STATES OF JERSEY

r

DRAFT MATRIMONIAL CAUSES (AMENDMENT No. 11) (JERSEY) LAW 200-

---

Lodged au Greffe on 20th May 2003
by the Legislation Committee

STATES GREFFE

Jersey

DRAFT MATRIMONIAL CAUSES (AMENDMENT No. 11) (JERSEY) LAW 200-

European Convention on Human Rights

The President of the Legislation Committee has made the following statement –

In the view of the Legislation Committee the provisions of the Draft Matrimonial Causes (Amendment No. 11) (Jersey) Law 200- are compatible with the Convention Rights.

(Signed) **Deputy R.G. Le Hérissier of St. Saviour**

REPORT

The Legislation Committee has in recent months considered proposals from the Jersey Law Society for reform of the Matrimonial Causes (Jersey) Law 1949, as amended ("the 1949 Law"). The main proposals were –

(a) to abolish the ground of cruelty in petitions for divorce and replace it with the ground of 'unreasonable behaviour'; and

(b) to equalise the position of the husband and wife in respect of their being able to petition for divorce after a certain qualifying period of residence in the Island.

The Committee itself went on to consider a further aspect of the 1949 Law, namely, the ground of adultery and whether it should be a requirement that the petitioner not only prove the allegation of adultery, but also be required to show that he or she found it intolerable to live with the respondent as a result of the adultery.

The following report deals –

Firstly, with the ground of cruelty and whether it should be replaced with the ground of unreasonable behaviour.

Secondly, with the ground of adultery and whether the petitioner should be required to show that the adultery has made it intolerable to live with the respondent.

Thirdly, with the question of equalising the position of the husband and wife in bringing petitions for divorce after certain periods of residence in the Island.

Cruelty/unreasonable behaviour

The 1949 Law includes cruelty as one of the grounds upon which a spouse may petition for divorce or judicial separation. The same ground existed in the law of England and Wales until the enactment of the Divorce Reform Act 1969 under which one of the ways of proving that the marriage had broken down was to show –

> "*that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent*".

In Jersey, however, the ground of cruelty remains. There must, as a general rule, be hurt or injury to health or a reasonable apprehension thereof. Generally speaking, for cruelty to be proved –

(i) the conduct complained of must be of a grave and weighty nature constituting cruelty in the ordinary sense of that word such that the other spouse should not be called on to endure it and such as to make continued cohabitation virtually impossible;

(ii) it is not necessary to establish a desire or intention to injure. If there is conduct dangerous in itself (for example gross physical violence) a decree will be granted whatever the respondent's state of mind. But in borderline cases, the existence of an intention is relevant: for example a man who, knowing that his wife is severely allergic to dogs, deliberately leaves her amongst them with no means of escape would be guilty of cruelty; if he did not know of his wife's condition, his behaviour (however thoughtless) could not be said to be so;

(iii) the question is, not what are the standards of a reasonable man or woman but whether *this* conduct by *this* man to *this* woman, or *vice versa*, is cruelty. The personal characteristics of each spouse may be taken into account in deciding (a) whether there is anything about the respondent to excuse conduct that would otherwise be cruel, and (b) whether a hypersensitive petitioner can establish cruelty where a more robust petitioner would have been left unmoved. These questions only become relevant in borderline cases: in clear cases of physical violence, there is no room for argument about the expectations of the parties.

Some common examples of cruelty are –

(i) conviction of criminal offences which involve directly or indirectly the other party, or are particularly relevant to their relationship: for example a persistent course of dishonesty and fraud causing deep embarrassment to the other spouse;

(ii) sexual offences, such as indecent exposure, or sexual assaults on the wife's children;

(iii) sexual matters: for example the practice of perversions, excessive sexual demands, infecting the petitioner with venereal disease, submitting to a sterilisation operation against the wishes of the other party;

(iv) physical violence, severe neglect or persistent insults, abuse and obscene language.

In England and Wales, the substitution for cruelty of unreasonable behaviour means that the behaviour of the respondent must be looked at in the light of all the surrounding circumstances, including the degree of any provocation. The court must consider the effect of the respondent's behaviour, whether such behaviour is voluntary or involuntary, on the particular petitioner. It is the state of the relationship between the parties that is being examined; not whether the conduct is good or bad.

The court must consider not only the behaviour of the respondent but the character, personality, disposition and behaviour of the petitioner. It is not possible to provide an exhaustive list of what does or does not amount to unreasonable behaviour, but the following examples may assist.

A spouse's continued financial irresponsibility may, in certain circumstances, constitute unreasonable behaviour. A husband's dogmatic and chauvinistic behaviour has been held to be behaviour with which a wife could not reasonably be expected to live. The actions of a spouse suffering from mental illness and which were involuntary have been held not to constitute unreasonable behaviour. A party's disinclination and boredom with the marriage does *not* entitle the court to dissolve it. Association, not resulting in actual sexual intercourse, with a member of the opposite sex might constitute behaviour of a kind to justify a decree of divorce.

Unreasonable behaviour is often approached by considering whether any right thinking person would come to the conclusion that the respondent in question had behaved in such a way that the petitioner could not reasonably be expected to live with the respondent taking into account the whole of the circumstances and the characters and personalities of the parties.

The arguments about the earlier ground of cruelty were well rehearsed in England and Wales prior to the enactment of the Divorce Reform Act 1969. The Archbishop of Canterbury formed a Committee that produced a report entitled "Putting Asunder". Amongst its many conclusions, the report stated that the primary and fundamental question in divorce proceedings should be –

> "*Does the evidence before the court reveal such failure in the matrimonial relationship, or such circumstances adverse to that relationship, that no reasonable probability remains of the spouses again living together as husband and wife for mutual comfort and support?*"

If so, the legal tie should be dissolved. The Report was referred by the Lord Chancellor to the Law Commission. The Commission took as its basic assumption that –

> "*a good divorce law should seek to (i) buttress, rather than to undermine, the stability of marriage; and (ii) when, regrettably, a marriage has irretrievably broken down, enable the empty legal shell to be destroyed with the maximum fairness, and the minimum bitterness, distress, and humiliation*".

The Commission went on to say –

> "*First, the law should make it possible to dissolve the legal tie once that has become irretrievably broken in fact. If the marriage is dead, the object of the law should be to afford it a decent burial. Secondly, it should achieve this in a way that is just to all concerned, including the children as well as the spouses, and which causes them the minimum of embarrassment and humiliation. Above all, it should seek to take the heat out of the disputes between husband and wife and certainly not further embitter the relationships between them or between them and their children. It should not merely bury the marriage, but do so with decency and dignity in a way which will encourage harmonious relationships between the parties and their children in the future*".

Reverting to the present position in Jersey, representatives of the Law Society made the following observations about the 1949 Law –

> "[We . . .] *have from time to time come across clients who could well successfully petition on* [the ground of cruelty] *but are reluctant to do so out of embarrassment or, indeed, fear of further maltreatment. Thus, a number are prepared to continue to live in some state of misery when this should not be necessary . . .*
>
> *Under our present law, parties may divorce after living apart for more than one year with both parties consenting, the parties living apart for more than two years where the consent of the other is not necessary, cruelty and adultery. Many petitions proceed on the first two grounds . . . there are numbers of situations where separations do not occur frequently on financial grounds and there may well be no adultery which is at least provable. Were unreasonable behaviour to be a ground, the spouse so complaining could at least petition and once that were set in motion then it would become possible for*

other ancillary matters to be more readily resolved or argued before the Court if necessary. . . . [To] expect a spouse (usually the wife) to put up with behaviour which falls short of cruelty but with no other available ground is not a very desirable state of affairs."

The ground of unreasonable behaviour is of course now already available to secure an order under the Separation and Maintenance Orders (Jersey) Law 1953, as amended[1].

The Legislation Committee believes that there is much force in the points made above. The Committee also feels that the arguments advanced decades ago in England and Wales have the same force today in Jersey. The law should achieve the dissolution of the legal tie in such a way as to cause the parties the minimum of embarrassment and humiliation. The continuing existence of the ground of cruelty, far from taking the heat out of the disputes between husband and wife, seems more calculated further to embitter the relationships between them or between them and their children. To cite the Law Commission, the law "should not merely bury the marriage, but do so with decency and dignity and in a way which will encourage harmonious relationships between the parties and their children in the future".

The Legislation Committee, having taken all of the above into consideration, has concluded that the existing ground of cruelty in proceedings for divorce or judicial separation should be abolished and that, in its place, there should be the ground that 'the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent'. The *projet de loi* would provide accordingly.

Adultery

Article 7 of the 1949 Law provides that it shall be a ground for divorce that the respondent "*has, since the celebration of the marriage, committed adultery*". The Law goes on to provide (in Article 9) that where the ground of the petition is adultery, the court must be satisfied that the petitioner "*has not, in any manner, been accessory to, or connived at, or condoned, the adultery*". In spite of this, adultery - without more - stands as a matrimonial offence sufficient in itself to constitute a ground for the dissolution of a marriage.

This ground for divorce has deep historical and, indeed, Biblical roots.

In the 19th Century, in England and Wales (amongst many other countries), adultery was regarded as sufficiently heinous to justify the dissolution of the marriage bond. However, the mid-Victorian attitude to sexual morality was such that, whilst one act of adultery by a wife was considered unforgivable and gave the husband the power to petition for divorce, she could not (save in very exceptional circumstances) rely even on a series of associations by him. Eventually, the Matrimonial Causes Act 1923 enabled the wife to petition on the ground of adultery in the same way as the husband.

By 1969, with the enactment of the Divorce Reform Act, the emphasis shifted from attempting to identify the "guilty" and the "innocent" party to the marriage to one of examining the true state of the marriage. A single act of adultery did not *necessarily* mean that the marriage was irretrievable. Therefore, in order for the court to be able to look at the reality of the state of the marriage, the Act required a petitioner seeking divorce on the ground of adultery to prove also that he or she found it intolerable to live with the respondent.

Jersey law still reflects the pre-War attitude: a single act of adultery, without more, is a sufficient ground for divorce in the absence of condonation or connivance.

In the opinion of the Committee, the court ought to be able to look at the reality of the situation when it considers the state of a marriage. In the modern world, it does not follow that one act of adultery spells the death of the marriage. If, on the other hand, the adultery is such that the petitioner finds it intolerable to live with the respondent, then there is true evidence that the marriage cannot be saved. The Committee has concluded that the existing ground in Article 7 of the 1949 Law ought to reflect this reality.

Accordingly, the *projet de loi* would amend the 1949 Law to substitute for the existing ground of adultery the ground that –

"*The respondent has, since the celebration of the marriage, committed adultery and the petitioner finds it intolerable to live with the respondent.*"

The qualifying period of residence

Under the 1949 Law, a husband may only petition for divorce if he is domiciled in the Island but a wife may petition if she has been ordinarily resident in Jersey for a period exceeding three years immediately preceding the presentation of her petition. A wife has the domicile of her husband and it is open to her to petition on that ground (assuming the husband retains Jersey domicile) if she has not been resident here for the requisite period.

In England and Wales today, one year's habitual residence (by either party) suffices to give the court jurisdiction to entertain divorce petitions. But this was not always the position. Jurisdiction used to be based solely on domicile and a court could pronounce a decree only if the husband (and, therefore, the wife) was domiciled in England when the petition was presented. Eventually the law was changed so that the wife was able to petition if (a) her husband had deserted her or had been deported and had been domiciled in England immediately before the desertion or deportation, or (b) if she had been ordinarily resident in England for three years immediately preceding the presentation of the petition and her husband was not domiciled in any other part of the United Kingdom or in the Channel Islands or the Isle of Man.

Nevertheless, hardship remained. A man habitually resident in England but domiciled abroad could never obtain a divorce in England. A woman in this position could do so if she could bring herself within one of the statutory exceptions and it was anomalous that she alone could rely on three years' residence in England. If the parties were British subjects domiciled in a country that based its divorce jurisdiction on nationality, they could get a divorce in neither country. Consequentially, the Law Commission recommended that jurisdiction should be extended to enable either spouse to petition if he or she had been habitually resident in England for a year. This recommendation was implemented by the Domicile and Matrimonial Proceedings Act 1973.

The anomalies described above in relation to the law of England and Wales prior to its reform are anomalies that exist still in the 1949 Law.

The Legislation Committee has concluded that the jurisdiction of the Family Division of the Royal Court should be extended to enable either spouse to petition if he or she has been habitually resident in the Island for one year. The *projet de loi* would provide accordingly.

Summary of reforms

1. The existing ground of cruelty in proceedings for divorce or judicial separation should be abolished and replaced with the ground that "the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent".
2. The existing ground of adultery in proceedings for divorce or judicial separation should be replaced with the ground that "the respondent has committed adultery and that the petitioner finds it intolerable to live with the respondent".
3. The jurisdiction of the Family Division of the Royal Court should be increased to enable either spouse (irrespective of the husband's domicile) to petition if he or she has been habitually resident in the Island for one year.

Financial/manpower statement

There are no financial or manpower implications for the States arising from the adoption of this draft Law.

European Convention on Human Rights

Article 16 of the Human Rights (Jersey) Law 2000 will, when brought into force by Act of the States, require the Committee in charge of a Projet de Loi to make a statement about the compatibility of the provisions of the Projet with the Convention rights (as defined by Article 1 of the Law). Although the Human Rights (Jersey) Law 2000 is not yet in force, on 12th May 2003 the Legislation Committee made the following statement before Second Reading of this projet in the States Assembly –

In the view of the Legislation Committee the provisions of the Draft Matrimonial Causes (Amendment No. 11) (Jersey) Law 200- are compatible with the Convention Rights.

Explanatory Note

This draft Law amends and modernises the grounds for petition for divorce and seeks to equalise the respective positions of husband and wife in respect of their ability to petition for divorce, judicial separation and nullity of marriage.

Article 1 is an interpretation provision.

Article 2 re-states with amendments the jurisdiction of the courts in relation to divorce and judicial separation. The amendment enables either the husband or the wife to petition for divorce, judicial separation or nullity of marriage after one year's residence in Jersey.

Article 3 adds to the existing ground for divorce of adultery the requirement that, as a result, the petitioner finds it intolerable to live with the respondent. The existing grounds for divorce of cruelty, rape, sodomy or bestiality are subsumed into a new ground, that the respondent behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent.

Article 4 makes amendments consequent on Article 3 and deletes references to the former grounds for divorce.

Article 5 makes an amendment consequent on Article 3 and deletes a reference to the former grounds. It also makes an amendment that is necessary because of a recent amendment to the Separation and Maintenance Orders (Jersey) Law 1953.

Article 6 makes an amendment consequent on Article 3 and substitutes a reference to the new grounds.

Article 7 makes an amendment consequent on Article 3 and substitutes a reference to the new grounds.

Article 8 makes an amendment that is necessary as the result of a recent amendment to the *Loi (1880) sur la propriété foncière.*

Article 9 removes a provision which has become redundant following the abolition of the concept of adultery as a matrimonial offence.

Article 10 is a savings provision, protecting the rights of parties to proceedings in force at the date of commencement.

Article 11 is a citation and commencement provision.

Jersey

DRAFT MATRIMONIAL CAUSES (AMENDMENT No. 11) (JERSEY) LAW 200-

A LAW to amend further the Matrimonial Causes (Jersey) Law 1949.[2]

Adopted by the States *[date to be inserted]*
Sanctioned by Order of Her Majesty in Council *[date to be inserted]*
Registered by the Royal Court *[date to be inserted]*

THE STATES, subject to the sanction of Her Most Excellent Majesty in Council, have adopted the following Law –

1

In this Law, "the principal Law" means the Matrimonial Causes (Jersey) Law 1949.[3]

2

For Article 6 of the principal Law[4] there shall be substituted the following Article –

"6 Jurisdiction

(1) The court shall have jurisdiction to entertain proceedings for divorce or judicial separation if (and only if) –

(a) the parties to the marriage are domiciled in Jersey on the date when the proceedings are begun; or

(b) either of the parties to the marriage was habitually resident in Jersey throughout the period of one year ending with that date.

(2) The court shall have jurisdiction to entertain proceedings for nullity of marriage if (and only if) –

(a) the parties to the marriage are domiciled in Jersey on the date when the proceedings are begun; or

(b) either of the parties to the marriage –

(i) was habitually resident in Jersey throughout the period of one year ending with that date, or

(ii) died before that date and either was at death domiciled in Jersey, or had been habitually resident in Jersey through the period of one year ending with the date of death.

(3) The court shall have jurisdiction to entertain proceedings for death to be presumed and a marriage to be dissolved if (and only if) the petitioner -

(a) is domiciled in Jersey on the date when the proceedings are begun; or

(b) was habitually resident in Jersey throughout the period of one year ending with that date.

(4) The court shall, at any time when proceedings are pending in respect of which it has jurisdiction by virtue of paragraph (1) or (2) of this Article (or by virtue of this paragraph), also have jurisdiction to entertain other proceedings, in respect of the same marriage, for divorce, judicial separation or nullity of marriage, notwithstanding that jurisdiction would not be exercisable under paragraph (1) or (2) of this Article.".

3

In Article 7(1) of the principal Law[5] –

(a) in sub-paragraph (a) after the word "adultery" there shall be added the words "and the petitioner finds it intolerable to live with the respondent";

(b) in sub-paragraph (c) for the words "treated the petitioner with cruelty" there shall be substituted the words "behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent";

(c) sub-paragraph (f) shall be repealed; and

(d) the words "and by the wife on the ground that the husband has since the celebration of the marriage been guilty of rape" shall be repealed.

4

In Article 9 of the principal Law[6] –

(a) in paragraph (2) –

(i) for the words "Subject to the provisions of paragraphs (2A), (2B), (3), (4) and (5) of this Article" there shall be substituted the words "Subject to the provisions of paragraphs (2A), (2B), (3) and (4) of this Article", and

(ii) sub-paragraph (b) shall be repealed;

(b) in paragraph (2B) the words "(b) or" shall be repealed;

(c) in paragraph (3) –

(i) sub-paragraphs (b) and (c) shall be repealed, and

(ii) in sub-paragraph (d) the words "adultery or", in both places where they appear, shall be repealed; and

(d) paragraph (5) shall be repealed.

5

In Article 13 of the principal Law[7] –

(a) in paragraph (1) after the expression "1953" there shall be inserted the words ", as amended"; and

(b) in paragraph (2) the words "adultery, desertion or other" shall be repealed.

6

In Article 14 of the principal Law[8] for the words “on the ground of the adultery, cruelty or desertion of the petitioner” there shall be substituted the words “on a ground mentioned in Article 7(1)(a), (b) or (c) of this Law”.

7

In Article 15(1) of the principal Law[9] for the words “on the ground of adultery” on both occasions where they appear there shall be substituted the words “alleging adultery”.

8

In Article 29(1)(d) of the principal Law[10] after the word “foncière” there shall be inserted the words “, as amended”.

9

In Article 41 of the principal Law[11] the words “but no witness in any such proceedings, whether a party thereto or not, shall be liable to be asked or be bound to answer any question tending to show that he or she has been guilty of adultery unless he or she has already given evidence in the same proceedings in disproof of the alleged adultery” shall be repealed.

10

This Law shall not affect the rights of any party to any proceeding instituted in the Family Division of the Royal Court before the coming into force of this Law.

11

This Law may be cited as the Matrimonial Causes (Amendment No. 11) (Jersey) Law 200- and shall come into force on such day as the States may by Act appoint.

[1] *See Article 2 as substituted by L.31/2000 – which came into force on 20th October 2000.*

[2] *Tome VII, page 580, Tome VIII, page 207, Volume 1961-1962, page 125, Volume 1968-1969, page 424, Volume 1979-1981, page 1, Volume 1982-1983, page 155, Volume 1986-1987, page 21, Volume 19941995, page 611, Volume 1996-1997, page 313, Volume 1998, page 185, Volume 2000, page 819 and Volume 2001, page 295.*

[3] *Tome VII, page 580, Tome VIII, page 207, Volume 1961-1962, page 125, Volume 1968-1969, page 424, Volume 1979-1981, page 1, Volume 1982-1983, page 155, Volume 1986-1987, page 21, Volume 19941995, page 611, Volume 1996-1997, page 313, Volume 1998, page 185, Volume 2000, page 819 and Volume 2001, page 295.*

[4] *Tome VII, page 583, Volume 1982-1983, page 155 and Volume 1996-1997, page 314.*

[5] *Tome VII, page 584 and Volume 1979-1981, page 1.*

[6] *Tome VII, page 585, Volume 1979-1981, page 2, Volume 1994-1995, page 611 and Volume 1996-1997, page 314.*

[7] *Tome VII, page 587.*

[8] *Tome VII, page 588.*

[9] *Tome VII, page 588.*

[10] *Tome VII, page 595.*

[11] *Tome VII, page 600.*