

STATES OF JERSEY



DRAFT WILLS AND SUCCESSIONS (AMENDMENT) (JERSEY) LAW 201-

Lodged au Greffe on 29th January 2010
by the Chief Minister

STATES GREFFE



Jersey

DRAFT WILLS AND SUCCESSIONS (AMENDMENT) (JERSEY) LAW 201-

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 Wills and Successions (Amendment) (Jersey) Law 201- are compatible with the Convention Rights.

(Signed) **Senator T.A. Le Sueur**

REPORT

Introduction

1. The Legislation Advisory Panel has recommended this *Projet de Loi* to the Chief Minister as Phase 1 of the review of Jersey Inheritance Law. It resolves the long outstanding issue of the treatment of illegitimate children for succession purposes.
2. As elaborated in an answer to a question posed by the Deputy of St. Martin on 20th October 2009, the Panel considered that the long outstanding delay in resolving this matter was unacceptable and that it should be brought to the Assembly without further delay.
3. The Panel will consider Phase 2 of the work once Phase 1 has been resolved. Phase 2 will deal with wider issues surrounding Inheritance Law, including (for example) '*légitime*' and will require further consideration and consultation before any proposals can be recommended to the Chief Minister before ultimate deliberation by the States Assembly.
4. The Panel considers Phase 2 to be of such importance that it will remain at the highest priority until it has been resolved, hopefully during 2010.

Overall background

5. In a Consultative Document entitled "*Succession Rights for Children Born out of Wedlock*" presented to the States on 14th September 1999¹, what was then the Legislation Committee noted that the status of illegitimate children in Jersey law was encapsulated in the blunt statement that such a child "*est un étranger à sa famille*" (literally, is alien to his or her own family).
6. The only inroad into this ancient principle was Article 11 of the Legitimacy (Jersey) Law 1973 which enabled an illegitimate child to inherit from his or her mother, and the mother to inherit from the child. It was proposed that consideration be given to extending the rights of the illegitimate child to inherit from the estates of his or her wider family as though he or she were legitimate.
7. In making that proposal, the Legislation Committee had regard to the European Convention on the Legal Status of Children Born out of Wedlock² and also to the European Convention on Human Rights³. The specific recommendation in the Consultative Document was –

"To amend the customary law generally to extend the rights of the illegitimate child to inherit from the estates of his or her wider family as though he or she were legitimate."
8. The responses to this recommendation were favourable – except that concern was expressed in one instance about the fact that the Jersey law of succession requires a certain share of a person's movable estate to be set aside for the children of the deceased. This fixed share is known as '*légitime*' and is a

¹ R.C.32/99 <http://www.statesassembly.gov.je/frame.asp>

² <http://conventions.coe.int/treaty/EN/Treaties/Html/085.htm>

³ The texts of the relevant Conventions were set out in the Consultative Document

common feature of continental systems of succession, and has long been known to the law of Scotland (where it is referred to as ‘legitim’ or ‘the bairn’s part’). The concern expressed was that illegitimate as well as legitimate children would be able as of right to make a claim on the estate; and this (so it was argued) would be liable to hurt the ‘legitimate’ family.

9. In a second Consultative Document entitled “Succession Rights”⁴ the Legislation Committee tried to accommodate this concern by recommending that *légitime* be abolished altogether and, in its place, the Royal Court be empowered – as are the courts of England and Wales under the Inheritance (Provision for Family and Dependants) Act 1975 – to order the payment out of an estate of a proper sum for the maintenance and support of the dependents of the deceased.
10. The Committee later lodged a Proposition entitled “Succession Rights for Children Born out of Wedlock”⁵ setting out proposals to put non-marital children on the same footing as marital children in terms of succession rights, and also to replace *légitime* with a new Law under which proceedings in the Royal Court could be instituted by order of justice to determine claims on an estate (similarly to the position in England and Wales under the 1975 Act).
11. The proposals were adopted in principle by the States on 11th November 2003 and extensive work was done by the Law Draftsman in conjunction with the Law Officers’ Department to draft a new Law to confer the necessary powers on the Royal Court to adjudicate on such claims.
12. It fell to the Legislation Advisory Panel to review the resulting draft legislation; and to consider the practical aspects of seeking to abolish *légitime* and replace it with a system involving Royal Court litigation. In this regard the Panel had the benefit not only of advice from the previous Attorney General, but of views expressed by the Royal Court itself as to how such legislation, if enacted, might work in practice. The Panel is indebted to the former Attorney General and to the Court.
13. Having weighed the advice and opinions furnished to it, the Panel (for reasons elaborated on below) recommended to the Chief Minister that he proceed without further delay to lodge a *Projet de Loi* to put non-marital children on the same footing as marital children in relation to succession rights. And that he do this without – for the moment at least – seeking to replace the automatic right of *légitime* with a system that would entail litigation in the Royal Court to determine claims on an estate.
14. Accordingly, this amendment of the Wills and Successions (Jersey) Law 1993 would meet the aim of the original Consultative Document to “... *extend the rights of the illegitimate child to inherit from the estates of his or her wider family as though he or she were legitimate*”.
15. In making the above recommendation to the Chief Minister, the primary objective of the Panel was to give effect without further delay to the recommendation in the 1999 Consultative Document; and the Panel was mindful of the following matters with regard to the in-principle decision of the States in 2003 (*see paragraphs 10 and 11 above*):

⁴ R.C.3/2001 <http://www.statesassembly.gov.je/documents/reports/21953-9615.htm>

⁵ P.121/03 <http://www.statesassembly.gov.je/documents/propositions/773-22373-2122003.htm>

15.1 *The law of légitime*

As mentioned in *paragraph 8* above the fixed share for children of the deceased is a common feature of continental systems of succession where illegitimacy has long ceased to be a bar to inheriting. The Panel did not see that opening this fixed share to children born out-of-wedlock was any more invidious to family unity than exposing a family to litigation, or the threat of litigation, in order to determine what the shares of the children ought to be. Such litigation would inevitably be contentious, if not acrimonious, and much more costly to the estate than the existing, simple, procedure of reducing the will *ad legitimum modum*. The existing procedure avoids the need for litigation that might exhaust the estate and become ultimately self-defeating.

15.2 *The Inheritance (Provision for Family and Dependents) Act 1975*

The Law Commission of England and Wales in its Consultation Paper No 172 of 2003 viewed the procedure under the 1975 Act as “*objectionable on the grounds of unpredictability and the likelihood of family acrimony*” and went on to observe that –

“...*applications under the 1975 Act require review of all the circumstances of the deceased and the claimant, they are notoriously slow and expensive, and the cost may be prohibitive for small estates*”.

The States were not aware of these observations by the Law Commission when the in-principle decision was taken in 2003. In the view of the Panel, any decision to replace the law of *légitime* with a procedure based upon that contained in the 1975 Act requires extremely careful thought.

16. But, whilst further thought is given to the law of succession as a whole, this ought no longer to hold back the reform of the succession rights of children born out-of-wedlock to which the attached draft Law would give effect. Accordingly it was considered that the most practical approach was to lodge this legislation as Phase 1 of the work on Jersey Inheritance Law.

The legislative background

17. At present, under Article 11 of the Legitimacy (Jersey) Law 1973, when the mother of an illegitimate child dies, the child, or, if the child is dead, his or her children, are entitled to any interest in the mother’s estate as though her child had been legitimate. The mother is similarly entitled in respect of the child’s estate if the child dies before she does. Beyond the rights under Article 11, a non-marital child is excluded from sharing in the estate of a non-marital relative (unless, of course, he or she is named in a will).
18. The draft Law would repeal Article 11. In its place, a new *Part 3A* in the principal Law would make provision for ‘equality of succession rights of legitimate and illegitimate issue’ and, in particular, a new *Article 8C* would provide henceforth that –

“*An illegitimate child shall have the same rights of succession as if he or she were the legitimate issue of his or her parents*”

and that

“A person shall have the same rights of succession –

(a) to the estate of an illegitimate child; or

(b) to an estate traced through a relationship of which an illegitimate child was the progeny,

as if that child were the legitimate issue of his or her parents”.

19. By having “rights of succession”, illegitimate children would rank as heirs on intestacy; and this would entitle them e.g. to apply for letters of administration in respect of movable estate where there is no will.
20. For a description of the full provisions of *Part 3A* – relating to the construction of wills, codicils, etc. and the presumption of survivorship relating to illegitimate children – please refer to the draftsman’s Explanatory Note herein.
21. Separately from the new *Part 3A*, a new *Article 18A* would be inserted in the principal Law relating to gamete donors. This is to resolve uncertainties that may arise about the status of men and women who donate sperm and ova for use in the provision of assisted reproduction services to others. As regards succession rights, the donor would not be treated as the father or, as the case may be, the mother of the child – with the result that, not only would the child have no right to participate in the estate of the donor, but the donor would have no right to participate in the estate of the child, if the child died first. Of course, this would not affect the right to adopt a child.

Conclusion

22. This draft Law, if approved, will effect a long awaited reform of the Jersey law of succession rights. Few people in the 21st Century will look with favour upon a succession régime that deems non-marital children to be ‘alien’ to their own family.
23. This Law amounts to a very significant and, it has to be said, long overdue civil law reform.

Financial/manpower statement

There are no additional financial or manpower implications for the States arising from the adoption of this 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 26th January 2010 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 Wills and Successions (Amendment) (Jersey) Law 201- are compatible with the Convention Rights.

Explanatory Note

Article 1 defines the Wills and Successions (Jersey) Law 1993 as the “principal Law”.

Article 2 amends the principal Law consequentially upon the new Article 8C inserted by this Law, in that it provides for expressions in the principal Law regarding children (issue) and relatives to be construed in accordance with that Article. This is of greatest significance for Part 3 of the principal Law. Part 3 contains rules as to the entitlement of a spouse and issue to a deceased person’s estate. The effect of the construction provision added is to treat legitimate and illegitimate children alike.

Article 3 inserts a new Part 3A in the principal Law.

Part 3A - Equality of succession rights of legitimate and illegitimate issue

Article 8A - Interpretation of Part 3A

This Article contains definitions for the purposes of Part 3A only.

Article 8B - Application of Part 3A

This Article specifies when the rules in Part 3A apply. They only apply to the estate of a person who dies on or after the day this Part comes into force.

Article 8C - Equality of succession rights of legitimate and illegitimate issue

This is the most important Article of Part 3A, conferring on an illegitimate child the same rights of succession as if he or she were legitimate. Similarly, the rules as to succession to the estate of an illegitimate child are replaced with a rule that the succession is the same as if the child were legitimate, and any right of succession that is traced through an illegitimate child is to be traced as if the child were legitimate.

Article 8D - Construction of dispositions

This Article provides that any will, codicil or like instrument relating to rights of succession is to be construed so that references to issue, and like phrases, are to be taken to include legitimate and illegitimate children alike. However, this rule of construction is overridden by the will, codicil or other instrument showing a contrary intention. This Article only applies to a will, codicil or other instrument executed on or after the day this Part comes into force.

Article 8E - Presumption of survivorship relating to illegitimate child

This Article creates 2 rules designed to assist in the administration of estates which involve, or may involve, an illegitimate child.

The first would assist in a case where the whereabouts of the father of an illegitimate child is not known. It raises a presumption that the child has not been survived by the father or by any person who might trace an interest in the child’s estate through the father.

The second is intended to ensure that there is no doubt about who may obtain a grant of probate or administration, by raising a presumption that a deceased person is not survived by an illegitimate child or any person who would trace a relationship to the deceased through an illegitimate child.

Article 8F - Amendment of customary laws

This Article confers on an illegitimate child the same succession rights, according to customary law, as a legitimate child.

Article 8G - Construction of enactments

This Article requires that any enactment relating to rights of succession must be construed in accordance with Article 8C.

Article 4 inserts Article 18A in the principal Law. Article 18A is concerned with the status of men and women who donate sperm and ova for use in the provision of assisted reproduction services to others. It makes it clear that, for the purposes of rights of succession, the donor is not to be treated as the parent of the child born as a consequence of the provision of the services.

Article 5 amends the Adoption (Jersey) Law 1961 so as to delete words which are made otiose by the rule in Article 8C.

Article 6 repeals Article 11 of the Legitimacy (Jersey) Law 1973, consequentially upon the enactment of Article 8C. Article 11 contains rules about the rights of succession of an illegitimate child and to the estate of an illegitimate child, which are superseded by the rule in Article 8C for equal treatment of legitimate and illegitimate issue.

Article 7 provides for the citation of the Law and for it to commence 3 months after it is registered.



Jersey

DRAFT WILLS AND SUCCESSIONS (AMENDMENT) (JERSEY) LAW 201-

Arrangement

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Jersey

DRAFT WILLS AND SUCCESSIONS (AMENDMENT) (JERSEY) LAW 201-

A LAW to amend the Wills and Successions (Jersey) Law 1993, to revise the customary law rules of succession, and to make consequential amendments to other enactments.

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 Wills and Successions (Jersey) Law 1993¹.

2 Article 1 amended

In Article 1 of the principal Law –

- (a) the text of Article 1 shall be numbered as paragraph (1) of that Article;
- (b) after paragraph (1) there shall be inserted the following paragraph –

“(2) In this Law, any reference to a ‘child’, ‘heirs at law’, ‘issue’ or ‘relatives’, or to any description of relative, shall be construed in accordance with Article 8C, as it applies by virtue of Article 8B.”.

3 Part 3A inserted

After Part 3 of the principal Law there shall be inserted the following Part –

“PART 3A
EQUALITY OF SUCCESSION RIGHTS OF LEGITIMATE AND
ILLEGITIMATE ISSUE

8A Interpretation of Part 3A

In this Part –

‘commencement day’ means the day this Part came into force;

‘disposition’ means a disposition made by –

- (a) a will or codicil; or
- (b) an instrument executed *entre vifs* which relates to rights of succession;

‘rights of succession’ include the entitlement, according to customary law –

- (a) to apply to reduce a will *ad legitimum modum*; or
- (b) to a grant as administrator or executor dative.

8B Application of Part 3A

This Part applies to the estate of a person who dies on or after the commencement day.

8C Equality of succession rights of legitimate and illegitimate issue

- (1) An illegitimate child shall have the same rights of succession as if he or she were the legitimate issue of his or her parents.
- (2) A person shall have the same rights of succession –
 - (a) to the estate of an illegitimate child; or
 - (b) to an estate traced through a relationship of which an illegitimate child was the progeny,as if that child were the legitimate issue of his or her parents.

8D Construction of dispositions

- (1) This Article applies to a disposition executed on or after the commencement day.
- (2) The disposition shall be construed in accordance with the rights expressed in Article 8C, unless a contrary intention appears.
- (3) Accordingly, in the disposition, ‘child’, ‘issue’, ‘son’ and ‘daughter’ and any similar description, shall be taken to include both legitimate and illegitimate persons of that description, unless the contrary intention appears.
- (4) A disposition executed before the commencement day is not, for the purposes of paragraph (1), to be treated as executed on or after

that day by reason only that the will or instrument in which it appears has been confirmed by a codicil or further instrument executed on or after that day.

8E Presumptions of survivorship relating to illegitimate child

- (1) Unless the contrary is proved, an illegitimate child shall be presumed not to have been survived by his or her father or by any person related to the child only through the child's father.
- (2) Unless the contrary is proved, for the purposes of obtaining a grant of probate or administration, it shall be presumed that the deceased was not survived by –
 - (a) an illegitimate child; or
 - (b) any person whose relationship to the deceased is traceable through the birth of an illegitimate child.

8F Amendment of customary laws

The customary laws of succession are hereby amended so as to confer the rights expressed in Article 8C.

8G Construction of enactments

Enactments pertaining to rights of succession shall be construed so as to confer the rights expressed in Article 8C.”.

4 Article 18A inserted

After Article 18 of the principal Law there shall be inserted the following Article –

“18A Gamete donors

- (1) Part 3A of the Wills and Successions (Jersey) Law 1993 shall not be construed as conferring rights of succession as if a child were the legitimate issue of a man where –
 - (a) the man's sperm is used for the purposes of medical, surgical or obstetric services provided for the purpose of assisting the child's mother to carry the child; and
 - (b) those services are not received by him and the mother together.
- (2) Paragraph (1) does not affect the operation of Article 20 of the Adoption (Jersey) Law 1961² in the event that the child is adopted by the man.
- (3) For the avoidance of doubt, a woman whose ova are used for the purposes of medical, surgical or obstetric services provided for the purpose of assisting another woman to carry a child is not, for the

purpose of conferring any rights of succession, to be treated as the mother of the child.

- (4) Paragraph (3) does not affect the operation of Article 20 of the Adoption (Jersey) Law 1961 in the event that the child is adopted by the woman first mentioned in that paragraph.”.

5 Adoption (Jersey) Law 1961 amended

In Article 23 of the Adoption (Jersey) Law 1961, in paragraphs (1), (2) and (3)(c), the words “born in lawful wedlock” shall be deleted.

6 Legitimacy (Jersey) Law 1973 amended

In the Legitimacy (Jersey) Law 1973³ –

- (a) Article 11 shall be repealed;
- (b) the text of Article 14 shall be numbered as paragraph (1) of that Article;
- (c) after paragraph (1) of Article 14 there shall be added the following paragraph –

“(2) Notwithstanding the repeal of Article 11 of this Law by the Wills and Successions (Amendment) (Jersey) Law 201-⁴, that Article shall continue to apply to confer rights of succession in a deceased person’s estate if and to the extent that Part 3A of the Wills and Successions (Jersey) Law 1993 does not, by virtue of Article 8B of that Law, apply to the estate.”.

7 Citation and commencement

This Law may be cited as the Wills and Successions (Amendment) (Jersey) Law 201- and shall come into force 3 months after it is registered.

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- ¹ *chapter 04.960*
 - ² *chapter 12.050*
 - ³ *chapter 12.450*
 - ⁴ *P.7/2010*