

Family Law & Assets Matrimonial in Jersey



Introduction

This guide provides an overview of family law when problems arise between couples relating to finances and/or their children. It summarises important aspects of the law as it applies upon breakdown of relationships. It will also be of interest to lawyers advising clients about enforcement against assets held in Jersey, particularly where they are in trust.

It is not intended to be a comprehensive guide but provides an overview of the approach of the Jersey Court. The Jersey Court will look to English case law but is not bound to follow same and will, if it feels appropriate, take a different approach.

If you require any advice or assistance you are encouraged to contact our matrimonial team, details of which are found at the end of this guide.

This publication is intended for general information purposes only and should not be relied upon as a source of legal advice. Information correct as of February 2018. Independent legal advice should be sought before taking any action based on information contained within this publication.

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Divorce – Basic Principles

Governed by the **Matrimonial Causes (Jersey) Law 1949** as amended [‘MCL’] unless there are extenuating circumstances (exceptional hardship or depravity) couples must be married three years prior to issuing a petition¹.

The petition is based upon one of the following grounds²:

- since the marriage the Respondent has committed adultery and the Petitioner finds it intolerable to live with the Respondent;
- the Respondent has deserted the Petitioner without cause for the period of at least two years immediately preceding the presentation of the petition;
- since the marriage the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the Respondent;
- 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;
- the Respondent is serving a sentence of imprisonment for life or for a term of not less than 15 years;
- the parties have lived apart for a continuous period of at least one year immediately preceding the presentation of the petition and the Respondent consents to the divorce;
- the parties have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition.

While the majority of these grounds will be familiar to a practitioner in England and Wales, it should be noted that in the latter two grounds there is no provision for a period of reconciliation. So should the parties separate for

¹ MCL Art 8(1)

² MCL Art 7(1), [2]

six months and then reconcile for two weeks, the date when the separation started is reset to the day after the last day of reconciliation.

The divorce process is similar to that in England and Wales. A petition is issued and served, with the Respondent filing an Acknowledgment of Service. The Petitioner can then apply for decree nisi and subsequently for decree absolute.

Jurisdiction

If both parties are domiciled in Jersey or either party is habitually resident in Jersey for the year preceding the date of issue of proceedings the Jersey Court will have jurisdiction³.

Issues over assets may mean that another jurisdiction is more appropriate.

Forum

Jersey is not a signatory to **Brussels II Regulation** and is not obliged to refuse jurisdiction if one party issues a petition in another jurisdiction prior to the petition being issued in Jersey.

The Jersey Court acknowledges the importance of ‘comity’ between jurisdictions but will, if it believes it is the appropriate jurisdiction, retain jurisdiction.

The Court will consider whether or not the Respondent has been properly served within the jurisdiction. If so, the Respondent must show why proceedings should be stayed by showing there is another competent jurisdiction that is clearly or distinctly more appropriate than Jersey to hear the action. Further, the Court will consider which jurisdiction has the more

³ Art 6, MCL

substantial or real connection with the case, considering factors such as the relevant law, where the cause of action arose, convenience and most importantly where the assets are and the options available to the Court in that jurisdiction in relation to the assets. If the Respondent fails on these points the Court will refuse the stay. If the Respondent succeeds on these points, the Applicant may still argue that justice requires the action to continue in Jersey.

The Court looks at where the most suitable jurisdiction is for the matter to be heard⁴.

The next step would be for the proceedings in the other jurisdiction to be stayed on the basis of forum non conveniens,⁵ a costly and/or time consuming process. The Jersey Court found a way around this in divorce proceedings⁶ by ordering a party to file a notice of discontinuance in the foreign jurisdiction on the following basis:

- the Jersey Court believed it was clearly the most appropriate forum; and
- the proceedings in Jersey required protection against the vexatious, oppressive or unconscionable conduct of the one of the parties. On this occasion the stealth with which divorce proceedings were commenced in Madeira was held to be sufficient.

Financial Remedies on Divorce

Articles **27 – 31 MCL** set out the jurisdiction of the court to deal with the parties' finances upon divorce and the process is set out within the **Matrimonial Causes Rules 2005** ['the Rules'] as amended.

If the Jersey Court does not have case law dealing with issues it will look to English case law, but is not bound by them. While the Rules state that the overriding objective is to deal with cases justly (**Rule 47(1)**), the statute does not set out what should be taken into account to ensure a just decision.

4 Crociani v Crociani 2013 [2] JLR 369

5 as in Mittal v Mittal [2013] EWCA Civ 1255

6 De Sa v Luis 2009 JLR 44

Following **O'H v B**⁷ the Jersey Court has regard to: all the circumstances of the case, financial resources of the parties, financial needs of the parties, standard of living, age, duration of marriage, any disability, contributions and needs of the children; reflecting the factors set out in s25 of the **Matrimonial Causes Act 1973** as amended.

The Jersey Court has a duty to consider the desirability of a clean break between the parties⁸ and has followed the developments of the English case law of **White v White, Miller v Miller, McFarlane v McFarlane** and **Charman v Charman**⁹. The yardstick of equality is the starting point, taking into account fairness and the factors as set out above. The Jersey Court has and continues to develop case law based on the principles of equal sharing of assets gained during the course of the relationship or used and/or seen as matrimonial assets. The welfare of any children of the marriage is of primary importance as far as the Jersey Courts are concerned. This may have an impact on the division of assets on divorce.

Assets which are owned prior to the marriage, or obtained by only one party during the marriage and/or after marriage but prior to a financial order, are often called 'non-matrimonial assets'. The name 'non-matrimonial assets' gives parties a false sense that they are excluded from the asset pot to be shared on divorce. This is not the case. Essentially any asset of the marriage is a 'matrimonial asset'.

The question is whether the asset is ring-fenced and treated separately to other marital assets. Factors which will be taken into account include: when the asset was/is received, the intention of the party giving the asset, the purpose of the asset (where appropriate), whether the asset has been used by the parties as a joint asset or kept separate and apart from other marital assets.

While similar to the English and Welsh position, practitioners should be aware that pension sharing is not an option and unlike in England & Wales, there is no equivalent to **section 37 Matrimonial Causes Act 1973** as amended [avoidance of transactions intended to prevent or reduce assets].

The Court may order the transfer of a property whether real or personal to a child or children of the family or to a person for the benefit of a child or

7 2007 JLR N [29]

8 Boudin v Smith 1995 JLR N [15]

9 [2006] UKHL 24, [2006] 2 AC 618, [No 4], [2007] 1 FLR 1246 and [2001] 1 AC 596

children. The court is also obliged to consider whether it should exercise its powers under the **Children (Jersey) Law 2002** ['CJL'] in respect of the children in the light of arrangements made, **Art 25A MCL**.

Freezing Orders

The court has an inherent jurisdiction to grant an injunction to preserve assets pending determination of financial settlement upon divorce or within proceedings (and also by **MCL, Art 3(2)**).

The Plaintiff Spouse must show:

- a good arguable case for assets to be frozen, or a sum[s] of money equivalent in value to the assets to be frozen (as may be appropriate); and
- if the court were to make the order whether there is a real risk that the assets may not be preserved until the final determination of the financial matter; and
- the order is just; and
- the order must not be disproportionate to the object to be achieved.¹⁰

The standard of proof while high, is lower than that required for a Mareva injunction, as it preserves assets over which both parties have a proprietary claim. An order may take into account payment of bona fide liabilities. The court will look at all circumstances, including the Respondent's other assets, to ensure it finds an equilibrium between safeguarding the assets, while not unduly restricting the Respondent's ability to maintain himself or those assets¹¹.

An injunction may be used to prevent disposition of the assets of a company beneficially owned and controlled by the Respondent. The court will allow the company to use the injunctioned assets to pay its reasonable legal and administrative

¹⁰ Matthews [nee Jasper] v Matthews 2001 JLR 671

¹¹ Z v Y and A Limited 2014[2] JLR Note [10]

expenses.¹²

Obtaining Information

If there is insufficient information to obtain a freezing injunction or to identify assets to enforce against, an application may be made against a third party (such as a bank or trust company) that has been 'mixed up' in wrongdoing, under the Norwich Pharmacal¹³ jurisdiction.

For these purposes "wrongdoing" can include non-disclosure by a party in matrimonial proceedings. The Court may order the third party to disclose information needed to identify or trace assets.

Trusts and Divorce

The Jersey Court has the power under **MCL Art 27** to vary a post-nuptial settlement between the parties to a marriage.

For the Court to exercise this power, the settlement must confer a benefit on the beneficiaries as husband and wife and the settlement must have a 'nuptial quality' about it¹⁴.

Where this is not applicable the Court must decide whether the trust is a resource available to the parties: if a spouse were to request the trustees to advance capital from the trust fund, whether the trustees would be likely to do so.¹⁵

¹² Z v Y and A Limited supra

¹³ Norwich Pharmacal Co and Others, Customs and Excise Commissioners [1974] AC133

¹⁴ J v M 2002 JLR 330

¹⁵ F v G [2012] JRC 215

Considerations for a Trustee¹⁶

The most likely scenario for a Jersey corporate trustee is that a divorce will involve a Jersey law trust with divorcing beneficiaries, who are resident in a foreign jurisdiction.

There are three important factors to consider:

- Provision of information; and
- Submission to the jurisdiction of a foreign court; and
- Enforcement of a foreign judgment.

Provision of Information

Disclosure of trust documentation falls under the inherent jurisdiction of the Court to supervise the administration of the trust.¹⁷

The most sensible way forward is to seek a directions hearing (under **Art 51 Trusts (Jersey) Law 1984 ('TJL')**) for an endorsement of a trustees' decision of documents to be disclosed or withheld. If a trustee unreasonably refuses to disclose documents at an early stage it may be liable for indemnity costs.¹⁸

A starting point for documents that can be released are those that a beneficiary is normally entitled to see: the trust deed, accounts (which may include accounts of underlying companies), bank statements and portfolio valuations.¹⁹

¹⁶ Based upon the then Deputy Bailiff's speech to ACTAPS November 2008. See also Deputy Bailiff Birt JGLR 2009 Issue 1 p.2 and Birt, Commr, JGLR [2015] Issue 2

¹⁷ Schmidt v Rosewood [2003] 2 AC 709

¹⁸ Hogg v. Williamson 2003 JLR N [38]

¹⁹ Re B Settlement 2011 JLR 236

While there is a presumption in favour of disclosure of the above trust documents to beneficiaries, there a discretion to withhold documents, if to do so is in the best interests of all beneficiaries.

A trustee would not normally be expected to provide trust documents to a spouse who is not a beneficiary. There are exceptions to this presumption such as in **Re M Trust**,²⁰ where the grandfather was a beneficiary and the documents were disclosed to him in the knowledge they would be provided to his non-beneficiary son to produce in divorce proceedings in the UK.

The trustee should consider the following points when deciding whether or not to provide the information requested:

- The context for the application for disclosure;
- The capacity in which a beneficiary seeks disclosure;
- Relevance to current or potential issues;
- Purpose;
- Whether it is a substantive request for specific documents or a fishing exercise;
- Whether the documents concern third parties and their interests;
- Whether disclosure would amount to pre-action discovery.

The Court will normally order the provision of the fullest information to assist a foreign Court in determining how to divide matrimonial assets, even when a trustee has not submitted to the jurisdiction of the foreign court.²¹

²⁰ 2012 [2] JLR 51

²¹ Re H Trust 2006 JLR 280

Documents to Withhold

Ordinarily, a trustee would be entitled to withhold documents containing deliberations as to the exercise of its powers or discretions, the reasons for same and the material on which the reasons are based.

Letters of Wishes and minutes of trustees meetings would ordinarily fall within this category. The Court may order disclosure of this information but the starting position is that disclosure will be refused.²² If a spouse has a copy of an old Letter of Wishes and has disclosed this within matrimonial proceedings, the Court may feel it appropriate for the most up to date information to be before the foreign Court.

If there is any indication that the information is sought in order to attack the trust, by asserting the trust is a sham, disclosure may be withheld. In **R v C**²³ the Jersey Court issued a Letter of Request to the Seychelles in divorce proceedings, on the condition that an allegation that the Seychelles trust was a sham be abandoned.

Be aware of the status of the documents created or obtained in, so-called **Article 51** applications. Such hearings are held in private and the documents relating to same are confidential, however, in **Re M Trust**²⁴ the beneficiary children applied to intervene in the parents' divorce proceedings in England. The condition of joinder in England was that they gave an undertaking to the English Court to produce, if ordered to do so, all documents they received in connection with the trustee's **Article 51** application in Jersey. This meant the children, as beneficiaries, would be in contempt in one jurisdiction or the other.

The Royal Court in Jersey granted leave to disclose the material, save for legal advice obtained by the trustee prior to the application. The Royal Court noted that if the Courts in England were to make this a routine requirement, the Court in Jersey would have to change its procedures to protect confidentiality.

²² *Trilogy Management Ltd. v. YT Charitable Foundation [Intl.] Ltd* 2015 [2] JLR 15; *Re Rabaiotti 1989 Settlement* 2000 JLR 173; *Breakspear v Ackland* [2008] EWHC 220 Ch

²³ [2008] JRC 179

²⁴ 2012 [2] JLR 51

Submission to the Jurisdiction of a Foreign Court

A trustee would be at risk of being found to be in breach of trust if it were to submit to the jurisdiction of a foreign court without seeking an **Article 51** direction.²⁵

Ordinarily the Court would order a trustee not to submit to the jurisdiction of a foreign court.²⁶

As a matter of private international law submitting to the jurisdiction means submitting to the outcome of those proceedings. A trustee is not normally advised to submit, so discretion remains with the Jersey Court.

The Court may endorse submission to a foreign jurisdiction in certain circumstances. For example, where the assets of the trust are situated in the foreign jurisdiction and it would be unreasonable for the trustee not to submit. In **Re Otto Poon Trust**²⁷ the Royal Court agreed that the trustee should submit to the jurisdiction of the Hong Kong Court as 70% of the trust assets were situated there.

As an alternative to submitting to the jurisdiction the trustee might consider providing evidence as a witness to try to avoid adverse inferences being drawn as to the nature and availability of trust assets. There are difficulties with this position.²⁸

²⁵ *Re The Fountain Trust* 2005 JLR 359

²⁶ *Re H Trust* 2006 JLR 280

²⁷ [2011] JRC 167

²⁸ *BJ v MJ* [2011] EWHC 2708, Mostyn J & Birt, Commr JGLR [2015] para 38

Enforcement of a Foreign Judgment in Jersey

Enforcement will depend on whether the foreign Court applied foreign law or Jersey Law.

If a trustee has submitted to the jurisdiction and the foreign Court applied Jersey law to any question concerning the trust the judgment will be enforceable, although at the discretion of the Jersey Court²⁹.

If the trustee does not submit to the jurisdiction of the foreign Court, the judgment would not be enforceable in Jersey.

If the foreign Court applied foreign law to any question concerning the trust any order will not be enforceable in Jersey³⁰. A trustee will therefore have to consider whether to exercise its discretion to give effect to the foreign Court order.

If the foreign Court made an order which varies the trust and the variation is such that a trustee has the power to make it under the terms of a trust deed, a trustee may choose to give effect to the order. In any event it is advisable to obtain the blessing of the Court (**Article 51 TJL** hearing).

If the foreign Court made an order purporting to alter the trust, a trustee cannot give effect to the order without the consent of all the beneficiaries. Where all beneficiaries are ascertained and are adult and of sound mind, they may agree the alteration. Where beneficiaries include minors, unborn or unascertained beneficiaries, a trustee will need to seek the consent of the Court to any alteration to the trust.³¹

A trustee maintaining a neutral position should represent the interests of unascertained beneficiaries.³²

If the foreign Court has ordered appointment of capital to a sub-trust for the

benefit of one spouse, a trustee may be the trustee of both.³³ However, a trustee should be aware of the risk of conflicts of interest. For example, if the beneficiary spouse of the sub-trust requests payment out of the entire capital of the sub-trust for tax purposes, giving consideration to the interests of the beneficiary spouse of the main trust will place you in conflict.³⁴

The foreign Court may make an order that the beneficiary spouse pay a lump sum to a non-beneficiary spouse. If the beneficiary spouse requests payment of that lump sum, a trustee has discretion how to act. Payment to a non-beneficiary will not amount to a fraud on a power if it is made for the benefit of the beneficiaries, because it discharges a legal and moral obligation which is recognised by the beneficiary spouse. For example, it would allow the spouse to meet an order made in divorce proceedings, or because it brings an end to long-running litigation between spouses, allowing the entire family to get on with their lives.³⁵

Relations with other Jurisdictions

It may sometimes be perceived, from outside the jurisdiction, that Jersey adopts a protectionist stance.

Art 9 TJL is often raised in support of this:

“(1) Subject to paragraph (3), any question concerning –

(a) the validity or interpretation of a trust; shall be determined in accordance with the law of Jersey and no rule of foreign law shall affect such question.

(4) No foreign judgment with respect to a trust shall be enforceable to the extent that it is inconsistent with this Article irrespective of any applicable law

29 Brunei Investment Agency v Fidelis Nominees Ltd [2008] JRC 152

30 Art 9(4) TJL

31 Art 47 TJL

32 Mubarak v Mubarak [2008] JCA 196

33 Re B Trust 2006 JLR 562

34 A Trustees Ltd v W, X, Y and Z [2008] JRC 097

35 Otto Poon Trust [2014] JRC 254A

relating to conflicts of law.”

Article 9 was introduced because it was felt that foreign Courts had repeatedly failed to have sufficient regard to Jersey trusts law. In **The Matter of M and Other Trusts**³⁶ Jersey indicated again, it would consider amending its law, if the English Courts repeatedly failed to have regard to the confidentiality of documents in **Art 51** hearings [see above].

Notwithstanding this, case law shows that Jersey Courts have normally given effect to the orders of the English Court in matrimonial proceedings. The leading Jersey case is **In the Matter of IMK Family Trust**.³⁷ The Royal Court could not enforce a judgment of the Family Division of England and Wales varying or altering a Jersey trust under the provisions of the MCA because of **Art 9 TJL**. It indicated it could, however, in certain circumstances, give effect to an Order of the Family Division by giving **Art 51 TJL** directions. In this case this was not possible, as it would have been directing the trustees to act outside of the powers conferred on them by the trust deed. This did not end the matter. In order to take part in the English proceedings, the First Respondent in the Jersey case, Mr Mubarak, (the husband) had written a letter in 2006 to the trustees in which he consented to the payment of a lump sum to his wife from the Trust. The Royal Court found it could give approval under **Art 47 TJL** to a variation of the trust deed, because it considered all adult beneficiaries had consented to the variation, Mr Mubarak’s consent being by way of the letter from 2006. The representative of the minor and unborn beneficiaries also consented.

Post-Nuptial Agreements

The traditional outlook has been that an agreement entered after marriage to regulate affairs on future separation or divorce would not be upheld as it was contrary to public policy.

36 [2012] 2 JLR 51

37 [2008] JLR 250

A post-nuptial agreement is distinct from a separation agreement between couples who are either in the process of separation or about to separate, which are upheld, subject to the proviso that the Court’s jurisdiction cannot be ousted.

The Privy Council decision of **MacLeod v MacLeod**³⁸ upheld a Post-Nuptial agreement and was seen as extremely significant. **MacLeod** has been applied in Jersey in **Re II**.³⁹ The Royal Court expressed the following principles:

- A Court would apply a greater level of scrutiny when considering whether to enforce a post-nuptial settlement than it would when considering whether to ratify an agreement reached between parties after negotiations in financial provision proceedings; and
- When considering the weight to be given to a post-nuptial agreement, the Court would bear in mind that effect should be given to formal agreements properly and fairly arrived at with competent legal advice, unless there were good and substantial grounds for concluding that it would be unjust to do so; and
- The Court would consider all the circumstances surrounding the making of the agreement, including the conduct of the parties and issues such as pressure or the exploitation of a dominant position to secure an unreasonable advantage, inadequate knowledge, possibly bad legal advice and an important change of circumstances.

The Court in **Re II** did not uphold the postnuptial agreement because it was not expressed to be a formal agreement; there was evidence of improper pressure and the husband had had no legal advice.

38 [2010] 1 AC 298

39 [2010] JLR N [50]

Pre-Nuptial Agreements

The issue of pre-nuptial agreements has received only very limited consideration by the Jersey Court.

The Court did consider the leading English case of **Radmacher v Granatino**⁴⁰ in **L v M**⁴¹, finding that a pre-nuptial agreement could be considered as part of 'all the circumstances of the case',⁴² but the parties could not oust the jurisdiction of the Court. In this case the pre-nuptial agreement failed because the parties' needs dictated a different outcome. However, a detailed analysis of the circumstances in which the Jersey Court would be prepared (or not) to uphold a pre-nuptial agreement has not reached the Court and the law in Jersey waits to be clarified.

Civil Partnerships and Same Sex Marriage

The **Civil Partnership (Jersey) Law 2012** ['CPL'] governs civil partnerships between same sex couples.

If a civil partnership breaks down it is dissolved. Grounds for dissolution are similar to grounds for divorce, save that there are no grounds of adultery⁴³ or imprisonment. The court's powers to make orders in relation to financial settlement upon dissolution can be found at **Art 44 – 51 CPL** and follow those governing divorce. A notable difference between **CPL** and the **MCL** is that **Article 47 CPL** permits the Court to cancel, vary, modify or terminate terms of separation made during the partnership or in anticipation of its formation i.e. a pre-partnership agreement. **Article 27 MCL** makes no such reference in

40 [2010] UKSC 42

41 [2017] JRC 062A

42 Art 29[1] MCL

43 Art 28 CPL

relation to agreements made in anticipation of marriage.

As on divorce, upon dissolution of a civil partnership, neither party will be entitled to any share or interest in the estate of the other party or to rights of dower (a right of enjoyment) over the immoveable estate, unless they are named as a specific beneficiary of a will. If a will exists referring to the other as a civil partner, and there is no additional will, the initial will is read as if the parties had never been civil partners, as for divorced couples.

A law allowing same sex marriage is now in draft form and was lodged in the States Assembly for debate in October 2017.

Cohabitation

This is not the case. The term 'common-law marriage' has not helped as it gives an impression of some form of legal tie.

If there are children of the relationship, under **Schedule 1** of the **Children (Jersey) Law 2002** ['CJL'] as amended the Court can transfer property to a child for their benefit, providing the caring parent with a home. Sale of the home may be deferred until the occurrence of a specified event. This was confirmed in **P v Q**⁴⁴ when the court decided that the definition of 'property' contained within **Schedule 1(1)(iv) CJL** should include immoveable property, mirroring the position had the parents been married.⁴⁵

This construction of the legislation was consistent with **the International Covenant on Civil and Political Rights**, which Jersey signed up to through the UK. **Article 26** of this Covenant guarantees equality before the law for all persons without discrimination.

A parent with care of a child can also seek a lump sum payment and maintenance provision under **Schedule 1 (1)(i) CJL**. Only one lump sum payment can be awarded, although this can be made by way of several payments. Any application for lump sum payment must be carefully calculated, to ensure all necessary capital expenditure is included.

44 [2014] JRC 146A

45 Art 28 MCL

The child's welfare is considered as part of the circumstances of the case. The carer's needs are relevant in the sense that he or she must be in a position financially and generally to care for the child. Whilst the parents' financial resources are considerations, the Court will guard against unreasonable claims, going wider than those reasonably necessary. The overall result aimed for is one of fairness and reasonableness.⁴⁶

In relation to property upon separation of cohabitants, the law in Jersey has been usefully clarified in **Flynn v Reid**.⁴⁷ The facts reflect a common scenario. The parties, who did not marry, lived in the family home and had two children. The defendant purchased the property and provided the deposit, although a bank loan was taken out jointly by the parties. The property was placed in the sole name of the defendant because the plaintiff lacked housing qualifications. The defendant continued the loan payments for some six years after the couple separated and the plaintiff had moved out with the children.

Jersey does not recognise a division between legal and equitable interests in immovable property and therefore the Court would not impose a common intention constructive trust over the property to achieve fairness between the parties, as would have been the approach of the English Courts.⁴⁸ An argument based on proprietary estoppel similarly failed. The Court instead relied on the doctrine of unjust enrichment (following Scottish Law⁴⁹ which also does not distinguish between legal and beneficial ownership, together with the French principle of *enrichissement sans cause*).

The test to be applied is:

- Has the plaintiff been enriched at the expense of the defendant and what is the nature of that enrichment?
- If so was the enrichment unjust?
- If so, what remedy, in the particular circumstances of this case, is open to the defendant and is that remedy equitable?

The Court had no doubt the defendant had been enriched at the expense

of the plaintiff, not only in monetary terms but also more interestingly, by provision of domestic services in caring for the children, which was of value to the defendant. In the courts of England and Wales a claim under the **Trusts of Land and Appointment of Trustees Act 1996** does not acknowledge any value in the provision of domestic services, such as raising children, to create an interest in property.

Children – Private Law Proceedings

The Jersey Court has the power to make orders in respect of children under the **CJL**.

The English practitioner will be familiar with many of the principles from the **Children Act 1989** as amended, such as the welfare of the child is paramount, delay is likely to be prejudicial and the child's wishes and feelings are important.

The Court has the power to grant parental responsibility, residence, contact, prohibited steps and specific issue orders, **Art 10(1) CJL**. Further it can make orders enabling a child's name to be changed and for a child to be removed from the jurisdiction under **Art 14 CJL**. Unmarried fathers of children born prior to 2 December 2016, even if named on their child's birth certificate, do not automatically obtain parental responsibility. An unmarried father of a child born on or after 2 December 2016, if named on the birth certificate, automatically obtains parental responsibility for the child, whether married or not.⁵⁰ This important change does not apply retrospectively.

46 C v L 2009 JLR Note 41 and I v J 2013 [2] JLR Note [16]

47 2012 JLR [1] 370

48 Stack v Dowden [2007] UKHL 17 and Jones v Kernott [2012] 1 A.C.776

49 McKenzie v Nutter, 2007 SLT [Sh Ct] 17, at para 33

50 Children and Adoption [Amendment] (Jersey) Law 2016

The Hague Convention on Child Abduction

Jersey is an independent member having signed up to same as of 2005.

If a child is abducted from Jersey to another signatory country, an application is made by the wronged parent through the Central Authority, for the return of the child to Jersey, where the abducting parent should make the appropriate application for leave to remove under the **CJL**. An application form is completed and the details are passed to the receiving signatory state for the appropriate action to be taken. **The Hague Convention** only applies to children aged under 16.

If a child is abducted to Jersey and an application is made under the **Hague Convention on Child Abduction**, the abducting parent will be served with papers and given the opportunity to defend the application. A summary of the defences are:

- The wronged parent has known the location of the child and agreed to the removal. Agreement can be by way of acquiescence, for instance the wronged parent had known the location of the child, but not taken any steps to have the child returned for a period of time.
- The wronged parent is not actually exercising custody rights.
- There is a grave risk of physical or psychological harm or placing in an intolerable situation. This can be a risk to the mother which would impact on her care of the child.
- The child's objections.
- The child is settled in its new environment.
- Discretion of the Court.

Case law on the defences is of limited value, because the cases are fact specific. There has only been one case in Jersey which has followed English

case law. In **Re Max (Family)**⁵¹ the child was not returned to the applicant jurisdiction, the defence of consent being found.

Children's Maintenance

Unlike England and Wales where there is a set formula to decide maintenance, with top ups available in high income cases, in Jersey there is no such formula.

However, a guide is that out of net salary a paying parent will provide 15% for one child, 20% for two and 25% for three or more children. The Court will look at the impact such an order would make on the paying parent's financial position and will vary the amount to be paid if it were to cause hardship. Such payments are usually made until the child reaches 18 or finishes full-time secondary/tertiary education.

Given the lack of funding in Jersey for children to attend university, leave is normally given for a return of the issue to court upon a child going to university, if agreement cannot be reached.

51 [2014]JRC 190

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