Thornton Matrimonial Survey shows that the highest priority for law reform among family lawyers was the introduction of no fault divorce, closely followed by protection for cohabiting couples and the introduction of binding marital agreements.<sup>2</sup>
- 3.2 In Jersey, there may be fewer obstacles to law reform in the family law arena and it may be that with well thought through proposals, the law relating to the dissolution of marriage (and civil partnerships) and the provision of financial remedies can be brought up to date without the opposition that beset the passage of the 1996 Act in England and Wales.
- 3.3 Originally divorce, like probate, was the preserve of the Ecclesiastical Court in Jersey. The 1949 Law empowered the Royal Court to "grant decrees of dissolution and nullity of marriage, of judicial separation and of restitution of conjugal rights, and to make provision for matters incidental thereto". The 1949 Law has been amended over the years and case law has developed following the English lead. One significant element of modern English divorce law which was not brought into Jersey law is the concept of irretrievable breakdown of the marriage as being the only ground for divorce, although still having to be evidenced by several "facts" such as adultery, unreasonable behaviour or separation<sup>3</sup>. It is unclear why this change was not incorporated into the Jersey law when others were.

### 4 **Sacrament or Contract?**

- 4.1 Divorce and the ease or otherwise with which it can be achieved has, given its origins, for many years been influenced by religious ideas about the sanctity of marriage. In fact, despite the perception within church circles, in England, divorce ceased to be a religious matter on the passing of the Matrimonial Causes Act 1857 which brought divorce into the secular courts. In 1858 there were 300 divorce petitions in contrast to the 3 the previous year, when a private Act of Parliament had been necessary. Before the coming into force

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<sup>2</sup>Grant Thornton, *Matrimonial Survey 2013* (10th edition), available online at <[http://www.grant-thornton.co.uk/Global/Publication\\_pdf/Matrimonial-Survey-2013.pdf](http://www.grant-thornton.co.uk/Global/Publication_pdf/Matrimonial-Survey-2013.pdf)>

<sup>3</sup>Introduced into English law by the Divorce Reform Act 1969

of the Marriage Act 1836 there was no concept of civil marriage as is known today, only marriages celebrated in church being valid, in England. In Jersey these provisions were adopted in 1842.<sup>4</sup> The availability of both religious and civil marriages (and now civil partnerships) has had an impact on the way divorce or dissolution is viewed in society generally, some seeing marriage as a religious sacrament, as it was in Jersey before 1842 and others taking the view that all marriages, both religious and civil, are in fact simply contracts. Over the past 150 years marriage, divorce and personal relationships have changed beyond all recognition, many changes being linked to the emancipation of women and the increasingly secular nature of society as well as marriage. The aims of a good divorce law however, remain, as described by the English Law Commission in 1966.<sup>5</sup>

- 4.2 "...to buttress, rather than undermine, the stability of marriage, and when, regrettably, a marriage has irretrievably broken down, to enable the empty legal shell to be destroyed with the maximum fairness and the minimum bitterness, distress and humiliation."
- 4.3 A belief in the value of marriage as an institution and a desire to support marriages wherever possible is not incompatible with a system that moves away from blame when a marriage has broken down.

## 5 **Current legislative provisions in Jersey**

- 5.1 The Matrimonial Causes (Jersey) Law 1949 enables the Royal Court to grant decrees of dissolution and of nullity of marriage and of judicial separation. The Civil Partnership (Jersey) Law 2012 makes similar provision in respect of civil partnerships.

## 6 **The 3 year bar**

- 6.1 No divorce petition may be filed with the court until the parties have been married or in a civil partnership for more than 3 years. This 3 year bar is one of the areas where the law in Jersey differs from that in England and Wales and also Guernsey and Scotland. Designed to encourage people to work at their marriages, this period before which a divorce petition can be filed was reduced to one year in England almost 30 years ago and has never existed in Guernsey or Scotland. Today, when couples frequently live together for lengthy periods before marrying, the purpose of a requirement to have been married for any period of time before being able to divorce is unclear, especially given the availability of judicial separation, property and maintenance settlements and orders in relation to children enabling couples to be divorced in all but name within 3 years of marriage. An explanation may be that the 3 year bar was included in the 1949 Law following on from the English Matrimonial Causes Act 1937. The bar was a late addition to the 1937 Bill, which widened the grounds for divorce and the bar appears to have been included in order to ease the passage of the Bill through the House of Commons, that is, primarily for political reasons. The rationale for limiting access to divorce in short marriages was public policy, to safeguard against irresponsible or trial marriages and to

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<sup>4</sup>Loi (1842) Sur L'Etat Civil established a register of births marriages and deaths and enabled civil marriages to take place in Jersey

<sup>5</sup>Law Commission of England and Wales, *Reform of the Grounds of Divorce: The Field of Choice*, Law Com No. 6.

increase stability during the "difficult early years".<sup>6</sup> It was also considered that the 3 year bar would deter hasty remarriage.

- 6.2 It is possible to obtain a divorce within 3 years of marriage if the case is one where exceptional hardship is suffered by the petitioner or there is exceptional depravity on the part of the respondent. In giving leave for a petition to be filed within 3 years of marriage the court must have regard to the interests of any children and consider whether there is any prospect of reconciliation between the parties before the 3 years have expired. This is the only reference to reconciliation in the whole of the current Matrimonial Causes (Jersey) Law.
- 6.3 The inability to petition for divorce within 3 years of marriage, even where there is abuse (not amounting to exceptional depravity) or adultery is a cause of distress to those unable to escape their unhappy marriages. The populations of Guernsey and Scotland do not appear to have suffered without a 3 year bar. A bar was considered<sup>7</sup> when Scottish divorce law was reformed by the Divorce (Scotland) Act 1976 but it was concluded that the provision was unnecessary as the statistics gave little support to the view that time restrictions made any material contribution towards the objectives of a good divorce law. The English position is now that there is a mandatory one year bar, there no longer being any discretion to allow a petition to be issued before the first anniversary of the marriage for any reason. It is proposed that the law in Jersey should be changed to be the same as in Guernsey and Scotland and there should be no restriction on issuing a divorce petition at any time after marriage. There is no public interest in preventing people from divorcing if their marriage has broken down within the first 3 years.

## 7 **Grounds for divorce**

- 7.1 The grounds for divorce are found in Article 7 of the 1949 Law. They are a mixture of old grounds, some dating back from the enactment of the Law in 1949 and some more recent in origin. There are grounds based on fault and grounds based on separation. The "fault" grounds are that the respondent:
- (a) Has since the celebration of the marriage committed adultery and the petitioner finds it intolerable to live with the respondent;
  - (b) Has deserted the petitioner without cause for a period of at least 2 years immediately preceding the presentation of the petition;
  - (c) Has since the celebration of the marriage behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;
  - (d) Is incurably of unsound mind and has been continuously under care and treatment for a period of at least 5 years immediately preceding the presentation of the petition; or

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<sup>6</sup>Law Commission of England and Wales report, "Time Restrictions on Presentation of Divorce and Nullity Petitions" (1982) Law Com No 116 para 2.14

<sup>7</sup>ibid

(e) Is serving a sentence of imprisonment for life or for a term of not less than 15 years.

7.2 Grounds b) d) and e) are rarely used<sup>8</sup>, if ever. Where adultery is used as a ground, unlike in England and Wales where the adultery can be described as being with a person the petitioner does not wish to name (as opposed to "unknown") the co-respondent has to be named<sup>9</sup>, served and respond to the proceedings, unless there are "special grounds"<sup>10</sup> not to do so. This can raise the emotional temperature and reduce the chances of financial and children matters being resolved amicably. It also increases the costs if there is no admission of adultery. The most commonly used of the "fault" grounds is behaviour (commonly referred to as "unreasonable behaviour"). The test is subjective and objective, that is, the question is: "would any right thinking person come to the conclusion that this [husband] has behaved in such a way that this [wife] cannot reasonably be expected to live with him taking into account the whole of the circumstances and the characters and personalities of the parties?".<sup>11</sup> As a consequence the particulars of behaviour do not necessarily need to be very strong with the result that there are very few marriages where it would not be possible to found a petition on this ground.

7.3 Of the separation grounds, Article 7(2) of the 1949 Law indicates that a petition may be presented on the basis that the parties to the marriage:

(a) have lived apart for a continuous period of at least one year immediately preceding the presentation of the petition and the respondent consents to a decree being granted; or

(b) have lived apart for a continuous period of at least 2 years immediately preceding the presentation of the petition.

7.4 These grounds differ from the single ground in England and Wales of "irretrievable breakdown of the marriage".

7.5 Very few divorces are defended<sup>12</sup>, and even when they are there are very few people who cannot get divorced if they choose to do so. There are provisions for the refusal of a divorce in a separation case if the dissolution of the marriage would result in grave financial or other hardship<sup>13</sup> and that it would, in all the circumstances, be wrong to dissolve the marriage, but again, this is a little used provision.

## 8 Reconciliation

8.1 It is interesting that unlike the English law, Jersey law does not encourage or even condone or facilitate reconciliation when parties are within divorce proceedings or are separated prior to the issue of a petition. A modern divorce law should encourage

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<sup>8</sup>See Appendix 2 divorce statistics

<sup>9</sup>Rule 6 Matrimonial Causes Rules 2005

<sup>10</sup>Article 17(1) Matrimonial Causes (Jersey) Law 1949

<sup>11</sup>*Livingstone-Stallard v Livingstone-Stallard* [1974] 2 All E R 766 at 771

<sup>12</sup>In Jersey there have not been any defended divorces for many years according to the Judicial Greffe.

<sup>13</sup>Article 10(1) Matrimonial Causes (Jersey) Law 1949



reconciliation wherever possible. This will be easier to achieve if the requirement to apportion blame for the breakdown is removed.<sup>14</sup> In England, every divorce petition has to be accompanied by a Certificate of Reconciliation, with the solicitor certifying whether or not the Petitioner has been given advice about reconciliation or referred to suitable agencies. This has in fact become just a matter of form filling in most cases, but at least the law encourages reconciliation to be considered and to be part of the advice given to a Petitioner when contemplating divorce. The court also has the power to adjourn proceedings in order to enable attempts to be made to effect reconciliation<sup>14</sup>. In Jersey, the law is such that reconciliation is actively discouraged<sup>15</sup>. It should be noted here that reconciliation in this context means that the parties consider their differences and, despite the potential availability of grounds for a divorce, decide to continue with their marriage. It is an entirely different concept from mediation. In mediation (dealt with below), parties who still wish to divorce or separate (ie are not reconciling) arrange the progress of their divorce and matters relating to the arrangements for children and any financial settlement through the medium of mediation.

8.2 The separation grounds for divorce were first introduced into Jersey law in 1979<sup>16</sup>, at which point the length of the separation required was the same as England (two years with consent and five years without). The Law was further amended in 1996<sup>17</sup> to the current position of a divorce being available for couples who have lived apart for a continuous period of one year with consent or two years without consent. Unlike in England, there is no provision for the separation to be interrupted to allow the parties to explore the possibility of reconciliation. This means that if the parties spend even one night together under the same roof, the period of separation has to start all over again. In fact, in one case<sup>18</sup>, where the couple spent a few nights together in a different jurisdiction, in someone else's house, that was considered to be sufficient to prevent a separation divorce, and the separation period had to start again. In England, in order to facilitate and encourage reconciliation, the period of separation can be stopped and restarted, allowing the parties to live together for up to six months without having to restart the period of separation.<sup>19</sup>

8.3 The combination of the 3 year bar, supposedly to encourage couples to try to succeed with their marriages and the lack of any express framework for reconciliation is an unfortunate inconsistency within the existing law. Hence the need for the abolition of the 3 year bar and the establishment of a divorce process which encourages reconciliation.

## 9 **Judicial separation**

9.1 At one time married women had very few rights. They were not sui juris or "legally competent" until 1925 and they could not divorce their husbands as easily as their husbands could divorce them. Judicial separation, which freed them from the obligation to live with and provide conjugal services to their husbands followed on from the

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<sup>14</sup>Section 2(5) Matrimonial Causes Act 1973

<sup>15</sup>*A v B* [2010] JRC 157A

<sup>16</sup>Following the passing of the Matrimonial Causes (Amendment No.5) (Jersey) Law 1978

<sup>17</sup>Following the passing of the Matrimonial Causes (Amendment No.9) (Jersey) Law 1996

<sup>18</sup>See *A v B* above fn13

<sup>19</sup>Matrimonial Causes Law 1973 s2(5)

ecclesiastical concept of a divorce a mensa et thoro.<sup>20</sup> Nowadays divorce and judicial separation are gender blind and based on the same grounds as divorce (except for an additional ground of "habitual drunkenness" in judicial separation which is not a ground for divorce). Judicial separation is rarely used as a remedy except when the parties cannot divorce because they have not been married for 3 years. There were 3 judicial separations in Jersey in 2012 and 3 in 2013.<sup>21</sup>

- 9.2 In keeping with the history of judicial separation being a remedy available to wives, the Law specifically states that a husband shall not be liable for "any engagement or agreement into which the wife may enter after the separation begins" except where the husband is not paying maintenance, in which case he is liable to pay for "necessaries" supplied for the use of the wife or children. This provision is inconsistent with the gender blind concept of judicial separation or divorce. It is of course highly unlikely that any shopkeeper would provide "necessaries" to a wife and expect to be paid by the husband today, even if they knew what "necessaries" were. Such a provision is outdated in the 21st century and it is proposed that neither husband nor wife should be liable to third parties for the debts of the other within marriage, following separation or on divorce. This of course would not do away with the responsibility of spouses to maintain each other.

## Nullity

The current Matrimonial Causes (Jersey) Law is confusing in respect of nullity, stating at Article 18 that the court may decree the nullity of a marriage on any ground on which a marriage is "void or voidable or on any of the following grounds":

- (a) the continuing impotency of one party or of both parties to the marriage since the celebration thereof;
- (b) that the marriage was celebrated through fraud, threats or duress by the respondent upon or to the petitioner;
- (c) that the marriage has not been consummated owing to the wilful refusal of the respondent to consummate the marriage;
- (d) that the respondent was at the time of the marriage pregnant by some person other than the petitioner, unless the pregnancy resulted from intercourse which occurred between the respondent and a former husband during the subsistence of their marriage;
- (e) that the respondent was at the time of the marriage suffering from a venereal disease in a communicable form;
- (f) that either party to the marriage was at the time of the marriage of unsound mind or was then suffering from mental disorder of such a kind or to such an extent as to be unfitted for marriage and the procreation of children or subject to recurrent attacks of insanity or epilepsy;

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<sup>20</sup> a legal separation whereby parties no longer had to share "bed and board" but remained legally married.

<sup>21</sup> Judicial Greffe statistics

- (g) that an interim certificate has, after the time of the marriage, been issued to either party to the marriage;
- (h) that either party to the marriage satisfies such conditions and has taken such steps, in an approved jurisdiction, for the recognition of his or her change of gender by that jurisdiction as –
  - (i) *are prescribed, in respect of that jurisdiction, by Order made by the Chief Minister, or*
  - (ii) *if no conditions and steps are prescribed under clause (i) in respect of that jurisdiction, satisfy the Court that, but for the fact that the parties are still married, the change of gender would be recognized by that jurisdiction;*
- (i) *that the respondent is a person whose gender at the time of the marriage had become the acquired gender:*

*Provided that, in the cases specified in sub-paragraphs (d), (e), (f) or (g), the court shall not grant a decree unless it is satisfied –*

- (i) *that the petitioner was at the time of the marriage ignorant of the facts alleged,*
- (ii) *that proceedings were instituted within a year from the date of the marriage, and that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the grounds for a decree.*

*Any child born of a marriage avoided pursuant to paragraph (1)(b), (c), (e), (f), (g) or (h) shall be a legitimate child of the parties thereto notwithstanding that the marriage is so avoided.*

*Without prejudice to paragraph (1), the court shall not grant a decree of nullity under Article 18(1) on the ground mentioned in sub-paragraph (g) of that paragraph unless it is satisfied that proceedings were instituted within 6 months of the date of issue of the interim certificate.*

[http://www.jerseylaw.je/Law/display.aspx?url=lawsinforce%2fconsolidated%2f12%/2f12.650\\_MatrimonialCausesLaw1949\\_RevisedEdition\\_1January2013.htm-EN-0038](http://www.jerseylaw.je/Law/display.aspx?url=lawsinforce%2fconsolidated%2f12%/2f12.650_MatrimonialCausesLaw1949_RevisedEdition_1January2013.htm-EN-0038)

*In any proceedings for nullity of marriage, evidence of the question of sexual capacity or gender shall be heard in camera unless, in any case, the court is satisfied that in the interests of justice any such evidence ought to be heard in open court.*

*In this Article 'approved jurisdiction', 'interim certificate' and a reference to a person's acquired gender have the same respective meanings as in Article 1 of the Gender Recognition (Jersey) Law*

As all the grounds listed would appear to make a marriage voidable, the second "or" in the article appears to be otiose. The significant emphasis on sexual activity in relation to marriage is at odds with marriage in an era where sexual activity is not confined to

marriage and when the Civil Partnership (Jersey) Law 2012 specifically excludes reference to consummation or impotence. A difference between the law relating to divorce and the law relating to the dissolution of a civil partnership is the reference to a marriage being capable of annulment on the basis that a party at the date of the marriage was "of unsound mind or was then suffering from mental disorder of such a kind or to such an extent as to be unfitted for marriage and the procreation of children or subject to recurrent attacks of epilepsy" (emphasis added). The corresponding provision in the Civil Partnership Law states: "that either party to the civil partnership was at the time of the formation of the civil partnership suffering from a mental disorder of a kind or to such an extent as to be unfit for civil partnership". This difference of wording alone indicates that the reference to epilepsy, at least, in current times is accepted as not acceptable today, is demeaning and discriminatory and should be changed. The omission of the reference to children in the Civil Partnership Law is probably because of perceived biological imperatives, but at a time when fertility can be controlled in ways not foreseen in 1949, it would seem unnecessary to link mental health and children in this way. It is perhaps unfortunate that when the Civil Partnership (Jersey) Law was passed, the opportunity was not taken to amend the Matrimonial Causes (Jersey) Law in line with the new statute.

## 10 **Connivance, Condonation and Collusion**

- 10.1 Under the Matrimonial Causes Rules 2005 rule 5(1)(n) a divorce petition has to state whether there has been any connivance or condonation on the part of the petitioner and, except with a separation petition, that the petition is not presented or prosecuted in collusion with the respondent or co-respondent(s). These concepts were excised from English law more than 50 years ago<sup>22</sup> and certainly seem to be inconsistent with the availability in Jersey of a one year separation divorce.
- 10.2 In effect, despite the provisions of the law, it is possible to get divorced if you want to, even if your spouse does not. Having to jump through the hoops of the Matrimonial Causes (Jersey) Law 1949 just increases legal costs or work for the Judicial Greffe staff when people act in person and can inflame an already difficult emotional situation when it is necessary for there to be allegations of fault.
- 10.3 Under the Matrimonial Causes (Jersey) Law 1949 there is provision for financial orders to be made in respect of:
- (a) child maintenance;
  - (b) spousal maintenance
  - (c) maintenance secured on capital assets;
  - (d) lump sums;
  - (e) property transfers (between spouses or to children),
  - (f) variation of trusts of marriage and separation settlements;

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<sup>22</sup>Matrimonial Causes Act 1963

- (g) orders for sale of property;
- (h) interim orders for the support of either party (these have been extended by case law to include interim maintenance in order to pay legal fees).<sup>23</sup>

In terms of the powers of the court, these are quite wide ranging. The only area where there is a potential lacuna that doesn't appear in the English legislation, is in relation to pensions. Currently, pension funds cannot generally be cashed in or transferred to third parties. Frequently in Jersey, especially with a large population employed in the finance industry in one guise or other, there are considerable pension assets. When the assets come to be divided on divorce, if a significant proportion of the assets of the parties consists of a large pension belonging to just one of them, it can be difficult to do justice in the division of assets if there are insufficient other assets to off-set the pension. In England and Wales this difficulty has been addressed by enabling "pension sharing" and "pension earmarking" orders. The latter are rarely used, but pension sharing orders can be a valuable tool for a family court judge tasked with dividing the assets fairly between the parties.

## 11 Disclosure and Tracing

- 11.1 In considering financial orders on divorce it is necessary to have full disclosure of all the assets. It is also necessary on occasion to safeguard those assets to prevent dissipation which may be attempted in order to avoid or limit financial orders. The court has considerable discretion when making financial orders but must take into account "all the circumstances of the case including the conduct of the parties to the marriage insofar as it may be inequitable to disregard it". This means that if a party transfers assets out of their ownership in order to frustrate a claim within divorce proceedings, that can be taken into account in the final order. However, there is currently no provision to "unpick" a disposition made to avoid an adverse order and so it is open to unscrupulous spouses to transfer assets to others to avoid meeting their responsibilities to their spouses. To try to retrieve assets in such cases involves tracing claims and possibly Pauline actions<sup>24</sup>, all of which can be expensive and time consuming. Having a provision within the family law legislation enabling the court to set aside such a disposition would simplify matters and would act as a deterrent to unscrupulous spouses.

## 12 Clean break

- 12.1 It is generally accepted that wherever possible it is desirable for there to be a "clean break" between parties on divorce. This enables the parties to move on with their lives and provides certainty about what on-going liabilities there will be. However, the current law in Jersey does not allow the court to order a clean break, and the previous practice of allowing a clean break within a consent order (by dismissing Article 33 – Power to vary orders) has ceased following the recent case of *C v D*<sup>25</sup>.

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<sup>23</sup>*S v C* [2003] JLR Note 24 *K v P* [2009] JLR Note 42

<sup>24</sup>A Pauline action is a customary law action to set aside a disposition which has been made to avoid a debt. In England s37 of the Matrimonial Causes Act 1973 gives the Court a similar power in family cases.

<sup>25</sup>[2013] JRC056

12.2 The English law has a specific provision<sup>26</sup> placing a duty on the court, when exercising its powers in relation to financial provision, to consider terminating the financial obligations towards the other party as soon as is just and reasonable.

### 13 Procedure in financial Claims

13.1 The current procedure in respect of financial claims within divorce proceedings is set out in the Matrimonial Rules 2005. These rules include the overriding objective:

#### **Overriding Objective**

- (a) The overriding objective of the Court is to deal with cases justly.
- (b) Dealing with a case justly includes, so far as is practicable –
  - (i) *ensuring that the parties are on an equal footing;*
  - (ii) *saving expense*
  - (iii) *dealing with the case in ways that are proportionate –*
    - (A) *to the amount of money involved*
    - (B) *to the importance of the case*
    - (C) *to the complexity of the issues, and*
    - (D) *to the financial position of each party*
  - (iv) *ensuring that it is dealt with expeditiously and fairly; and*
  - (v) *allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases*

#### **The Court shall seek to give effect to the overriding objective when it –**

- (a) exercises any power given to it by this Part; or
  - (b) interprets any Rule.
- (3) *The parties must help the Court to further the overriding objective.*
  - (4) *The Court shall further the overriding objective by actively managing cases.*
  - (5) *Active case management includes –*
    - (i) *encouraging the parties to co-operate with each other in the conduct of the proceedings;*

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<sup>26</sup>Section 25A Matrimonial Causes Act 1973

- (ii) *encouraging the parties to settle their disputes through mediation, where appropriate;*
- (iii) *identifying the issues at an early date;*
- (iv) *regulating the extent of disclosure of documents and expert evidence so that they are proportionate to the issues in question;*
- (v) *helping the parties to settle the whole or part of the case;*
- (vi) *fixing timetables or otherwise controlling the progress of the case;*
- (vii) *making use of technology; and*
- (viii) *giving directions to ensure that the trial of a case proceeds quickly and efficiently.*

13.2 The procedure was simplified when the 2005 Rules were brought into force. When an application is made for ancillary relief (a financial claim) at a preliminary directions hearing the progress of the case is mapped out. Sworn affidavits of means are ordered to be filed and exchanged followed by questionnaires relating to those affidavits, replies to questionnaires, and frequently schedules of deficiencies and responses to schedules of deficiencies. In England, although questionnaires can be raised, the judge determines which questions may be put to the other side, after affidavits of means have been filed and exchanged. This then limits the questions to those the judge feels will assist the case and which are proportionate. This limiting of questions and replies makes the information gathering part of the process more efficient and focussed. A similar procedure could be adopted in Jersey under the current Rules (questionnaires could be limited to those approved by the judge) but enshrining such a step within the Matrimonial Causes Rules would assist in reducing costs, increasing efficiency and reducing animosity between the parties.

## 14 **Marital Agreements**

14.1 One of the difficulties there is currently in respect of financial orders made on divorce, is a lack of certainty. The provisions of the Law are wide-ranging and give the Court considerable discretion in the way assets are divided on divorce. The starting point of an equal division, which has been established by case law in England originally<sup>27</sup>, followed by local decisions can be departed from by use of the "section 25 factors" in particular the needs of the parties:

25 (1) It shall be the duty of the court in deciding whether to exercise its powers .... to have regard to all the circumstances of the case including the following matters, that is to say -

- (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;

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<sup>27</sup> *White v White* [2001] 1 AC 596

- (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
- (c) the standard of living enjoyed by the family before the breakdown of the marriage;
- (d) the age of each party to the marriage and the duration of the marriage;
- (e) any physical or mental disability of either of the parties to the marriage;
- (f) the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family;
- (g) ...the value to either of the parties to the marriage of any benefit (for example, a pension) which ... (by reason of the divorce) ..that party will lose the chance of acquiring;..."

14.2 The Court in Jersey expressly sanctioned and encouraged reliance on these "section 25 factors" in *Howarth v McBride*<sup>28</sup> and subsequent cases.

14.3 One way around this lack of certainty would be if couples could agree either in advance of their marriage<sup>29</sup> or during their marriage but before divorce<sup>30</sup> how assets should be divided in the event of a breakdown of the marriage. Such "marital agreements" are not currently binding in Jersey. The Court retains a full discretion to make any of the orders available to it, regardless of any prior agreement between the parties. That said, one of the factors to be considered, not just in s25 MCA but also in Article 29 of the Matrimonial Causes (Jersey) Law 1949 which specifies that:

14.4 Where a decree of divorce, nullity of marriage or judicial separation has been made, the court may, having regard to all the circumstances of the case including the conduct of the parties to the marriage insofar as it may be inequitable to disregard it and to their actual and potential financial circumstances, order ...

14.5 Entering into a pre or post nuptial agreement is likely to be classed as such conduct, especially if there have been few changes in the parties' circumstances since the making of the agreement.

14.6 In the absence of binding marital agreements it is difficult to predict what will happen on divorce if finances are not agreed and the Court is called upon to make an order. Where one or both parties have substantial assets acquired before the marriage or when they have responsibilities to former spouses and/or children from previous relationships, it can be important to them to be able to have some certainty about how their assets will be dealt with by the Court on divorce which is not possible at present. It is proposed that there be a presumption in favour of the terms of a marital agreement being binding on the parties if certain safeguards are in place (see below in recommendations).

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<sup>28</sup>1984 JJ1

<sup>29</sup>Pre Nuptial Agreements

<sup>30</sup>Post Nuptial Agreements



## 15 Cohabitation

15.1 There is no specific protection within Jersey family law for cohabiting couples. Their rights, such as they are, stem from the general civil law. There was some attempt by the Deputy Bailiff to follow English case law, which gives more rights to cohabitants, in the case of *Flynn v Reid*<sup>31</sup>, but this was overturned on appeal<sup>32</sup> with the Court of Appeal indicating that the Royal Court's description of the proceedings as "quasi-matrimonial" was inaccurate and that the case was, in the absence of a marriage, essentially a property dispute. The law on cohabitation is complex and controversial but outside the scope of this report.

## 16 Reasons for Reform

16.1 Jersey's divorce law is already derivative, it comes from the English law. Not only does the Jersey statute follow English law to a significant extent, but the Court in Jersey follows English case law. In England, from at least as long ago as 1965<sup>33</sup> it has been accepted that there should be a move to a no fault system of divorce. Before and since that time, many other countries have recognised the benefits of a no fault divorce regime. The opposition to no fault divorce has always been that it would make divorce too easy and would undermine the importance of marriage and family life. In fact, by the time a couple (or one of them) decides the marriage is over, it will be almost always possible for there to be a divorce, so moving to a no fault basis for divorce is unlikely to increase the divorce rate, just make divorce less costly in financial and human terms.

16.2 Where a divorce cannot proceed on the basis of separation, either adultery of behaviour grounds are used. Appropriately trained family lawyers try to mitigate the effects of fault based petitions dropping unexpectedly through unwitting respondents' letter boxes, but not all divorces are dealt with by family lawyers and the present system just serves to stir up enmity, even where there is a commitment to good practice. Not only that, the costs of making out a case for a fault based divorce are higher than with a no fault divorce such as a separation divorce and as costs are generally claimed from the respondent in fault based divorce, this just exacerbates an already unfriendly situation. Making divorce difficult does not reduce the number of divorces, it just makes them more painful.

16.3 Society in Jersey has moved on considerably since the 1949 Law was passed. There is more equality and less discrimination<sup>34</sup>, Jersey now has a Civil Partnership Law, illegitimacy is no longer the bar to succession it once was, far more people live together

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<sup>31</sup>[\[2012\]JRC100](#)

<sup>32</sup>[\[2012\]JCA169](#)

<sup>33</sup>See Law Commission of England and Wales, *Putting Asunder: A divorce Law for Contemporary Society 1966* and *Facing the Future - A Discussion Paper on the Ground for Divorce* Law Com No170, HC 479

<sup>34</sup>The Discrimination (Jersey) Law 2013 is now in force, even if only for race discrimination at the time of writing but other forms of discrimination including gender discrimination are to be outlawed in due course.

rather than getting married, divorce is much more common than in previous generations and the stigma there once was in respect of divorce and single parenthood has greatly diminished.

- 16.4 Divorce and family law generally were once the preserve of litigation lawyers. In the last 15 years or so, family law in Jersey has become a specific area of practice in its own right, and a distinct way of dealing with family law cases has begun to develop. Generally, family lawyers in Jersey try to deal with family law cases in an amicable and conciliatory way, considering all the surrounding issues such as the effect on the wider family and emotional as well as financial and strictly legal aspects of a case. The current legislation does not assist this way of working. The 3 year bar, forcing couples to remain married unless there are exceptional reasons, the requirement for a year of separation before a consensual divorce can be started and the existence of fault grounds only serve to make divorce more difficult and acrimonious than it need be.
- 16.5 Not only do these aspects of current divorce law make the process for divorcing couples much more emotionally draining than necessary, they also lead to an increase in legal costs and demands on the court's time. Once proceedings start off in a non-consensual way in respect of the divorce petition, whether by naming a co-respondent or listing hurtful particulars of unreasonable behaviour, the die is often cast for more unpleasantness in trying to resolve matters relating to children and finances. Couples going through the pain of relationship breakdown need the judicial processes to assist them to move on to an amicable resolution of things rather than to inflame the situation and to make them pay more as a result.

## 17 **Mediation, Arbitration and Collaborative Law**

- 17.1 In many parts of the world including USA, New Zealand and Canada as well as England and Wales, non-court based solutions to family law problems are actively encouraged or even required to be tried or at least considered before divorce proceedings can be started.
- 17.2 In Jersey, in October 2013, Family Mediation Jersey was launched. The new mediation service has the support of the Court and has experienced a high level of referrals in its first few months. Mediation is a cost effective way of resolving disputes whereby one or two trained mediators assist couples to reach agreement about finances or children matters or both. It is cheaper than the parties using lawyers<sup>35</sup>. The agreements reached in mediation can be turned into consent orders which then have the force of a court order<sup>36</sup>. The support of the Court is fundamental to the

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<sup>35</sup>Typically the cost of using Family Mediation Jersey is less than half the cost of using lawyers: £175 per hour per person for those paying the full mediation fee. A lawyer would typically cost between £200 and £400 per hour for each client, and as the work takes place intensively in meetings with the parties with no correspondence and few documents prepared, the time spent by the mediators is less than that spent by lawyers.

<sup>36</sup>The drafting of consent orders and advice on the content means that some legal work is required when cases are mediated, but much less than when litigated.

success of mediation and to the promotion of its wider use. The move towards more mediation will be enhanced by a reformed divorce law which enshrines the importance of using non court solutions such as mediation and arbitration in statute. It may also be helpful for the Court if incentives to mediate were to be included in a new Law, perhaps in respect of costs orders or the fee structure.

- 17.3 Arbitration is well recognised as a way of settling disputes in areas ranging from the supply of goods and services, employment contracts, partnership agreements and construction matters. It is less well known as a way of resolving family law disputes. Family arbitration has been adopted in England and Wales and the advantages of a speedier, completely confidential method of adjudication where the arbitrator can be chosen by the parties for his or her particular expertise have been recognised. There is currently no system of family arbitration available in Jersey<sup>37</sup>, but on the basis that anything not proscribed by law is legal, there would not appear to be any reason for arbitration not to be available for family cases in Jersey. Once an arbitral award has been made, it can be converted to a consent order in the same way as a mediated settlement can be. Any new divorce law could easily accommodate arbitration.
- 17.4 Collaborative law<sup>38</sup> is another way of resolving family law disputes without recourse to the courts. Collaborative law has been available in Jersey since its launch in November 2006 and there are currently 8 collaboratively trained family lawyers in the island. With collaborative law the parties and their lawyers agree not to go to court and conduct negotiations through round table meetings. This allows all matters to be taken into account and reduces conflict. Agreements can then be drawn up as consent orders for ratification by the Court.
- 17.5 As can be seen from the above, there are now more methods of resolving family disputes available to separating spouses than in the past. The law should recognise these changes and incorporate encouragement to consider reconciliation wherever possible as well as non-confrontational and out of court solutions such as mediation and arbitration as part of the divorce process when appropriate.
- 17.6 The process of passing legislation in Jersey is generally more streamlined than in England. The political obstacles which beset the 1996 Family Law Act should not apply in Jersey and should not apply in the current social climate. There is an opportunity for Jersey to take the lead on no fault divorce within the British Isles and to pass a new law untrammelled by historic concepts of "matrimonial offences" in a more enlightened age.

## 18 Suggested Reforms

- 18.1 Any changes to the law of divorce will also need to apply to the dissolution of civil partnerships in an entirely parallel way as the intention with the Civil Partnership Law 2012 was to allow gay couples to enjoy the same rights and responsibilities as heterosexual couples do through marriage. It may be that following on from the move in England and Wales and Scotland to allow same sex marriage, a reform of divorce

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<sup>37</sup>There is one qualified family arbitrator in Jersey.

<sup>38</sup>

law could be accompanied by an extension of the law of marriage in the same way in Jersey. That however is outside the scope of this report.

18.2 A new divorce law should be clear as to the principles underlying the law. The principles underlying the ill-fated English Family Law Act 1996 are worthy of being incorporated in any Jersey legislation. These are:

- to support the institution of marriage;
- for parties to be given encouragement and assistance to save their marriages wherever possible;
  - where a marriage has broken down irretrievably it should be brought to an end:
  - with minimum distress to the parties and any children;
  - in a way so as to promote as good a continuing relationship between the parties and children as possible;
  - without costs being unreasonably incurred.
- Any risk of violence or abuse to the parties or any children to be, as far as possible, removed.

The divorce process should be that:

- Either or both parties to the marriage may issue a "Statement of Marital Breakdown" to indicate their desire to divorce, at any time during the marriage. The possibility of a joint statement will remove the need for one party alone to be the instigator of a consensual divorce;
- Both parties should be provided with information detailing the purpose and availability of:
  - Counselling;
  - Mediation;
  - Collaborative law;
  - Arbitration;
  - Parenting plans;
  - Parenting classes;
  - Legal principles (not advice) about children and financial issues;
  - Any other services available which may assist them;
  - This information should be available at an early stage through CAB, Relate, GPs and the internet.
- The parties should be encouraged to try to reconcile;

- There should be a period of 6 months from the date of the Statement of Marital Breakdown at which time either or both parties would be able to file a declaration that the marriage has broken down and then the divorce can be finalised;
- During this 6 month period the future arrangements for the children and financial matters should be settled wherever possible;
- The court should encourage the parties to use non-court dispute resolution methods where at all possible;
- Matters relating to children should continue to be dealt with through the Children (Jersey) Law 2002;
- The range of financial orders available to the court should include pension sharing orders and orders to set aside financial dispositions where appropriate;
- The court should be able to impose a clean break on the parties if appropriate;
- There should be no requirement to separate. The parties should be able to remain living together until the divorce is made final, if they wish (in order to try to reconcile, or if it is in the interests of the children, for example);
- The Court should be able to reduce the waiting time for good reason;
- If, however, the parties have lived separately for 6 months or more prior to the Statement of Marital Breakdown being issued, there should be no further waiting period, either or both parties should be able to move straight to a declaration that the marriage is at an end;
- There should be an ability for the court to hold up the divorce for a good reason, but, with the adoption of pension sharing orders, there would no longer be any need for the court to be able to prevent divorce altogether to avoid financial hardship for a party.
- If divorce were to be available as above, there would be no need for marriages to be capable of annulment except possibly on the basis of fraud, threats or duress. However, any marriage contracted on such a basis which a party seeks to bring to an end would almost certainly have broken down irretrievably, so divorce would be the most appropriate way forward. Nullity on such grounds was really only necessary to get around the 3 year bar in any event, so there would be no hardship to couples if this remedy were to be no longer available. Marriages would still be capable of being set aside where they were void ab initio for example because the parties (or one of them) were not of marriageable age, they were within the prohibited degrees of affinity and consanguinity or the marriage was bigamous<sup>39</sup>.

#### Marital agreements

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<sup>39</sup>Marriage and Civil Status (Jersey) Law 2001

It is proposed that married couples should be able to enter into binding agreements about what should happen if their marriage should come to an end. Unmarried couples can currently enter into binding cohabitation agreements, but few do. If binding agreements were available for couples marrying, it may be that other couples would also regularise their relationships with agreements. Such agreements could have particular importance to couples who have children from previous relationships or who have specific assets which they want to protect for specific purposes.

In terms of marital agreements it is proposed that such agreements should not be mandatory, but where people choose to enter into them they should be binding on couples unless one of a number of safeguards is breached. This will enable the Court to review agreements which may be seriously unfair.

It is proposed<sup>40</sup> that marital agreements should be binding unless:

- Entered into as a result of unfair pressure or undue influence;
- One or both parties did not have access to independent legal advice about the terms of the agreement;
- One or both parties failed to provide full and frank financial disclosure before the agreement was made;
- The agreement was made fewer than 42 days before the marriage;
- Enforcing the agreement would cause substantial hardship to either party or to any minor child of the family;
- If any of the above factors apply, the court shall give the agreement such weight as it thinks fit, taking into account all the circumstances.

## 19 Conclusions

19.1 Divorce law in Jersey needs to be reformed. A move to a no fault system would be in keeping with the general trend towards a more conciliatory approach to divorce law across the world and the encouragement of non-court forms of resolution of financial matters and arrangements for children. Bringing in a measure of certainty through binding marital agreements in certain cases would go some way to moving the law on as it relates to personal relationships. The promotion of conciliation and mediation will benefit individuals and also lessen the amount of court time needed to deal with what are personal matters which, in most cases will be better dealt with by the parties themselves, not by the Court.

### **The Jersey Law Commission December 2014**

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<sup>40</sup>These proposals mirror, to a large extent, the proposals of the English Law Commission report "Matrimonial Property, Needs and Agreements" published on 27<sup>th</sup> February 2014

Responses to this Consultation Paper should be made in writing, by 31 March 2015, to:

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