

STATES OF JERSEY

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DRAFT LEGITIMACY (AMENDMENT) (JERSEY) LAW 200

Lodged au Greffe on 7th December 2007
by the Chief Minister

STATES GREFFE



Jersey

DRAFT LEGITIMACY (AMENDMENT) (JERSEY) LAW 200

European Convention on Human Rights

In accordance with the provisions of Article 16 of the Human Rights (Jersey) Law 2000 the Chief Minister has made the following statement –

In the view of the Chief Minister the provisions of the Draft Legitimacy (Amendment) (Jersey) Law 200- are compatible with the Convention Rights.

(Signed) **Senator F.H. Walker**

REPORT

The presumption of legitimacy

1. The presumption of legitimacy is the presumption that the child of a married woman born during the marriage is taken automatically to be the husband's child. The presumption existed in Norman customary law – as in a great many other European legal systems – and was expressed in the maxim *pater est is quem nuptiae demonstrant* (*celui est le père que le mariage désigne* or, in English, 'the father is whom the marriage shows')^[1]. It has been given statutory force in the Legitimacy (Jersey) Law 1973 ("the 1973 Law") Article 2(2) of which provides that –

“The fact that a child is born or conceived during the subsistence of a lawful marriage raises a presumption that the husband is the father of the child . . .”

2. This protected the institution of marriage from the intrusion into the life of a family of the lover of an adulterous wife. The presumption, however, was not irrefutable. The husband could (if he wanted to) refuse to accept the life-time burden of bringing up another man's child. Thus, evidence that the husband was incapable of being the father (by absence, impotency, *etc.*) could displace the presumption.

3. This is reflected in Article 2(2) of the 1973 Law under which the presumption may be rebutted by “*strong and satisfactory evidence*” that the husband was sexually impotent or was physically separated from the mother at the time of conception; or that the mother was guilty of adultery and that the father did not have marital intercourse with her at the time of conception.

4. If the child was born within the first 180 days of the marriage, the presumption may be rebutted by showing that the husband did not have opportunities for pre-marital intercourse with the mother at the time of conception – but no evidence is admissible on this ground if the husband knew of the pregnancy at the time of the marriage or if he joined in registering the birth.

5. The draft Law would replace Article 2(2) with the following statement of the presumption of legitimacy and the single ground on which it would be able to be rebutted:

“The fact that a child is born or conceived during the subsistence of a lawful marriage raises a presumption that the husband is the father of the child which may be rebutted only by strong and satisfactory evidence to the contrary.”

6. This would not weaken the presumption of legitimacy as such, but would remove the list of *specific* grounds on which the presumption was able to be rebutted – because those grounds have to all intents and purposes become redundant with the advent of accurate blood and DNA testing. This is not to say that they could never be invoked in any case where, for some reason, a blood test was not feasible; but it would mean that they were no longer the *exclusive* grounds for rebutting the presumption. The requirement for “*strong and satisfactory evidence*” would remain, but that evidence would be able to take the form of the results of a DNA test or the like, as well as the form it takes at present.

7. The one provision that would fall away, however, is the bar on adducing evidence in support of a petition in respect of a child born within the first 180 days of marriage where the husband was aware, at the time of the marriage, that the mother was pregnant or was a party to the registration of the birth of the child (*see* paragraph 4 above).

Right to petition the Royal Court

8. The draft Law would also amend Article 7 of the 1973 Law. Article 7 is concerned with who may apply to the Royal Court for a decree declaring that a child is illegitimate (*i.e.* rebutting the presumption of legitimacy).

9. As mentioned earlier, what lay behind the presumption was the protection of the institution of marriage – so much so that only certain persons were ‘qualified’ to apply for a declaration of illegitimacy. Any man claiming to be the father did not, by reason of that claim alone, have a right to ask the Court to declare that the child was not fathered by its mother's husband. Even the mother herself had no such right.

10. So it is that Article 7(1) of the 1973 Law restricts the range of persons who may apply to the Court to any person who “...*is presumed to be the father of a child born in Jersey or born abroad of a woman who was domiciled in Jersey at the time of the birth, or any person whose right to any immovable or movable estate situate*

in Jersey is affected by the legitimacy of a child, whether born in Jersey or elsewhere”.

11. In the past, preventing the ‘real’ father from bringing a petition – even if it meant living a lie – was understandable given the deep social stigma and loss of rights and status that used to flow from illegitimacy. Better the pretence of legitimacy than the reality of bastardy. Nowadays, with accurate blood and DNA testing, not to mention less bigotry in matters relating to illegitimacy, the parties – as well as the Court – tend more to be concerned with ascertaining the truth than with shielding a child, or for that matter a mother or a family, from any perceived stigma. The draft Law would take account of this by widening the scope of Article 7 of the 1973 Law so as to enable a man who claims to be the father of a child to make an application to the Court for a declaration of illegitimacy; and also to enable the mother of the child herself to make such an application.

Financial/manpower implications

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

European Convention on Human Rights

Article 16 of the Human Rights (Jersey) Law 2000 requires the Minister 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). On 6th December 2007 the Chief Minister made the following statement before Second Reading of this Projet in the States Assembly –

In the view of the Chief Minister the provisions of the Draft Legitimacy (Amendment) (Jersey) Law 200- are compatible with the Convention Rights.

Explanatory Note

Article 1 defines the Legitimacy (Jersey) Law 1973 as the “principal Law”.

Article 2 amends Article 2 of the principal Law. Article 2 of the principal Law creates the presumption that a child born or conceived during a marriage is the child of the husband. Currently, the presumption can only be rebutted by evidence of circumstances or events which are specified in the Article. These are set out below for information:

- “(a) that the husband was physically incapable, by reason of absence, accident or otherwise, of cohabiting with the mother at the time of the conception of the child;*
- (b) that the husband was sexually impotent at the time of the conception of the child;*
- (c) that the husband was living apart from the mother at the time of the conception of the child and that the husband did not have opportunities for marital intercourse at that time;*
- (d) that the mother has been guilty of adultery and that the father did not have marital intercourse with the mother at the time of the conception of the child; or*
- (e) in the case of a child born within the first 180 days of the marriage of the husband and the mother, that the husband did not have opportunities for pre-marital intercourse with the mother at the time of the conception of the child:*

Provided that no evidence in support of the grounds specified in this sub-paragraph shall be admissible where it is proved that the husband was aware, at the time of the marriage, that the mother was pregnant or that he was a party to the registration of the birth of the child.”

The standard of proof required to rebut the presumption is that there must be strong and satisfactory evidence to the contrary.

This amendment retains the standard of proof but removes the list of circumstances and events and provides instead that any evidence can be produced to rebut the presumption. In doing so, it also removes the restriction on rebutting the presumption of legitimacy that is contained in the proviso to sub-paragraph (e), as set out above.

It should be noted that, in the course of proceedings, the Royal Court may already give a direction, under Article 72 of the Children (Jersey) Law 2002, for a DNA test to be used. That Article also contains provision as to the consent required for a sample to be taken from a person for the purposes of a test, in particular, in the case of a person lacking capacity to give consent.

Article 3 amends Article 7 of the principal Law. Article 7 empowers certain persons to apply to the Royal Court for a decree declaring that a child is illegitimate. Currently, the only persons that may apply are –

- (a) a man who is presumed, in accordance with Article 2 of the Law, to be the father of a child who was either born in Jersey or born abroad of a mother domiciled in Jersey at the time;
- (b) any person whose right to movable or immovable estate in Jersey is affected by the legitimacy of a child, wherever born.

The amendment expands the right to apply so that either the mother of the child or a man who claims to be the father of the child may also apply in the case of a child either born in Jersey or born abroad of a mother domiciled in Jersey at the time.

Article 4 provides for the citation and commencement of the Law.



Jersey

DRAFT LEGITIMACY (AMENDMENT) (JERSEY) LAW 200

Arrangement

Article

- 1 Interpretation
- 2 Article 2 amended
- 3 Article 7 amended
- 4 Citation and commencement



Jersey

DRAFT LEGITIMACY (AMENDMENT) (JERSEY) LAW 200

A LAW to amend further the Legitimacy (Jersey) Law 1973 and for connected purposes

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 Interpretation

In this Law, “principal Law” means the Legitimacy (Jersey) Law 1973^[1].

2 Article 2 amended

In Article 2 of the principal Law, for paragraph (2) there shall be substituted the following paragraph–

“(2) The fact that a child is born or conceived during the subsistence of a lawful marriage raises a presumption that the husband is the father of the child which may be rebutted only by strong and satisfactory evidence to the contrary.”.

3 Article 7 amended

In Article 7 of the principal Law, for paragraph (1) there shall be substituted the following paragraphs–

“(1) Any of the following persons may apply by petition to the Court for a decree declaring that a child who was born in Jersey, or who was born abroad of a mother who was domiciled in Jersey at the time of the birth, is illegitimate –

- (a) a man who, in accordance with Article 2, is presumed to be the father of the child;
- (b) the mother of the child;
- (c) a man who claims to be the father of the child.

(1A) Any person whose right to any immovable or movable estate situate in Jersey is affected by the legitimacy of a child, whether the child was born in Jersey or elsewhere, may apply by petition to the Court for a decree declaring that the child is illegitimate.”.

4 Citation and commencement

This Law may be cited as the Legitimacy (Amendment) (Jersey) Law 200- and shall come into force 7 days after it is registered.

^[1] See *Le Gros: Traité du Droit Coûtumier de l'Ile de Jersey*, page 450.

^[1] *chapter 12.450*