

## DIVORCE LAW REFORM

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*This article is based upon a Consultation Paper entitled “Divorce Reform” published by the Jersey Law Commission in December 2014. The author was the Topic Practitioner involved in the preparation of that Paper. The article examines the current law of divorce, analyses its defects, and suggests reforms.*

### **1. Introduction**

1 The Jersey Law Commission, in its topic paper published in October 2015 proposed that a completely new law should be brought in to replace the Matrimonial Causes (Jersey) Law 1949, the emphasis to be on no fault divorce and the resolution of differences outside the court process. A catalyst for the proposed reforms was the changes to family law brought about by the Civil Partnership (Jersey) Law 2012 and the proposed equal marriage legislation which will allow same sex couples to marry.

2 It is when the Civil Partnership Law is compared and contrasted with the Matrimonial Causes Law that it is easy to see the cracks in the original 1949 Law. Whilst the old Law has been amended to a significant extent, it is now no longer fit for purpose in the 21st century. The new law would emphasise reconciliation processes to save marriages where possible. Where this is not possible, the next best outcome is for the couple to be helped to reach an agreement for themselves about how the marriage will be ended. Under the proposed new Law, where there is no dispute in respect of children or finances, a divorce should be able to be fast-tracked to obtain a divorce order within three months. Court proceedings should be the exception rather than the rule, reserved for any issues that the couple have not been able to resolve themselves.

3 The recommendations are far-reaching. Adequate reform cannot be achieved by mere amendment to the existing legislation; therefore a new Family Law is proposed to implement the recommendations.

4 The main change being proposed is that the basis for obtaining a divorce (or dissolution of a civil partnership) should not be based on factors such as adultery or unreasonable behaviour, but rather no fault divorce without the need, as now, for a lengthy period of separation. A further proposed change is the abolition of the three-year waiting

period before divorce proceedings can be started, bringing Jersey law into line with the law in Guernsey and Scotland.

5 In relation to financial settlements, there are proposals for the court to order a financial “clean break” after divorce, that there should be provision for dispositions intended to defeat claims to be set aside and parties should be free to enter into legally binding agreements both before and during their marriage.

6 In terms of the process for divorce, a simpler and less adversarial approach is proposed. There are also plans for a Resolution Service, administered separately from the court system, to provide alternative dispute resolution services, mediation, arbitration and counselling services for couples who feel their marriage is coming to an end.

7 The starting point of the Law Commission report is that Jersey law on divorce should have the following aims—

- to support the institution of marriage;
- to encourage and assist parties to save their marriages wherever possible; and
- where a marriage has broken down irretrievably, it should be ended with the minimum distress to the parties and any children, so far as possible promoting a good continuing relationship between the parties and their children, with the minimum of cost.

## **2. Background**

8 Divorce is a matter of great significance to many people in Jersey—typically between 240 and 260 couples a year petition for divorce. 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) is an important matter in its own right, but inevitably also needs to take into account financial remedies on divorce and dissolution and separation.

9 The report concentrates on divorce reform. The Law Commission recognises that the breakdown of relationships between unmarried cohabiting couples is another area of private law which needs to be reformed but that is outside the remit of the divorce reform report.

10 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 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. It is for this reason that radical change is proposed with a move to “no fault” divorce by way of a new Family Law.

### 3. No fault divorce

11 Jersey, in common with 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 live in England and Wales. The 2015 Grant Thornton Matrimonial Survey showed that the highest priority for law reform among family lawyers was the introduction of no fault divorce.<sup>2</sup> Resolution, the former Solicitors Family Law Association reaffirmed its commitment to no fault divorce during its annual conference on 22 April 2016. The No Fault Divorce Bill was due to have its second reading in March 2016 and although this has been postponed, the subject remains on the agenda.

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<sup>1</sup> See Appendix: Chronology.

<sup>2</sup> Grant Thornton, *Matrimonial Survey 2015*, available online at [www.granthornton.co.uk/globalassets/1.../2015/matrimonial-survey-2015.pdf](http://www.granthornton.co.uk/globalassets/1.../2015/matrimonial-survey-2015.pdf).

12 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. The proposals in the Law Commission's report are being considered by the States of Jersey prior to the introduction of equal marriage in 2017. It is hoped that the new legislation will incorporate no fault divorce into the law at that time, or at least to set out a timetable for divorce reform.

13 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, the significant legislation in England being the Divorce Reform Act 1969 and the Matrimonial Causes Act 1973. One significant element of modern English divorce law (introduced into the English legislation by the Divorce Reform Act 1969) which has not been 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. It is unclear why this change was not incorporated into the Jersey law when others were but the suggestion has been made that it came down largely to the non-conformist religious views of States members at the time the Jersey law was amended following the changes in the English legislation.<sup>3</sup>

#### **4. Sacrament or contract?**

14 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 three the previous year, when a private Act of Parliament had been necessary. Before the coming into force of the Marriage Act 1836, there was no concept of civil marriage as is known today, only marriages celebrated in church

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<sup>3</sup> See fn 15 below.

being valid, in England. In Jersey these provisions were adopted in 1842.<sup>4</sup>

15 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>—

“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.”

16 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**

17 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 three-year bar**

18 No divorce or dissolution petition may be filed with the court until the parties have been married or in a civil partnership for more than three years. This three-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 more than 30 years ago and has never existed in Guernsey or Scotland. Today, when couples

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<sup>4</sup> *Loi (1842) sur L'État 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.

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 three years of marriage. An explanation may be that the three-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 increase stability during the “difficult early years”.<sup>6</sup> It was also considered that the three-year bar would deter hasty remarriage.

19 It is possible to obtain a divorce within three 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 three 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 three years have expired. This is the only reference to reconciliation in the whole of the current Matrimonial Causes (Jersey) Law 1949.

20 The inability to petition for divorce within three 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 three-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.

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<sup>6</sup> Law Commission of England and Wales, *Time Restrictions on Presentation of Divorce and Nullity*.

*Petitions* (1982) Law Com No 116 para 2.14.

<sup>7</sup> *Ibid.*

21 The Law Commission propose that the law in Jersey should be changed to be the same as in Guernsey and Scotland. 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 three years.

### **7. Grounds for divorce**

22 The grounds for divorce are found in art 7 of the Matrimonial Causes (Jersey) Law 1949. 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 two 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 five years immediately preceding the presentation of the petition; or
- (e) is serving a sentence of imprisonment for life or for a term of not less than 15 years.

23 Grounds (b), (d) and (e) are rarely used, if ever. Where (a) (adultery) is used as a ground, the co-respondent has to be named,<sup>8</sup> served and respond to the proceedings, unless there are “special grounds”<sup>9</sup> not to do so. In contrast, in England and Wales the adultery can be described as being with a person the petitioner does not wish to name (as opposed to “unknown”). This requirement for named respondents in Jersey 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—

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<sup>8</sup> Rule 6 Matrimonial Causes Rules 2005.

<sup>9</sup> Article 17(1) Matrimonial Causes (Jersey) Law 1949.

“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>10</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.

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

- 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
- have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition.

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

25 Very few divorces are defended,<sup>11</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>12</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

26 Unlike 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 reconciliation wherever possible. This will be easier to achieve if the requirement to apportion blame for the breakdown is removed. 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

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<sup>10</sup> *Livingstone-Stallard v Livingstone-Stallard* [1974] 2 All E R 766 at 771.

<sup>11</sup> In Jersey there have not been any defended divorces for over 20 years according to the Judicial Greffe.

<sup>12</sup> Article 10(1) Matrimonial Causes (Jersey) Law 1949.



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>13</sup> In Jersey, the law is such that reconciliation is actively discouraged.<sup>14</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.

27 The separation grounds for divorce were first introduced into Jersey law in 1979,<sup>15</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>16</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>17</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>18</sup>

28 The combination of the three-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

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<sup>13</sup> Section 2(5) Matrimonial Causes Act 1973.

<sup>14</sup> *A v B* [2010] JRC 157A.

<sup>15</sup> Following the passing of the Matrimonial Causes (Amendment No 5) (Jersey) Law 1978.

<sup>16</sup> Following the passing of the Matrimonial Causes (Amendment No 9) (Jersey) Law 1996.

<sup>17</sup> See *A v B* above, fn 14.

<sup>18</sup> Matrimonial Causes Law 1973 s 2(5).

within the existing law. The Law Commission recommend the abolition of the three-year bar and the establishment of a divorce process that encourages reconciliation.

### **9. Judicial separation**

29 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 ecclesiastical concept of a divorce *a mensa et thoro*.<sup>19</sup> Nowadays divorce and judicial separation are mostly 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 three years. There were three judicial separations in Jersey in 2012 and three in 2013.<sup>20</sup>

30 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. Neither husband nor wife should be liable to third parties for the debts of the other within marriage, following separation or on divorce.

31 Without the three-year bar in place before a divorce or dissolution is possible, there would no longer be any need for judicial separation as a concept. Once a marriage is at an end, divorce or dissolution would be a simple, single stage process.

### **10. Nullity**

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<sup>19</sup> A legal separation whereby parties no longer had to share “bed and board” but remained legally married.

<sup>20</sup> Judicial Greffe statistics.

32 The Matrimonial Causes (Jersey) Law 1949 is confusing in respect of nullity. Article 18 states 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;
- (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
- (iii) 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.

(2) 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.

(2A) 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.

(3) 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.

(4) 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.”

33 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.”

34 This difference of wording alone indicates that the reference to epilepsy, at least, is recognised not to be 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 was unfortunate that when the Civil Partnership Law was passed in 2012, the opportunity was not taken to amend the Matrimonial Causes Law in line with the new statute. The Law Commission recommends that the concept of voidable marriages is removed from the new law completely. A marriage will still be void *ab initio* if entered into by parties who are below the age of consent to marry, within the prohibited degrees of consanguinity and affinity (blood relations or relations through marriage) or already married to someone else (which would make the marriage bigamous). There will no longer be any need for petitions of nullity. Marriages will only be brought to an end by divorce or dissolution, a single, simplified process.

### **11. Connivance, condonation and collusion**

35 Under the Matrimonial Causes Rules 2005, r 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 removed from English law more than 50 years ago<sup>21</sup> and certainly seem to be inconsistent with the availability in Jersey of a one year separation divorce with consent. With no fault divorce there will be no need for the concepts of connivance, condonation or collusion to remain within the legislation.

### **12. Financial orders**

36 Under the Matrimonial Causes (Jersey) Law 1949 there is provision for financial orders to be made. Orders can be made in respect of—

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<sup>21</sup> Matrimonial Causes Act 1963.

- (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;
- (g) orders for sale of property; and
- (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>22</sup>

37 In terms of the powers of the court, these are quite wide ranging. The only area where there is a potential gap that does not 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 value of 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. The Law Commission recommends that the proposed new Law provides for pension sharing, to divide assets more easily when a marriage comes to an end.

### **13. Disclosure and tracing**

38 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 the extent of 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

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<sup>22</sup> *S v C* 2003 JLR N [24], *K v P* 2009 JLR N [42].

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>23</sup> all of which can be expensive and time consuming. The Law Commission’s recommendation is that the proposed new Law should enable the court to set aside dispositions which could defeat legitimate claims being made. This would simplify matters and would act as a deterrent to unscrupulous spouses tempted to try to put assets out of reach.

#### 14. Clean break

39 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 statute law in Jersey does not allow the court to order a clean break,<sup>24</sup> and the previous practice of allowing a clean break within a consent order (by dismissing art 33—Power to vary orders) has ceased following the decision in *C v D*.<sup>25</sup>

40 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. It is recommended that the proposed new Law should give a similar power to the Royal Court.

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<sup>23</sup> A Pauline action is a customary law action to set aside a disposition which has been made to avoid a debt. In England s 37 of the Matrimonial Causes Act 1973 gives the court a similar power in family cases.

<sup>24</sup> There is no equivalent in Jersey law to s 25A(3) Matrimonial Causes Act 1973.

<sup>25</sup> [2013] JRC 056.

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

**15. Procedure in financial claims**

41 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 at r 47—

**“Overriding objective**

- (1) The overriding objective of the Court is to deal with cases justly.
- (2) Dealing with a case justly includes, so far as is practicable—
  - (a) ensuring that the parties are on an equal footing;
  - (b) saving expense;
  - (c) dealing with the case in ways that are proportionate—
    - (i) to the amount of money involved,
    - (ii) to the importance of the case,
    - (iii) to the complexity of the issues, and
    - (iv) to the financial position of each party;
  - (d) ensuring that it is dealt with expeditiously and fairly; and
  - (e) allotting to it an appropriate share of the Court’s resources, while taking into account the need to allot resources to other cases.
- (3) 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.
- (4) The parties must help the Court to further the overriding objective.
- (5) The Court shall further the overriding objective by actively managing cases.
- (6) Active case management includes—
  - (a) encouraging the parties to co-operate with each other in the conduct of the proceedings;
  - (b) encouraging the parties to settle their disputes through mediation, where appropriate;
  - (c) identifying the issues at an early date;



- (d) regulating the extent of disclosure of documents and expert evidence so that they are proportionate to the issues in question;
- (e) helping the parties to settle the whole or part of the case;
- (f) fixing timetables or otherwise controlling the progress of the case;
- (g) making use of technology; and
- (h) giving directions to ensure that the trial of a case proceeds quickly and efficiently.”

42 The procedure for financial claims 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.

43 The Law Commission recommends that a similar procedure should be adopted in Jersey (questionnaires could be limited to those approved by the judge). Enshrining such a step within the Matrimonial Causes Rules would assist in reducing costs, increasing efficiency and reducing animosity between the parties.

## **16. Marital agreements**

44 One of the difficulties currently encountered 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 was originally established by case law in England<sup>27</sup> and followed by local decisions, can be departed from by use of the “s 25 factors” in particular the needs of the parties—

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

“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;
- (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 . . .”

45 The court in Jersey expressly sanctioned and encouraged reliance on these “s 25 factors” in *Howarth v McBride*<sup>28</sup> and subsequent cases.

46 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 s 25 Matrimonial Causes Act but also in art 29 of the Matrimonial Causes (Jersey) Law 1949 which specifies that—

“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

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<sup>28</sup> 1984 JJ 1.

<sup>29</sup> Pre-nuptial agreements.

<sup>30</sup> Post-nuptial agreements.

the marriage insofar as it may be inequitable to disregard it and to their actual and potential financial circumstances, order . . .”

47 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.

48 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.

49 The Law Commission recommends that in Jersey law there should be a presumption in favour of the terms of a marital agreement being binding on the parties if certain safeguards are in place.

### **17. Cohabitation**

50 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 the current report. It is a topic to which the Law Commission may return.

### **18. Reasons for reform**

51 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

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<sup>31</sup> 2012 (1) JLR 370.

<sup>32</sup> 2012 (2) JLR 226.

<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 No 170, HC 479.

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, even under the current fault based system, 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.

52 Where a divorce cannot proceed on the basis of separation, either adultery or 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.

53 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 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.

54 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 circumstances 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 three-year bar, forcing couples to remain married unless there are exceptional reasons, the requirement for a year of separation before a consensual divorce

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<sup>34</sup> The Discrimination (Jersey) Law 2013 is now in force, sex discrimination being outlawed from September 2015.

can be started and the existence of fault grounds only serve to make divorce more difficult and acrimonious than it need be.

55 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.

### **19. Mediation, arbitration and collaborative law**

56 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.

57 In Jersey, in October 2013, Family Mediation Jersey was launched and in March 2016 another mediation provider, Alternative Resolutions, was founded. Family Mediation Jersey has the support of the Royal Court and has experienced a steady stream of referrals from lawyers, the court and others since its inception. 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 usually cheaper than the parties only using lawyers.<sup>35</sup> The agreements reached in mediation can be turned into consent orders which can then be enforced if necessary.<sup>36</sup> The support of the court is fundamental to the 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

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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 and a half session 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 mediation work takes place intensively in meetings with the parties with no correspondence and few documents prepared, the overall 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.

of using non court based 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.

58 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. Family arbitration both in respect of finances and children matters is available in Jersey.<sup>37</sup> There is no specific legislation in respect of family arbitration but on the basis that anything not proscribed by law is legal, arbitration can be (and has been) used for family cases in Jersey. Once an arbitral award has been made, it needs to be converted to a consent order in the same way as a mediated settlement can be if it is to be enforceable between the parties. Any new divorce law could easily accommodate arbitration.

59 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 eight 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.

60 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.

61 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

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<sup>37</sup> The author is currently the only qualified family arbitrator in Jersey.

<sup>38</sup> See B Corbett, "Collaborative Law—How to have a Good Divorce" (2008) 12 *Jersey and Guernsey Law Review* 104, available online at [www.jerseylaw.je](http://www.jerseylaw.je).

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.

## **20. Recommendations for reform**

62 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. The States of Jersey have now confirmed that it is intended to change the law in Jersey to allow same sex marriage and also to incorporate reform of divorce law at the same time. The new Equal Marriage legislation is due to be brought into force during 2017.

63 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; and
  - without costs being unreasonably incurred; and
- any risk of violence or abuse to the parties or any children to be, as far as possible, removed.

## **21. A new divorce law**

64 The divorce process should be that (1) it should be possible to obtain a divorce without apportioning blame. If a couple agree that their marriage is at an end they should be able to apply jointly for a divorce and, in the case of couples without children and where finances are agreed, this could be an administrative process, without necessarily the need for judicial oversight. The process could be swift, perhaps as little as three months; and (2) where one party wishes to divorce but the other is unsure or would rather not, instead of having to come up with examples of unreasonable behaviour, or name and

shame a spouse and a co-respondent, an application for a divorce should be capable of being made by one party to a marriage, such an application to be made regardless of the length of the marriage, any separation or any behaviour of either party.

### ***A Resolution Service***

65 Once the application is made and sent to the other party (by post or email) both parties should be referred to a new service: “the Resolution Service”. This would be administered by a body separate from the court. This could be Family Mediation Jersey, who already has a structure of a management committee and mediators, or some new body. The idea would be that both parties are referred to the organisation and can attend either together or apart or access information through the internet. The organisation would provide alternative dispute resolution services, mediation and arbitration typically, but also counselling services. In the USA the concept of the “divorce coach” is well known and it is recognised by people working with divorcing couples that frequently they are affected differently by the divorce process and their emotional readiness for negotiation may not always be the same.

66 This can lead to inequalities as a more dominant spouse (perhaps with a more assertive lawyer) can achieve a better outcome by proceeding when the other spouse is emotionally vulnerable or has not yet come to terms with the breakdown of the marriage. If arrangements are made in such circumstances they may not always be the best for the family as a whole and frequently children are brought into the fray as pawns in their parents’ power play. This is not good for the family, increases costs and court time and is not even satisfying for lawyers. Antagonistic parties who run up large bills are rarely happy clients, and lawyers, who would seem to be gaining from conflict, are frequently unable to collect fees for all the work undertaken.

67 As well as counselling, negotiation, mediation and arbitration services it would be appropriate for the Resolution Service to also provide legal and financial information to assist parties. It is proposed that legal aid for court applications would not be available until parties had utilised the relevant services on offer. This should not be just as a box ticking exercise but a real attempt to resolve matters.

68 In respect of children, the proposed Resolution Service should provide access to the Children in Mind course run by The Bridge, and support from JFCAS officers or others experienced in understanding how relationship breakdown can affect children. Family Mediation Jersey now has mediators trained in Direct Consultation with Children. They are skilled at showing parents how best to work together to help their children through the difficulties they will face. Access to other



materials such as DVDs, interactive websites, books, parenting plans, contact charts and children's books should also be provided to spouses. And there is no reason to limit this Resolution Service to married couples; others going through relationship breakdown should be able to access the support provided as they are currently able to with mediation.

69 It should also be possible for parties to work with their lawyers to resolve matters without court proceedings, through collaborative law, lawyer led mediation, round table meetings and general negotiation if they wish. Some parties may be reassured by having lawyer involvement as they use the services of the Resolution Service. But whatever methods of dispute resolution are used, parties will need to show that they have made serious efforts to resolve matters through other means before being able to make an application to court.

## **22. Court process**

70 Once parties have been through and had the benefit of the services available to them through the Resolution Service, then, and only then, should they be able to access the court for a determination of any outstanding issues by a judge. Hopefully, having been able to utilise the services available, most couples will have been able to resolve their disputes and not need the courts to decide things for them. That will leave more court resources for the most difficult cases and possibly, with appropriate training, enable the family registrars to have time to deal with at least some public law children cases, thus reducing the burden on the Royal Court.

71 The Law Commission recognises that the proposed Resolution Service will need funding. Premises and administrative staff will be needed as well as paid counsellors and mediators. Legal and financial advisors would probably be otherwise in private practice, offering their services on fixed fee basis as tribunal chairs are paid. The lawyers would need to be specialist family lawyers so it would be difficult to incorporate the scheme into the current legal aid system, but paying a lawyer a day rate for providing legal information to many couples, either individually or in group sessions would be cheaper than hourly rates for work undertaken. Armed with information (as opposed to specific legal advice), parties would be able to enter into supported negotiations (supported by a lawyer if desired by the parties) or mediation and reach their own settlements.

72 The Law Commission has not been able to carry out a costing exercise. They acknowledge that funding such a Resolution Service may not be cheaper than the current system but it would be a reallocation of costs from the courts to the Resolution Service. A greater emphasis on parties reaching settlement through negotiation

and mediation will reduce the legal costs of the parties and the emotional costs. Reducing harmful acrimony will result in a reduction of hidden costs such as the need to access mental health and other medical services for both adults and children and potentially even a reduction in criminal justice costs. A better service.

### **23. Procedure**

73 The Law Commission proposes 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.

74 Both parties should be provided with information detailing the purpose and availability of counselling, mediation, collaborative law, arbitration, parenting plans, parenting classes, legal information, financial information and other services which may assist. This would be provided through the Resolution Service. Access to, and information about, the Resolution Service would be available from CAB, GPs, Relate, lawyers and the internet. Legal aid should not be available until the Resolution Service has been used.

75 Parties should be given the opportunity to reconcile and be provided with information about Relate.

76 A joint application where there is no dispute in respect of children or finances should be capable of being “fast tracked” to final order of divorce within three months. Such applications would need little or no judicial consideration.

77 In all other applications for divorce there should be a period of six months from the date of the Statement of Marital Breakdown to enable discussions to take place about finances and children, after which time (if it is evidenced that both parties to the marriage are aware of the divorce proceedings) the divorce would be finalised unless either party applied to the court for a delay. The court should have a wide discretion in this regard, to be used sparingly. Equally, the court should be able to reduce the waiting time if there is a good reason to do so, for example a lengthy period of separation prior to the issue of the Statement of Marital Breakdown. With improved arrangements for financial provision there should be no need for a divorce to be prevented to avoid financial hardship to either party.

78 There should be no requirement for parties to live separately, although it is anticipated that many will wish to do so. 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).

79 Applications to the court in respect of finances or children should only be possible after other methods of dispute resolution have been tried except in exceptional circumstances, such circumstances to be determined by the court. All matters relating to children should continue to be dealt with under the Children (Jersey) Law 2002.

#### **24. Financial remedies**

80 The Law Commission also recommend that the range of financial remedies open to the court to order should be expanded to include pension sharing orders (which will need further consequential legislation) and orders to set aside financial dispositions where appropriate.

81 The court should be able to impose a clean break on parties.

#### **25. Procedure (financial remedies)**

82 Full disclosure is to be encouraged right from the start of a divorce to enable negotiations and dispute resolution to take place.

83 If, after all efforts have been made to resolve matters without recourse to the court, agreement can still not be reached, either or both parties should be able to make an application to the court for a financial remedy. As now, affidavits of means and financial information should be exchanged. This procedure should be altered to enable the court to have oversight of the questions asked in questionnaires, with questions being approved by the court prior to replies being requested. The use of Case Review Hearings as Financial Dispute Resolution hearings where the judge can assist the parties by giving an indication of her view of the case in order to narrow issues should be explored. Historically this has not been possible due to the limited number of Registrars (judges in the Family Court) and the potential for conflicts. This could be remedied by the use of Assistant Registrars similar to Assistant Magistrates, drawn from the ranks of senior family practitioners, paid on a *per diem* basis.

#### **26. Nullity**

84 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 three-year bar in any event, or for those couples who did not want to divorce for religious reasons, 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> The fact that the parties to the marriage are of the same sex will no longer make a marriage void once same sex couples can marry following the implementation of the equal marriage legislation in 2017.

## 27. Marital agreements

85 The Law Commission proposes 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 have particular importance to couples who have children from previous relationships or who have specific assets which they want to protect for specific purposes.

86 In terms of marital agreements, the Law Commission proposes 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. The proposal is<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; and
- enforcing the agreement would cause substantial hardship to either party or to any minor child of the family.

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

<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 February 2014.

87 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.

## 28. Conclusions

88 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.

## Appendix: Chronology

- 1842 Civil marriage available in Jersey
- 1949 Matrimonial Causes (Jersey) Law 1949
- 1953 Separation and Maintenance Orders (Jersey) Law 1953
- 1973 Matrimonial Causes (Jersey) Law 1949 amended to allow some financial orders to be made against wives as well as husbands.
- 1979 Divorce possible on the basis of two years' separation with consent or five years without.
- 1983 Wives able to issue divorce proceedings after three years residence in the Island even if their husbands were not domiciled in Jersey.
- 1986 Power to order sale of property
- 1996 Actions no longer possible for Restitution of conjugal rights. Separation divorce possible after one year with consent and two years without.
- 2005 Cruelty replaced as a ground by behaviour. Proceedings can be issued after one year's residence in the Island.
- 2005 Coming into force of the Children (Jersey) Law 2002.
- 2005 Matrimonial Causes Rules in force.
- 2012 Civil Partnership (Jersey) Law 2012.

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