

**THE STATES OF DELIBERATION**  
**of the**  
**ISLAND OF GUERNSEY**

**POLICY & RESOURCES COMMITTEE**

**THE MATRIMONIAL CAUSES LAW (GUERNSEY), 1939, AMENDMENT**

The States are asked to decide:-

Whether, after consideration of The Matrimonial Causes Law (Guernsey), 1939, Amendment Policy Letter dated 16<sup>th</sup> August 2019 they are of the opinion:-

1. To approve the Projet de Loi entitled 'The Matrimonial Causes (Guernsey) (Amendment) Law, 2019' and to authorise the Bailiff to present a most humble petition to Her Majesty praying for Her Royal Sanction thereto, noting that the two proposals relating to document duty and pension sharing are not included for the reasons set out in section 3 of the Policy Letter - The Matrimonial Causes Law (Guernsey), 1939 Amendment.
2. To direct the Policy & Resources Committee, in consultation with the relevant Committees of the States of Deliberation, to consider the matters relating to pensions noted in section 9.1 of this Policy Letter - The Matrimonial Causes Law (Guernsey), 1939 Amendment, and whether they should be considered for prioritisation during the next term as part of the Future Guernsey Plan.

The above Propositions have been submitted to Her Majesty's Procureur for advice on any legal or constitutional implications in accordance with Rule 4(1) of the Rules of Procedure of the States of Deliberation and their Committees.

## EXPLANATORY MEMORANDUM

This Law amends The Matrimonial Causes Law (Guernsey), 1939 to extend the powers of the Matrimonial Causes Division of the Royal Court to make orders relating to the division of assets between spouses on divorce, judicial separation or nullity. The amended provisions will increase the flexibility of the Court's powers, (inter alia) enabling the Court to order the transfer of property to children of the marriage, or to other persons for the benefit of such children; to direct that property be held on trust for sale; to require the parties to remain in joint ownership until a future time or event; to grant either of the parties rights of occupation in the matrimonial property; and to secure any such obligation by charge over any real property owned by the parties.

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The Presiding Officer  
States of Guernsey  
Royal Court House  
St Peter Port

16<sup>th</sup> August, 2019

Dear Sir

**1. Executive Summary**

- 1.1 This Policy Letter seeks States approval of some changes to the existing law governing how couples divorce, legally separate and annul a marriage, in line with the extant Resolution of 2009<sup>1</sup>.
- 1.2 These changes are separate to the full review of the Law<sup>2</sup> that the Policy & Resources Committee ("the Committee") is leading, the results of which will be brought to the Assembly in quarter 4 of 2019.
- 1.3 The purpose of the Amendment to the Law (Appendix A) is to extend the powers of the Royal Court to make orders relating to the division of assets between spouses on divorce, judicial separation or nullity, to help to reduce some of the conflict and challenge that occurs during this aspect of the process.
- 1.4 The Committee is of the view that it would be preferable to continue to progress with the changes to the current Law as appended rather than wait to incorporate within the full review of the legislation. By enabling the Court to have greater powers in the division of assets sooner rather than later, would be of greater benefit to those members of the community going through the process of divorce, judicial separation or annulment, in advance of the wider reforms being in place.

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<sup>1</sup> Billet d'État II of January 2009

<sup>2</sup> Billet d'État XII of June 2017

1.5 A Policy Letter accompanies this Amendment as it sets out the reasons why certain proposals covered by the extant 2009 Resolution (11) are not included in the Amendment, in line with H M Greffier's Submission of Propositions to the States, Directive No.1<sup>3</sup>.

1.6 It is further proposed that the Committee, in collaboration with other relevant Committees, should give the matters that cannot be included within the Amendment relating to pensions further consideration, including the possible need for primary legislation, as part of its handover report to inform the successor Committees and the Policy & Resource Plan.

## **2. Background**

2.1 How married couples can dissolve, separate and annul their marriage is set out in the Matrimonial Causes (Guernsey) Law, 1939, ("the Law"), which established the Matrimonial Causes Division of the Royal Court ("Divorce Court") to consider divorce, judicial separation and other matrimonial causes and issues.

2.2 The Divorce Court's jurisdiction is similar to: the Royal Court's when sitting as an Ordinary Court, ratifying terms of a separation agreement between spouses; and the Magistrate's Court when considering certain domestic matters such as granting of separation orders or making of maintenance orders.

2.3 In January 2009 it was recognised in a letter from H M Procurer that the areas where the majority of conflict and challenge occurred in matrimonial causes work related to:

- the custody of and access to children;
- the division of assets between spouses; and
- the payment of sums or maintenance.

2.4 The letter recognised that the extent of the powers in the Law of the Divorce Court were somewhat restricted in terms of division of assets and in particular, in relation to the local laws and practices relating to real property<sup>4</sup>. These limitations were identified in consultation with the Guernsey judiciary as causing difficulties 'as these limit the way in which the Divorce Court can fairly and appropriately structure the allocation of the assets of the parties to do justice between them in matrimonial proceedings.'

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<sup>3</sup> Directive No.1 of 2018 - The Submission of Propositions to the States

<sup>4</sup> 'land, and anything growing on, affixed to, or built upon land'

2.5 In England and Wales, the courts have, since the Matrimonial Causes Act 1973<sup>5</sup>, as amended, had greater flexibility to make more types of Orders to ensure fairness.

2.6 The 2009 proposed changes to the Law resolved by the States sought to address some of the issues relating to the division of assets between spouses and the payment of sums or maintenance, noted above, by suggesting Article 46 of the Law be amended to give additional powers to the Divorce Court to make a wider range of Orders. This was 'to ensure that justice is done between the parties in matrimonial proceedings'.

2.7 The Amendment relating to the additional powers for the Divorce Court included the –

'(a) power to order the transfer of real or personal property to a wider range of people, to include a child or children of the family, or to another person for the benefit of such child or children;

(b) power to create any trust or settlement of or affecting the real or personal property of the spouses, or to vary any existing trust or settlement of such property held for their respective benefit; and power to vest real or personal property in trust generally, including for the benefit of children of the family and other persons for their benefit; and in any such case on such terms as the Divorce Court may direct;

(c) power to direct a payment, or periodic payments, out of the proceeds of sale of real or personal property;

(d) power to direct that real or personal property, or any interest therein, should be held on trust for sale with power to postpone sale either indefinitely or to a fixed time or the happening of a certain event, or until further order of the Divorce Court;

(e) where real or personal property is held in undivided shares, power to suspend the ability of the co-owners to require a licitation (that is, a process vesting the property in either of them, which is ordinarily available as a matter of customary law) of the property for a fixed time or the happening of a certain event, or until further order of the Divorce Court;

(f) power to create for either of the parties a right of usufruct<sup>6</sup>, or habitation, or a right of possession e.g. a lease, or in reversion, or a right of occupation by way of licence, in any case on such terms and conditions as the Divorce Court may direct;

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<sup>5</sup> Matrimonial Causes Act 1973

<sup>6</sup> 'A Civil Law term referring to the right of one individual to use and enjoy the property of another, provided its substance is neither impaired nor altered.'

(g) power to secure by way of fixed charge any obligation pursuant to an order of the Divorce Court over the interest of either or both of the owners of real property, e.g. to secure the payment of monies; and

furthermore, the Divorce Court should have specific power to make such ancillary or incidental orders as may be necessary or expedient to give effect to any orders made.'

2.8 The agreed changes were not applicable to real property in Sark as the application of Article 46 was excluded under the Matrimonial Causes (Amendment Law) 2002. However, provision was made to ensure some fairness between divorcing spouses by giving the power to enable leasehold interest to be created in respect of tenements and freeholds in Sark.

### **3. The draft Projet Amendment**

3.1 The draft Projet appended to this Policy Letter has been written in accordance with the Resolution of the States of 30<sup>th</sup> January, 2009. However, two matters referred to in the 2009 Policy Letter are not addressed and Her Majesty's Procureur has advised as follows:

#### **Document duty**

3.1.1 The first departure concerns the proposal that where, as part of a Divorce Court order, a charge is imposed over any real property (which would normally have attracted document duty by reference to a percentage of the sum secured), the charge should attract only a nominal duty of £1. The Document Duty (Guernsey) Law, 2017, which repealed and replaced the Document Duty (Guernsey) Law, 1973 and the Document Duty (Guernsey) Ordinance, 2003, now provides that a transaction resulting from any such order is exempt from document duty. Therefore, that proposal, as part of the resolution, is no longer necessary.

#### **Pensions**

3.1.2 The second departure from the Resolution of 2009 concerns the proposal to enable the States by Ordinance to make provision relating to pensions in divorce proceedings, including pension sharing Orders and attachment Orders concerning the pension scheme of one of the parties. It is acknowledged that this would be a desirable tool for the Divorce Court in making provision for the division of the matrimonial assets. However, two major obstacles prevent the immediate introduction of such arrangements as follows –

- i. In order to introduce enforceable pension sharing arrangements, it is considered that primary pension legislation would need to be enacted. There is presently no pension legislation in the Bailiwick and its enactment would require consultation with industry and considerable resources in order to formulate policy proposals, draft legislation and bring it into effect; and
- ii. Many pension providers for Guernsey residents are based in the United Kingdom. Accordingly, it would be necessary for any Order for pension sharing which was made by the Divorce Court to be enforceable in the courts of the United Kingdom, or for persons divorced in the Bailiwick to be able to make an application for financial relief in the country where the pension provider was located. This would not be possible without an amendment to legislation in that country or at least for some reciprocal arrangements to be agreed. Jersey and the Isle of Man are in the same position; and representations have in recent years been made jointly to contacts in England, Scotland and Northern Ireland. The response has been that there is no clear reason to depart from the well-established principle that the financial affairs of persons divorced in other jurisdictions in the British Isles (i.e. Guernsey, Jersey and the Isle of Man) should be dealt with in those jurisdictions.

#### **4. Wider Matrimonial Causes Reform**

- 4.1 Through the work exploring Union Civile and the resulting Policy Letter on Same Sex Marriage<sup>7</sup>, it became apparent that there were some complex issues surrounding the Law that needed to be addressed in detail at a later date including matters relating to matrimonial causes. The States resolved that these separate policy issues should return to the States in a timely manner.
- 4.2 Following the change of government in May 2016, the reform of the Law was prioritised by the Committee, in the Policy & Resource Plan – Phase Two<sup>8</sup>, in support of achieving the One Community: inclusive and committed to social justice outcome and to address the issues raised through the Union Civile work. The Propositions and supporting Policy Letter setting out the proposals for change to policy in this area will be laid before the States during quarter 4 of 2019.

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<sup>7</sup> Billet d'État, XXIII of December 2015

<sup>8</sup> Billet d'État XII of June 2017

**4.3** Given that the attached Projet has progressed to the point of approval by the States, it is seen as being of greater benefit to the community to progress with the Amendment now, to be followed by the more substantial consideration of reforms to the Law.

**4.4** It is expected that there will be no further substantive amendments to the matters included in the appended draft legislation through the wider reform.

**5. Resource implications**

**5.1** There are no additional resource implications to progress this Projet.

**6. Legislative implications**

**6.1** Provision made by this Projet will be incorporated into the full reform of the Law once the policy decisions have been considered by the States and the legislation prioritised for drafting.

**7. Operational implications**

**7.1** There will be no operational implications if this Amendment to the law is approved.

**8. Timeframe**

**8.1** The amended legislation could be enacted in the first part of 2020, subject to Her Majesty's Royal Sanction.

**9. Conclusions and recommendations**

**9.1** St James Chambers has advised in relation to the two proposals not contained within the Amendment that:

(a) the reference to document duty at nominal sum is now superfluous given the changes made under the Document Duty (Guernsey) Law, 2017, which replaced the Document Duty (Guernsey) Law, 1973 and the Ordinance of 2003, to which the 2009 proposal relates; and



(b) the pensions proposals are not legally or practically possible at this stage given the substantial policy decisions, cross jurisdiction co-operation and potential need for alteration of other jurisdictions' legislation to progress the proposals on provision of Court Orders relating to pensions in divorce proceedings; and as primary legislation in this area is likely to have much wider implications for all pensions and not just those being shared as part of divorce proceedings; and given that this matter is not seen as a priority for other Crown Dependencies, that it cannot be considered as part of this Amendment.

9.2 The Committee is of the view that the matters noted in 9.1 (b) above merit further consideration as set out in Proposition 2.

9.3 The Committee considers that the remaining proposals should proceed to enactment without further delay and recommends that the States support the Propositions to which this Policy Letter is attached.

#### **10. Compliance with Rule 4**

10.1 Rule 4 of the Rules of Procedure of the States of Deliberation and their Committees sets out the information which must be included in, or appended to, motions laid before the States.

10.2 In accordance with Rule 4(1), the Propositions have been submitted to Her Majesty's Procureur for advice on any legal or constitutional implications. She has advised that there is no reason in law why the Propositions should not be put into effect.

10.3 In accordance with Rule 4(4) of the Rules of Procedure of the States of Deliberation and their Committees, it is confirmed that the propositions above have the unanimous support of the Committee.

10.4 In accordance with Rule 4(5), the Propositions relate to the duties of the Committee as set out in section (a) of its mandate.

Yours faithfully

G A St Pier  
President

L S Trott  
Vice-President

J P Le Tocq  
T J Stephens  
A H Brouard