JFLA commentary on proposed amendments to the draft Law

Article	Proposed amendment	Comments
3(1) and 3(2)	Either or both parties to a marriage or civil partnership may apply to the court for a dissolution order, which provides for the dissolution of the marriage or civil partnership on the ground that the marriage or civil partnership has broken down irretrievably. accompanied by a statement, signed by the applicant or applicants, that the marriage or civil partnership has irretrievably broken down and the applicant or applicants seek the dissolution of the marriage or civil partnership.	Irretrievable breakdown is not a fault-based ground and no defence is available pursuant to the draft law. It is important that the ground(s) upon which the court will have jurisdiction to dissolve a marriage or civil partnership i.e. irretrievable breakdown – should be included in the legislation. The report accompanying the draft law confirms the ground to be irretrievable breakdown. The proposed amendment mirrors Section 1 of the Matrimonial Causes Act 1973. Notably, the wording of the draft law currently mirrors the English legislation *save for* reference to irretrievable breakdown.
3(1)(3)	On receipt of a valid application, the court must – (a) take the statement to be conclusive evidence that the marriage or civil partnership has irretrievably broken down and the party or parties seek the dissolution of the marriage or civil partnership; and (b) make a dissolution order.	Additional proposed amendment to reflect the above

3	Include a further provision: The court may revoke a conditional order at any time after it is made (unless a final order has been made) on application by both parties to the marriage or civil partnership.	Save for Article 3(7), the court is not provided with the power to revoke a conditional order on the application of either of the applicant or on the application of both parties i.e. if the parties have reconciled. Whilst this can be dealt with in more detail in the rules, the court needs to be explicitly provided with the power to revoke conditional orders within the law. Notably, the court is expressly provided with this power in respect of separation orders at Article 4(4).
21(1)(b)	Replace "deed" with "contract"	The concept of a deed is not recognised in Jersey law.
21(2) and 21(3)	(2) The court must not make an order under paragraph (1) in respect of a child of the family who is aged 18 or over, unless it appears to the court that – (a) The child the child is, will be or (if an order were to be made under paragraph (1)) would be receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not while in gainful employment; or (b) there are special circumstances that justify the making of an order that extends beyond that date. (3) The court must not make an order securing a sum of money in respect of a child to whom paragraph 2(a) or 2(b) applies beyond the date of the child's 21st birthday.	These two provisions require restructuring to provide greater clarity. The provision in respect of making a secured provision order does not currently make sense. If the court cannot make an order in respect of a child who has reached the age of 18 unless 2(a) or (b) applies, the court would not be securing a sum of money beyond the age of 18 in respect of a child to whom neither of those provisions apply pursuant to Article 21(1). If paragraphs 2(a) or (b) do apply to the child, no secured provision order should be made which extends beyond the age of 21 (reflecting the current position pursuant to Article 25(3) of the Matrimonial Causes (Jersey) Law 1949.

21 generally		There is a clear need to ensure that the law clearly permits applications in respect of children of the family to be made by either party i.e. ensuring that there can be no suggestion that a child who has reached the age of majority should make their own application as an intervenor? Please see the court's decision in G v J (Matrimonial) 20-Apr-2022 in which the court determined it did not have power to make an order for financial provision in respect of a child of the family who had already reached the age of 18 at the date of the application for ancillary relief i.e. the child would have to make their own application either as an intervenor in the parents' ancillary relief proceedings and/or pursuant to Schedule 1 of the Children (Jersey) Law 2002. This is entirely out of line with best practice in family proceedings. It is imperative that children, even if they are 'adults', are not required to intervene in their parents' divorce proceedings, or issue their own applications for financial provision in circumstances in which the court is already considering the parties' finances.
22(3)	(3) The circumstances are that – (a) the nuptial agreement or nuptial trust was made because of fraud, threats or duress on either of the parties to the nuptial agreement or nuptial trust; (b) either or both parties did not have access to independent legal advice about the nuptial agreement or nuptial trust; (c) either or both of the parties did not provide full and frank financial disclosure before entering into the nuptial agreement or nuptial trust; (d) enforcing the nuptial agreement or nuptial trust would place either party or	Jersey law in respect of the approval/enforcement of prenuptial and postnuptial agreements has closely followed the developments in English law since the Supreme Court's decision in Radmacher v Granatino [2010] UKSC 42. In Radmacher, the Supreme Court held that pre and post nuptial agreements should be upheld wherever possible (and particularly where the provisions at 22(3)(a) to (d) are not met). As regards the proposed wording at 22(3)(d), the Supreme Court in Radmacher used the wording "predicament of real need" rather than substantial hardship. However, whilst the concept of "predicament of real need" has been explored and considered in a number of English decisions, it not been applied consistently, with some judges (in England) adopting a more generous approach in terms of their assessment of the needs of the financially weaker party than others. English caselaw continues to develop in this respect; it is anticipated

	a child of the family in a predicament of real need; (e) or the nuptial agreement or nuptial trust was entered into during the period of time beginning 4 weeks before the date of the marriage or civil partnership and ending 4 weeks after the date of the marriage or civil partnership.	that the English Court's forthcoming decision in Entwistle v Helliwell will provide some clarity. Notwithstanding this ongoing conflict within the English decisions, given that Jersey has, to date, followed the English position in respect of pre and post nuptial agreements, we propose that the wording adopted in Radmacher, namely "predicament of real need" be adopted in our legislation.
22(4) & 23(3) & 24(3)	In making an order under paragraph (2) the court must consider the provisions of Articles 30 to 32.	Remove reference to Article 20 – appears to be erroneous
22(1) & 23(1)(a) & 24(2)		Firstly, it is unclear if these are references to a conditional order or final order (see by comparison Article 24(1) and (2). We assume, by virtue of Article 1, that the references are to final orders, but that needs to be unambiguous. There are other inconsistencies in the draft law in respect of 'dissolution order' and 'conditional dissolution order' – these should be double checked and clarified. If so, we are concerned by the requirement for a final dissolution order (i.e. the equivalent of Decree Absolute) to have been made before financial orders can be made, and potentially, put into effect. Whilst final financial orders may currently be made 'subject to Decree Absolute', it is common practice that they are made and sometimes put into effect before Decree Absolute is granted. This is particularly so in cases in which parties need to, by way of example, transfer property in a foreign jurisdiction prior to the dissolution of their marriage (due to local laws and/or to ensure they are not required to pay increased taxes) Additionally, it might also be necessary to hold off from application for Decree

		Absolute to pension rights are preserved and/or medical/life insurance policies remain in place until a certain action has taken place. This is also likely to present issues in respect of timetabling final (financial) hearings, as we will need to ensure the parties are in a position to obtain the final dissolution order either immediately before or at the commencement of a final hearing. The reason for this restriction on the court's power is not understood. We advocate for amendments providing that orders can be made following the grant of conditional dissolution order, and we strongly request that this restriction on the court's power be given further consideration.
33	(1) An interim order remains in force until – (a) it is discharged by the court; or (b) the court makes a final order in respect of the matters dealt with in the interim order;	Remove Article 33(2)(c) – if the Court has refused the application, there is no interim order in force.
36	**36 Orders for payment in respect of legal services** (1) The court may make an order requiring 1 party to pay to another party an amount for the purpose of allowing that other party (the "applicant") to obtain legal services for the purpose of proceedings for – (a) a dissolution order; (b) an annulment order; (c) a separation order;	Whilst it is standard practice for each party to pay their own costs of divorce and ancillary relief proceedings, both interim maintenance and the payment of legal services are two of the main areas of ancillary relief proceedings in which we see abusive (and financially stronger) spouses continuing to perpetrate abuse against the financial weaker spouse. This is particularly the case in proceedings in which the abusive spouse also controls the majority/all of the parties' capital and income. The inability of the financially weaker spouse to access and utilise joint assets, and/or income which would during the marriage have been considered to be 'joint' (but is no longer classified as joint from the date of separation), can create significant stress and difficulty, including with respect to the payment of legal fees. Often, cases featuring an abusive spouse will be significantly more contentious and drawn out, which amplifies the financial issues faced by the financially weaker spouse. Family lawyers have limited ability to prevent such abusive behaviour as the court is unable to

	(d) a financial order, interim order and/or sale of property order; and/or (e) orders pursuant to Article 10 of the Children (Jersey) Law 2002 in respect of any child of the family. (2) An order under this Article may be made to enable the applicant – (a) to access legal services of a particular description including proceedings and/or any form of dispute resolution; or (b) to access legal services within a specified period or for the purposes of a specified part of the proceedings. (2) An order under this Article may – (a) or the payment of all or part of the amount by instalments of specified amounts; and (b) require the instalments to be secured to the satisfaction of the court. (6) An order under this Article may direct that payment of all or part of the amount is to be deferred. (7) The court may at any time in the proceedings vary an order made under this Article if it considers that there has been a material change of circumstances since the order was made. (8) For the purposes of assessing costs in the proceedings, the applicant's costs may be treated as reduced by any amount paid to the	consider all of the circumstances of the case until it makes final determinations in respect of financial issues. By way of example, the financially weaker spouse may i) have little to no income of their own, ii) be unable to access joint capital without the other party's consent (which is unlikely to be forthcoming), and iii) have no family or friends who can assist them financially. Crucially, they may also be ineligible for legal aid, if their 'share' of the joint capital exceeds £67,000. However, as noted, access to the joint capital may be impossible until the Court makes final orders. How then is the financially weaker party supposed to pay their legal fees and have equality of arms vis-à-vis the abusive spouse? Why do we seek to make this more difficult for those vulnerable spouses, and their children? Given the above, whilst we welcome the introduction of a specific provision granting the court the power to make such orders, we are concerned as regards the proposed introduction, by virtue of this draft provision, of the English law 'test'. The plethora of reported decisions in England in respect of LSPO applications demonstrates, in our view, i) the willingness of a hostile/abusive spouse to 'fight' these applications, even where it is disproportionate to do so, and ii) that the provisions in the English law in respect of LSPO have not been entirely successful. In short, we can see no good reason to blindly follow the English law in respect of LSPOs. It is our view that this provision should provide the court with a very wide discretion to make LSPOs (i.e. the legal test/requirements set out in the draft law should be removed) and that the court itself can then determine how these applications should be dealt with in Jersey, either via the Rules accompanying the law and/or via judgments. We therefore advocate for the deletion of provisions 36(2), 36(3) and 36(8). We also propose including Article 10 orders in respect of children under 36(1) – whilst this is perhaps an unusual proposal, we are mindful that in cases involving serious abuse, it may be necessary for the financial weaker spouse to issue applications in respect of the children to ensure their safety.

	applicant as a result of an order under this Article for the purposes of those proceedings should the court consider it to be fair and just to do so.	Additionally, we see no good reason why a financially weaker spouse should even be required to take out a loan to meet their legal fees, usually at very high interest rates, in circumstances in which funds are readily available. None of the English family law litigation lenders currently loan in Jersey. Of course, in cases in which the financially stronger party is not abusive but is simply able to assist the other spouse with the payment of their legal fees, the court can take account of those payments when final orders are made. However, this should automatically be the case – it should be at the discretion of the court as to how to treat these payments at final order (hence the proposed amendment at 36(8). It may be that the financially stronger party i.e. the payer, has misbehaved during proceedings and a costs order made against him/her; in such circumstances the court should not be required to reduce the applicant's costs.
40	(2) If the court is satisfied that person B may be about to make a reviewable disposition, the court may make an order restraining person B from doing so. (3) The court may set aside a disposition, and make a financial order or a sale of property order as if the disposition had not occurred, if the court is satisfied that – (a) the disposition is a reviewable disposition; (b) person B has made the disposition, and the court finds that they made the disposition with the intention of impeding the court; and	We understand that it is agreed that the amendments shown would be made to this Article. Additionally, we consider that, as pursuant to the English law (s37 of the Matrimonial Causes Act 1973), any disposition within 3 years of the application should be presumed to have been made with the intention of defeating the aims of the court. As things currently stand under the draft law, the burden will fall to show that a disposition has been made with the intention of defeating the aims of the court will be on the applicant, who is likely to be the financially weaker and/or more vulnerable spouse. If the law provided a (rebuttable) presumption against party B, the burden of proof would shift to party B, which would in our view make this provision fairer and more effective. We have not amended the provision to include wording regarding a presumption as consider it would be more appropriate for a law draftsperson to do so.

	(c) if that disposition had not happened the amount of the financial order or sale of property order would be altered.	