

## Legal 500 Family Law Country Comparative Guides – Jersey

**Briefing Summary:** Carey Olsen are pleased to have authored the Jersey chapter for the Legal 500 Family Law Country Comparative Guides 2024. The guide aims to provide a pragmatic overview of the laws and regulations of family law practice in Jersey, looking at divorce, child maintenance, custody arrangements and non-court dispute resolution.

**Service Area:** Dispute Resolution and Litigation, Civil and Family Disputes, Family Law

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### Divorce/jurisdiction

What are the jurisdictional requirements for divorce and property division?

Article 6 of the Matrimonial Causes (Jersey) Law 1949 provides that the Matrimonial Causes Division of the Royal Court of Jersey (now referred to as the Family Division) has jurisdiction to entertain proceedings for divorce or judicial separation if and only if:

- the parties to the marriage are domiciled in Jersey on the date when the proceedings are begun; or
- either of the parties to the marriage was habitually resident in Jersey throughout the period of one year ending with that date.

In what circumstances (if at all) would your jurisdiction stay divorce proceedings in favour of proceedings in another country?

The Family Division will hear applications to stay proceedings in Jersey in favour of proceedings in another country. Such applications will be determined in accordance with the *forum non conveniens* test. The court is concerned to establish which is the appropriate forum for the trial of the action i.e. that in which the case may be tried most suitably for the interests of all the parties and the ends of justice, assessing connecting factors which will include, inter alia, matters such as convenience or expense (such as availability of witnesses), the law governing the relevant transaction and the places where the parties respectively reside or carry on business.

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Is applicable law relevant in your jurisdiction – when would this apply?

No.

What are the grounds for divorce and are they fault-based?

Article 7 of the Matrimonial Causes (Jersey) Law 1949 provides both fault-based and non-fault-based grounds for divorce. A party is unable to petition for divorce on the basis of a non-fault-based ground unless they have been separated from their spouse for one year or more.

The fault-based grounds are:

- Adultery – the respondent has since the celebration of the marriage committed adultery (which must be between the respondent and a member of the opposite sex) and the petitioner finds it intolerable to live with the respondent;
- Desertion – the respondent has deserted the petitioner without cause for a period of at least two years immediately preceding the presentation of the petition;
- Unreasonable behaviour – the respondent has since the celebration of the marriage behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;
- Unsound mind – the respondent 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
- Imprisonment – the respondent is serving a sentence of imprisonment for life or for a term of not less than 15 years.

The non-fault-based grounds, to be petitioned by either party (not jointly) are 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 (referred to as 'one year's separation') 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 (referred to as 'two years' separation').

What are the requirements for serving the application for divorce on the Respondent?

Pursuant to Rule 9 of the Matrimonial Causes Rules 2005, service may be effected either personally or by post.

In Jersey, personal service must be effected by the Viscount.

In practice, where both parties have legal representation who are instructed accordingly, service of the petition will be effected by email on the other party's lawyer.

When is a foreign marriage, and when is a foreign divorce, recognised?

A foreign marriage will be recognised if it is a legal, valid marriage in the country in which the marriage took place.

A foreign divorce will be recognised when it has been granted by a court of competent jurisdiction.

Are same sex marriages permitted in your jurisdiction and/or is there another scheme? Do you recognise same sex marriages that have taken place in another jurisdiction?

Yes – the same scheme applies as on divorce.

Yes – Jersey will recognise a same sex marriage which has taken place in another jurisdiction if it is a legal, valid marriage in the country in which the marriage took place.

## Finances after divorce

What are the substantive financial orders (e.g. capital, property and maintenance) the court can make and how are claims determined?

Articles 25 and 27-31 of the Matrimonial Causes (Jersey) Law 1949 provides the Family Division with power to make the following substantive orders:

- Child maintenance;
- Spousal maintenance, including interim maintenance;
- Secured provision;
- Lump sums;
- Transfer, sale or settlement of property;
- Variation of a settlement.

Claims are determined in broadly the same manner as in England and Wales, namely the objective of the court is to achieve an outcome which ought to be 'as fair as possible in all the circumstances, the three essential principles at play being needs, compensation and sharing'. The Family Division will usually have regard to section 25 of the Matrimonial Causes Act 1973 (English legislation) in determining the orders to be made.

What orders can be made in relation to pensions and what are the guiding principles?

Pension sharing orders cannot be made in Jersey. Pensions are therefore usually dealt with by way of off-setting.

Can the court make interim provision (including for legal costs) during the proceedings?

Yes, interim maintenance can be ordered pursuant to Article 31 of the Matrimonial Causes (Jersey) Law 1949. Interim legal costs provision can also be ordered pursuant to the same statutory provision, save that the court will expect the applying party to have explored alternative sources of funding, including litigation funding, in advance of the application.

Can financial claims be made after a foreign divorce?

No.

What is the process for recognising and enforcing foreign financial orders (including orders relating to pensions situated in your jurisdiction)?

Foreign financial orders are not, *per se*, enforceable. It is important to note that this extends to injunctive relief granted by foreign courts which purports to extend to Jersey and assets there sited. A reciprocal order will need to be obtained from the Royal Court of Jersey to ensure the order's enforceability. Whilst this will for all intents and purposes be an application for a mirror order, the Royal Court will need to be satisfied as to the merits of the application. This is unlikely to require a full rehearing of the proceedings; the Royal Court is guided by the principle of comity. This means that although the Royal Court will review the merits of any stand-alone application by reference to principles of local law, the terms of an English order are usually accepted and recognised by reciprocal order.

It is unlikely that a financial remedies order against a pension sited in Jersey would be capable of registration and enforcement as there is no provision in Jersey legislation for pension sharing.

## Marital agreements

Are matrimonial property regimes recognised and if so, in what circumstances?

No.

How are pre and post nuptial agreements treated? Is it different if the prenuptial or post nuptial agreement was concluded in your jurisdiction (as opposed to another jurisdiction)?

Both pre and post nuptial agreements are treated in the same manner as they are treated by the Courts of England and Wales, namely they are not enforceable *per se* as the court's statutory duty to ensure fairness cannot be fettered, however they will be upheld unless it would be unfair to do so (i.e. in the event of a vitiating factor or one party being left in a position of need) – *per Radmacher v Granatino* [2010] UKSC 42.

No.

## Child maintenance

How is maintenance for a child dealt with in your jurisdiction?

Child maintenance or lump sum provision can either be ordered as part of an ancillary relief order, or pursuant to Schedule 1 of the Children (Jersey) Law 2002.

There is no formulaic approach to assessing the quantum of child maintenance payable in Jersey. When considering the issue of child maintenance and lump sum provision, the first step in the court's approach is to assess the needs of the child (including the need of the receiving parent to provide the child with housing). When assessing a child's needs it is important to note that a child is 'entitled to jam on their bread', where this can reasonably be afforded by their parents. The court will then go on to consider the ability of each of the parents to meet the child's needs. The court will consider the income, earning capacity and other financial resources available to each of the parents, as well as a parent's need to support other children. The child maintenance figure arrived at following the court's discretionary exercise is usually cross-checked against the old UK CSA percentage guidelines for fairness. However, it is simply that – a cross-check; it is neither the starting point, nor ending point, of the analysis.

With the exception of maintenance, does the court have power to make any orders for financial provision e.g. housing and/or capital sums for a child? If so, in what circumstances?

Yes. Such orders can be ordered either as part of an ancillary relief order, or pursuant to Schedule 1 of the Children (Jersey) Law 2002.

## Cohabitation/unmarried couples

Are unmarried couple relationships recognised (eg. as a civil partnership?)

Couples may enter into a formal civil partnership pursuant to the Civil Partnership (Jersey) Law 2012.

Unmarried couples who have not entered into a formal civil partnership are not recognised.

What financial claims, if any, do unmarried couples have when they separate and how are such claims determined i.e. what are the guiding principles?

Whilst the court is afforded significant powers pursuant to the Matrimonial Causes (Jersey) Law 1949 to consider the separation of spouses' finances on divorce, the court is not afforded such powers in respect of cohabiting couples who decide they no longer wish to be in a relationship and live together. In short, cohabiting couples' do not have the same rights on separation as married couples when divorcing.

There is the potential for difficulty to arise for cohabiting couples when property is purchased in one partner's sole name and where their finances are otherwise pooled, with both partners contributing to the purchase price of the property, to the mortgage, to the cost of utilities and to their collective living expenses. The partner whose name is on the property's deeds will be considered the property's legal owner and the other will need to make a claim that the other has been 'unjustly enriched' by virtue of their contributions, should the parties not be able to reach an agreement in respect of their respective financial interests in the property.

Where a separating cohabiting couple have children, they will each have the right to make an application for child maintenance and lump sums and property transfers under Schedule 1 of the Children (Jersey) Law 2002.

Pursuant to Articles 44 and 47 – 51 of the Civil Partnership (Jersey) Law 2012, couples who have entered into a civil partnership have broadly similar rights to married couples upon the dissolution of their civil partnership, namely;

- Child maintenance
- Spousal maintenance, including interim maintenance;
- Secured provision;
- Lump sums;
- Transfer, sale or settlement of property;
- Variation of a settlement.

## Children

What is the status of separated parents in relation to their children?  
Does it make a difference if the parents were never married?

Separated parents generally have equal status, save that fathers who were not married to the child's mother at the time of the child's birth and who are not named on the child's birth certificate will not automatically have parental responsibility for the child.

If a child was born on or after 2 December 2016, an unmarried father named on their child's birth certificate will automatically have parental responsibility for their child. For children born before 2 December 2016, unmarried fathers registered on their child's birth certificate will not automatically have parental responsibility.

What are the jurisdictional requirements for child arrangements/child custody?

Pursuant to the Child Custody (Jurisdiction) (Jersey) Law 2005, the court shall not have power to make child arrangements orders in respect of a child unless;

- The child is habitually resident in Jersey;
- The child is present in Jersey and is not habitually resident there or in the United Kingdom but the court considers the immediate exercise of its power is required in the child's welfare;
- The child's parents matrimonial proceedings are continuing in Jersey.

What types of orders can the court make in relation to child custody/a child's living arrangements and what are the guiding principles? What steps are followed to hear the voice of the child?

Article 10 of the Children (Jersey) Law 2002 provides that the Family Division may make the following orders;

- a contact order;
- a prohibited steps order;
- a residence order; or
- a specific issue order.

The overriding principle is the child's welfare i.e. what is in the child's best interests? The Family Division is guided by the welfare checklist set out at Article 2 of the Children (Jersey) Law 2002:

## **'2 Welfare of the child**

1. When the court determines any question with respect to –

- the upbringing of a child; or
- the administration of a child's property or the application of any income arising from it,

the child's welfare shall be the court's paramount consideration.

2. In any proceedings in which any question with respect to the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child.

3. In the circumstances mentioned in paragraph (4), the court shall have regard in particular to –

- the ascertainable wishes and feelings of the child concerned (considered in the light of the child's age and understanding);
- the child's physical, emotional and educational needs;
- the likely effect on the child of any change in his or her circumstances;
- the child's age, sex, background and any characteristics of the child which the court considers relevant;
- any harm which the child has suffered or is at risk of suffering;
- how capable each of the child's parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting the child's needs; and
- the range of powers available to the court under this Law in the proceedings in question.

4. The circumstances are that –

- the court is considering whether to make, vary or discharge an Article 10 order, and the making, variation or discharge of the order is opposed by any party to the proceedings; or
- the court is considering whether to make, vary or discharge an order under Part 4.

5. Where the court is considering whether or not to make one or more orders under this Law with respect to a child, it shall not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all.'

Where a father does not automatically have parental responsibility pursuant to the Children (Jersey) Law 2002, the court can grant parental responsibility.

In the majority of cases, the child's voice is heard via the appointment of a Jersey Court Advisory Service ('JFCAS') officer, who will prepare a welfare report. In more complex cases, the JFCAS officer may be appointed as Guardian for the children.

The Family Division judges will also, in appropriate cases, meet with children to discuss their wishes and feelings.

## What are the rules relating to the relocation of a child within and outside your jurisdiction and what are the guiding principles?

In accordance with Article 2(1) of the Children (Jersey) Law 2002, the Children's welfare shall be the court's paramount consideration in any leave to remove application.

The court must have regard to the facts as set out in the welfare checklist in Article 2(3) of the Children (Jersey) Law 2002.

The relevant principles to be applied are those set out by Mostyn J in *GT v RJ (Leave to Remove)* [2018] EWFC 26, principles that have been applied by the Royal Court – see, for example, *A v B* [2019] JRC 001A, *C v D* [2019] JRC 090A and *LL v MM* [2020] JRC 137. The principles have been distilled as follows:

- "The principle of the paramountcy of the children's best interests, as taxonomized by the welfare checklist, which is not to be glossed, augmented or steered by any presumption in favour of the putative relocater.
- Lord Justice Thorpe's famous 'discipline' in *Payne v Payne* [2001] 1 FLR 1052 is now relegated to no more than guidance, which can be drawn on, or not, as the individual case demands.
- If the applicant's case is not well thought out and is not supported by evidence it will likely fail.
- If the applicant's case, or the respondent's defence, is not advanced in good faith but rather is driven by an unworthy ulterior motive, then that case, or defence, will fail.
- The court must consider the impact on the mother if the application is refused as well as the impact on the father if it is granted.
- The court must undertake a 'global' or 'holistic' or '360 degree' exercise.
- The court's function in a removal case is one of evaluation rather than a pure exercise of discretion – see *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1, [2010] NZFLR 884.

- The court will have to resolve disputed facts and there is a burden of proof on the party alleging the facts in issue, but once the facts are established there is no formal legal burden of proof on the applicant – see *Payne v Payne* at para 25 per Thorpe LJ: “I do not think that such concepts of presumption and burden of proof have any place in Children Act litigation where the judge exercises a function that is partly inquisitorial.”
- Common sense dictates that where one parent seeks that a well-functioning status quo should be changed he/she has to make the running in terms of the evidence and argument to show that change would be more in the children’s interests than no change. Notwithstanding the partly inquisitorial function of the court the maxim *affirmati non neganti incumbit probatio* (the burden of proof is on him who affirms – not on him who denies) should loosely apply to the case for change.
- There is no principle in Children Act litigation that a new spouse takes subject to the claims of the old one (see, for money cases, *Vaughan v Vaughan* [2010] EWCA Civ 349 [2011] Fam 46). However, if someone forms a relationship with a woman who has children from a prior relationship where the father of those children is enjoying a stable regime of contact, then the new partner must surely be taken to enter the relationship, with all its incumbrances, with his eyes wide open. On the other hand, the father of those children must surely recognise the prospect of his former wife re-partnering and in that event a case for change being advanced. The weight to be attributed to these two general propositions will depend on the facts of the case in hand; and
- Arguments in relation to the devastation and impact of refusal of the relocating parent should be treated very circumspectly.”

## What is the process for recognising and enforcing foreign orders for contact/custody of children? Does your court operate a system of mirror orders?

The foreign order itself will not be enforceable in Jersey and steps should be taken to register the order (for, in effect, a mirror order).

If the order has been made under Part 1 of the Family Law Act 1986, it can be registered in Jersey without consideration of the merits, although it is important to note that any provision(s) in the English order regarding enforcement will not be recognised. Instead, the Royal Court will have its own full range of enforcement powers available to it.

Procedurally, the foreign court should send a copy of the Order, any prescribed particulars of variation, if relevant, and a copy of the accompanying documents to the Royal Court. The party seeking the mirror order may be required to make an application for this to happen, but it is the court of primary jurisdiction that makes the request to the Royal Court. The Royal Court has been clear that it has the inherent jurisdiction to make such mirror orders. The mirror order will, however, only take effect once the child comes within the jurisdiction of the Royal Court.

## Surrogacy

What is the status of surrogacy arrangements and are surrogates permitted to be paid?

Surrogacy is legal in Jersey. Surrogates must not be paid, but their reasonable expenses may be met.

Presently under Jersey law, the woman who gives birth to the baby will be the legal mother and if she is married, her husband automatically becomes the legal father even when the baby is not genetically related to the surrogate and husband. Couples will usually therefore apply for a Parental Order from the Courts of England and Wales – such orders are not currently available in Jersey, albeit this is due to change.

## Non-court dispute resolution (NCDR)

What forms of non-court dispute resolution (including mediation) are available in your jurisdiction?

The court encourages parties to settle their family disputes outside of the court arena. All forms of alternative dispute resolution (“ADR”) are voluntary.

Parties can engage in the following forms of ADR:

- Mediation
- Private financial dispute resolutions (p.FDRs) or court-led FDRs – whilst the FDR is not part of the court process in Jersey, p.FDRs and court-led FDRs are a commonly utilised form of ADR. English barristers are engaged to conduct p.FDRs and the Family Division offer a free court-led FDR in appropriate cases, with the Family Registrar not hearing the case providing an indication.
- Family Foundation – this is a free mediation service offered by the Family Division of the Royal Court. The team at Family Foundation includes Family Judges, Family Proceedings’ Officers (FPOs), Jersey Family Court Advisory Service (JFCAS) officers.

*Carey Olsen Jersey LLP is registered as a limited liability partnership in Jersey with registered number 80.*

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