

## Jersey & Guernsey Law Review – June 2013

### MISCELLANY

#### Discrimination and domicile

1 As Jersey moves nearer to enacting a law against discrimination<sup>1</sup> and attention is focused on unfairness caused by individuals discriminating against others by treating them less favourably on the basis of race, gender, age, disability, sexuality or other “protected characteristics” it is also instructive to look at areas where the law itself discriminates against particular classes of people unfairly. Generally speaking, such discrimination by a public body, such as the Royal Court, would fall foul of the Human Rights (Jersey) Law 2000, but only if someone makes a claim or otherwise brings the discrimination to public attention.

2 Historically, married women have suffered discrimination in that they were treated differently from their husbands in a variety of ways under customary law, only becoming fully *sui juris* at all following the passing of the *Loi (1925) étendant les droits de la femme mariée*. Even now, the default position under tax legislation is that a married man must complete the tax return on behalf of his wife, continuing the concept of the wife “belonging to” the husband rather than the couple being in an equal partnership. Thankfully the majority of family law has become gender neutral over the years, with both men and women being able to divorce, petition for judicial separation, pay and receive maintenance and, when married, automatically sharing parental responsibility for children.

3 There is however one area where discrimination in family law still reigns: domicile. In Jersey there is a domicile of dependence for married women, just as there is for children. This means that no matter what a woman’s connection to Jersey is, no matter how fervently she intends to make her home in Jersey, to commit to Jersey and to remain here permanently, if she is married to a man with a domicile elsewhere, she is unable to have a domicile of choice in Jersey. Equally, if a woman married to a Jerseyman seeks a domicile of choice abroad, unless her husband also changes his domicile, under Jersey law she is stuck with the same domicile as her husband, only losing her dependent domicile by divorcing him.

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<sup>1</sup> The States Assembly adopted the draft Discrimination (Jersey) Law 201- on 14 May 2013.

4 In succession law, domicile can have significant financial implications if, for example, a person's domicile is deemed to be that of England and Wales, where there is a regime of Inheritance Tax rather than Jersey where there is none. This was recognised as being a problem and was rectified by the *Probate (Jersey) Law 1998*, art 30(1) of which provides that—

“For the purposes of a grant in and the distribution of the movable estate of a deceased person who has at any time been married or in a civil partnership, the deceased person's domicile shall be ascertained by reference to the same factors as in the case of any other individual capable of having an independent domicile.”

Thus the law of Jersey provides for a married woman to have a domicile of choice in death, but not in life.

5 The reference in the probate law to civil partnerships is also somewhat surprising. As there is no way of determining who, in a civil partnership, is the “husband” and who the “wife”<sup>2</sup> it is not possible to determine who has the primary domicile and who has the domicile of dependence. As a consequence, the provisions in art 27 of the Civil Partnership (Jersey) Law 2012 are misleading. Article 27 stipulates that—

*“27 Jurisdiction*

- (1) The Court shall have jurisdiction to entertain proceedings for dissolution of the civil partnership or a legal separation order (‘separation order’) in respect of the civil partners if (and only if)—
  - (a) the parties to the civil partnership are domiciled in Jersey on the date when the proceedings are begun; or
  - (b) either of the parties to the civil partnership was habitually resident in Jersey throughout the period of one year ending with that date.”

6 It is clear from the wording (which replicates that in the corresponding article of the Matrimonial Causes (Jersey) Law 1949) of art 27(1)(a) that the assumption is that the parties share the same

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<sup>2</sup> Although the Income Tax (Jersey) Law 1961 has been amended (Part 16A, art 122C) to have partner A and partner B for income tax purposes instead of husband and wife, partner A being the one who fills in the tax return and being determined by age, partner A being the elder, unless, within 2 years of the civil partnership the parties choose to designate partner A as partner B and partner B as partner A!

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domicile, because art 27(1)(b) stipulates that there is jurisdiction if *either party* is habitually resident.

7 The passing of the Civil Partnership (Jersey) Law 2012, with the consequential amendments to other legislation was a missed opportunity to right a wrong for married women in Jersey. It would have been easy enough for the domicile of dependence for wives to have been abolished, as it was in England and Wales in 1974.<sup>3</sup>

8 Is it not time, almost 40 years after married women in England and Wales were afforded the right to choose their domicile, and almost 15 years after married women in Jersey were afforded the right to choose their domicile, that living, breathing, thinking, independent married women should have the right to choose their domicile?

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<sup>3</sup> Pursuant to s 1 Domicile and Matrimonial Proceedings Act 1973.