

Commentary on Article 25 of the Probate (Jersey) Law 1998 in the lead up to the introduction of the Law.

Note the 'Variation of Dispositions' provisions were discussed under Article 20 before it became Article 25 in the Draft Probate (Jersey) Law 199 lodged au Greffe.

This legislation was sponsored by the Finance and Economics Committee and developed by the Legislation Committee. The positions of the various parties contributing to the drafting of the Law were recorded in the Minutes of these two committees. Note the development and drafting were coordinated by the Judicial Greffier leading a Working Party of the Legislation Committee. The Draft Probate (Jersey) Law 199 was lodged au Greffe on 18th November 1997 by the Legislation Committee. The publication of the Draft Probate (Jersey) Law 199 in projet P.178/1997 by the States Greffe included a Report and an Explanatory Note as detailed below.

A search was initially made at the Judicial Greffe since the Judicial Greffier led the development process: a search was also made at the States Greffe, but no additional relevant records were found. In the records of the Judicial Greffe we have found the documents below which record the commentary made in the lead up to the introduction of the Probate (Jersey) Law 1998. Note these records are those found at the Judicial Greffe and are official copies of records from the States Greffe.

1. 15 Jan 1996: Legislation Committee Minutes Act 8.
2. 4 Apr 1996: Finance and Economics Committee Minutes Act 38.
3. 20 May 1996: Legislation Committee Minutes Act 10. REDACTED – see explanation of exemption applied below.

Documents lodged with the Draft law on 18th November 1997. Note these are published by the States Greffe as part of the DRAFT PROBATE (JERSEY) LAW 199 , projet P.178/1997, but excerpts covering Article 25 have been scanned and included in this response:

4. Report of the Legislation Committee to States of Jersey in Relation to the Probate (Jersey) Law 199 [Excerpt covering Article 25]
5. Explanatory Note of the Law Draftsman to accompany the draft Probate (Jersey) Law 199 [Excerpt covering Article 25]

The Law as enacted may be found on the JLIB website:

http://www.jerseylaw.je/Law/display.aspx?url=lawsinforce%5chtm%5cLawFiles%5c1998%2fJersey_Law_16-1998.htm

References to 'the Law' below are to the Freedom of Information (Jersey) Law 2011 which may be found on the JLIB site at:
http://www.jerseylaw.je/Law/display.aspx?url=lawsinforce%2fconsolidated%2f16%2f16.330_FreedomofInformationLaw2011_RevisedEdition_1January2015.htm

FOI exemption(s) applied:

31 Advice by the Bailiff, Deputy Bailiff or a Law Officer

Information is qualified exempt information if it is or relates to the provision of advice by the Bailiff, Deputy Bailiff or the Attorney General or the Solicitor General.

Justification for exemption

Item 3 – '20 May 1996: Legislation Committee Minutes Act 10' contains two paragraphs which record communication from the Bailiff in reporting the views of the Royal Court to the Legislation Committee. We consider that this information 'is or relates to the provision of advice by the Bailiff' and therefore the exemption described by Article 31 is engaged. This exemption is a qualified exemption under the Law.

Article 9(2) of the Law determines when we may refuse to supply information we hold which is covered by a qualified exemption:

9 When a scheduled public authority may refuse to supply information it holds

...

- (2) A scheduled public authority must supply qualified exempt information it has been requested to supply unless it is satisfied that, in all the circumstances of the case, the public interest in supplying the information is outweighed by the public interest in not doing so.

We recognise the public interest in supplying information which helps understanding of the process of changing the law. However it is also strongly in the public interest to maintain the exemption allowed by Article 31 and not supply information if it is or relates to the provision of advice by the Bailiff. In balancing the public interest in supplying the information on the one hand and on the other hand maintaining the exemption allowed under Article 31, we also consider that the other information which is being released does provide a full overview of the key issues raised in developing Article 25 of the Probate (Jersey) Law 1998; this means the additional public interest in supplying the paragraphs which engage the Article 31 exemption is correspondingly less. Therefore, having considered the balance of the public interest in all the circumstances of the case we are satisfied that the public interest in supplying this part of the information is outweighed by the public interest in not doing so and we have redacted the paragraphs from our response.

1. 15 Jan 1996: Legislation Committee Act 8.

Judicial Greffier



LEGISLATION COMMITTEE

15th January 1996

Probate
(Jersey)
Law 1949:
Review.
M307(10)

Bailiff
Ctt. Clk.
Jud. Gr.
A.G.
L.D.

8. The Committee, with reference to its Act No. 5 of 30th January 1995 and with the Judicial Greffier in attendance, considered the fifth working draft of the draft Probate (Jersey) Law 199, together with a report from the Judicial Greffier on the proposals. It recalled that a Working Party had been established in 1994 to review the Law and noted that the proposals had been considered by both the Royal Court and a representative of the Law Society Sub-Committee.

The Committee noted that as a result of these discussions a high degree of agreement had been reached on the various principles, but that there were four areas on which the Superior Number of the Royal Court had an opinion which differed from that of the Working Party and the Law Society Sub-Committee.

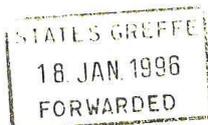
The Judicial Greffier outlined the proposals which were designed to simplify procedures and included a new fast track procedure in relation to jurisdictions with similar procedures and the granting of indemnity to banks in certain circumstances. However, it had been decided not to recommend a full postal system because of the financial and manpower implications involved.

The Committee noted that the proposal that the Court should have a discretion not to appoint the Executor named had not been accepted by the Royal Court on the basis that a person should be left to decide who to appoint as Executor. However, both the Working Party and the representative of the Law Society believed that there were cases where the Court should have the right to refuse to make a Grant to the named Executor. The Court did not support the proposed variance in the division of an Estate and it considered that this would be seen as a blatant tax evasion provision. However, this was supported by the Director of Financial Services.

The inclusion of a provision allowing a person who was entitled to a benefit under an Estate to disclaim this with the disclaimer dating back to the date of death was also not supported by the Court. In relation to the proposed inclusion of more detailed provisions in relation to access to Wills, the Committee did not support the proposal of the Vice President that Wills should be published.

In view of the complexity of the proposals, the Committee decided to give further consideration to the matter at its next meeting prior to the formal views of the Law Society being sought. It asked the President to seek the comments of the Bailiff on the proposals and asked that the comments of the Director of Financial Services be available for scrutiny. In the interim, the President undertook to consult with the President of the Law Society to apprise him of the proposals.


Greffier of the States



2. 4 Apr 1996: Finance and Economics Committee Act 38.

JUDICIAL
GREFFIER



FINANCE AND ECONOMICS COMMITTEE

4th April 1996

Probate
(Jersey)
Law 199:
Proposed
revision.
307(10)

F.S.D.
T.O.S.
C.A. to St.
Jud.G. ✓
A.G.
L.D.
Leg.C.(2)

38. The Committee received a Memorandum, dated 19th March 1996, from the Director of Financial Services regarding the proposed revision of the Probate (Jersey) Law 199-.

The Committee recalled that a working party, under the Chairmanship of the Judicial Greffier, had been working for some months on the proposed law. Following consultation with various interested parties, including the Royal Court and a sub-committee of the Jersey Law Society, a working draft of the new law had been prepared. The Committee noted that there were two issues of concern to the finance industry, contained in this draft law -

- (1) Article 20 "Variation of Dispositions or Distributions by Consent", this would allow the Court with the consent of all relevant parties, either to vary the way in which a deceased person's estate would be divided up, with the variation to take effect as if it had been effected by the deceased, or to direct the way in which the estate of a person would be divided up. It would also to allow the Court to decide in what manner the personal estate of a deceased person should be distributed;
- (2) the draft contained a new Article 21 to provide a disclaimer of an interest in personal estate. This provided for a person who was entitled to a benefit under an estate, to disclaim this, with the disclaimer dating back to the date of death, so that the person disclaiming never received the benefit. This would be of assistance to some people for tax purposes.

The Committee, having received an oral report from the Director, Financial Services Department, approved the proposals and decided to advise the Legislation Committee accordingly.

The Greffier of the States was directed to send a copy of this Act to the Legislation Committee.


Greffier of the States



3. 20 May 1996: Legislation Committee Act 10.

*3. Judicial
Greffier*



LEGISLATION COMMITTEE

20th May 1996

Probate
(Jersey)
Law 1949:
Review
M307(10)

Bailiff
L.C.C.
Jud.Gr.
A.G.
L.D.

10. The Committee, with reference to its Act No. 8 of 15th January 1996, received the Bailiff and the Judicial Greffier for discussions on the fifth working draft of the draft Probate (Jersey) Law 199. It noted that the draft had been approved by the Law Society and the Financial Services Department, but that the Royal Court had reservations in relation to some of the proposed provisions.

2 Paragraphs redacted:
See response for explanation

After discussion, the Bailiff withdrew from the Meeting.

The Committee agreed that it was not appropriate that the Court should be able to substitute its own views as to the executor for those of the testator and that the present wording was too wide. It agreed that the draft Law should be re-worded to meet the concerns of the Court in accordance with the following principles;

- (a) The phrase "fit and proper" should be replaced with words to make it clear that the power was only to be exercised in exceptional circumstances where there was a real concern as to the suitability of the executor to carry out his functions, eg. that he had recently been convicted of serious fraud.
- (b) If the Greffier was concerned as to the named executor, he should not be able to take a decision, but should merely refer the matter to the Royal Court. The Court could then convene other beneficiaries in order to hear their views before reaching a decision.

STATES GREFFE
- 3. JUN. 1996
FORWARDED

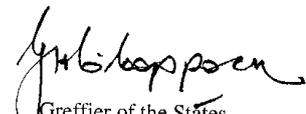
The Committee further noted that non-residence in the Island remained a ground for refusing to appoint a named executor. Although this had apparently not in practice been exercised, it was felt that it might be inappropriate in this day and age for an international finance centre to have such a provision and the Working Party was asked to advise on whether the provision should be removed.

In relation to Articles 20 and 21, the Committee noted that similar provisions existed in the United Kingdom which specifically envisaged a tax benefit being conferred. It further noted that the Finance and Economics Committee had considered these two articles and supported their retention. It was further noted that the Court already exercised jurisdiction in relation to the rectification and variation of trusts and that tax benefits might follow from the exercise of such powers. As there would be a public hearing with full disclosure, the Committee was of the view that the power could not be used for tax evasion, but could only apply to tax avoidance.

Having considered the views of the Royal Court, the Committee concluded that the provisions of Articles 20 and 21 were important and should remain. However, the wording should be amended so as to make it clear that references to "parties who in its opinion should be consulted..." extended only to beneficiaries under the will and did not include the revenue authorities of any country. Only those entitled under the will should be joined in the proceedings and the statute should provide that the Court should only consider the interests of the beneficiaries under the will in deciding whether or not to grant an order.

Having recalled that this work had been included on the Law Drafting Programme for 1996, the Committee asked the Law Draftsman to expedite its completion in consultation with the Judicial Greffier.

The Judicial Greffier was authorised to take the appropriate action.


Greffier of the States

4. Report of the Legislation Committee to States of Jersey in Relation to the Probate (Jersey) Law 199 [Excerpt covering Article 25]

2

REPORT

(A) Introduction and background

This law relates to the way in which the Royal Court deals with matters in relation to the personal or moveable property of a deceased person. The current law was passed in 1949 and, although there have been a few minor amendments to this, there has been no major review of this area of law since then. After a person's death, the Judicial Greffier normally makes either a grant of Probate (where there is a Will) or a grant of Letters of Administration (where there is no Will). He does so not only in accordance with Jersey law but also by applying the law of the deceased person's domicile (long-term home). In 1996 the Judicial Greffe issued 2,102 grants of which only 671 related to people who died domiciled in Jersey, 1,082 related to people who died domiciled elsewhere in the British Isles and 349 related to people who died domiciled outside the British Isles. The 349 cases of people who died domiciled outside the British Isles involved 69 countries and 93 legal jurisdictions. It is important to the finance industry in Jersey that we have an efficient Probate law. People who invest money in the Island need to have confidence both that assets will be released only to the correct people upon their death and that this will occur with a minimum of delay, cost and difficulty. The main purpose of the review has been to simplify and improve the procedure in this area and to make the obtaining of grants of Probate or Letters of Administration easier and cheaper whilst retaining high standards in ensuring that the assets of deceased persons are released only to the appropriate people.

(B) The detailed provisions

The Law Draftsman's explanatory note which is attached to the draft law explains in detail the effect of the various Articles. This report should be read in conjunction with the explanatory note and its main purpose is to explain the policy decisions behind the various changes.

(1) Article 1 contains various definitions. The word "grant" is defined as a grant of Probate or Administration. The word

[omit pages 3-7]

- (18) Article 25(1) creates two new provisions. The first allows the Court, with the consent of all parties who in its opinion should be consulted and having regard only to the interests of the beneficiaries or heirs interested in the part of the estate affected by the Order, to change the terms of the Will within two years after the death of the deceased person. Such an Order will take effect as from the date of death of the deceased person. This is a provision which has been requested by the finance industry because its existence is desirable from the point of view of people who invest monies in the Island. If their Will is inefficient from a tax point of view or they have failed to make a Will then the distribution of the estate can be varied by consent in a more tax efficient way. The Committee does not believe that this provision will create any difficulties from the point of view of British or other tax authorities because a similar power exists in Great Britain to make a deed of family arrangement within a two year period from the date of death.

The second provision in Article 25(1) is to allow the Royal Court to direct to whom and in what manner the moveable estate of a deceased person shall be distributed. Although the Royal Court already has a power, by consent, to end a dispute as to the distribution of the moveable estate of a deceased person, it is thought helpful to include an express power so to do.

- (19) Article 26 contains a new power to enable a person who is entitled to an interest in the moveable estate of a deceased person to disclaim the same with the disclaimer to have the effect of causing the person making it to be treated as having died before the deceased person. This provision is similar in purpose to the first aspect of Article 25(1) and is there to avoid the situation in which, notwithstanding a disclaimer, tax authorities elsewhere would treat the situation as if a gift had been made to the person disclaiming who had then made a transfer to some other person. Again, the Committee does not see this matter as being controversial from the point of view of British or any other tax authorities.

[omit pages 9-10]

5. Explanatory Note of the Law Draftsman to accompany the draft Probate (Jersey) Law 199
[Excerpt covering Article 25]

11

Explanatory Note

This draft Law replaces the Probate (Jersey) Law 1949 ("the 1949 Law"). Broadly, the draft Law re-enacts the provisions of the 1949 Law, but certain new provisions are introduced. These include new powers for the Judicial Greffier in relation to the making and revocation of grants (*Articles 6 and 16*), new provision as to entitlement to a grant as administrator or executor dative (*Article 14*), a new right for the Attorney General or an interested party to apply to court for the removal of an executor or administrator (*Article 17*), new powers for the Royal Court ("the Court") to vary dispositions by consent and for a beneficiary to disclaim his interest (*Articles 25 and 26*) and a new provision as to the law to which a will must conform to be valid (*Article 29*).

The draft Law is divided into five parts -

- Part I* - contains preliminary provisions as to interpretation, jurisdiction of the Court, and the powers and duties of its officers;
- Part II* - is concerned with the making of grants of probate and letters of administration, the lodging of caveats, the removal of executors and administrators from office and the making of subsequent grants;
- Part III* - is concerned with the collecting in of an estate and its distribution;
- Part IV* - specifies when and how interests in an estate can be varied or disclaimed;
- Part V* - contains miscellaneous and supplemental provisions as to the keeping of wills and other documents, the validity of wills and domicile.

Part I - Preliminary

Article 1 contains interpretation provisions.

Article 2 confers jurisdiction on the Court in all matters pertaining to grants of probate and letters of administration.

[pages 12-15 omitted]

Article 23 makes it an offence to administer any part of an estate without obtaining a grant. The penalty is an unlimited fine and/or twelve months' imprisonment.

Article 24 enables the Court to order the executor or administrator of an estate to exhibit an inventory of the deceased's movable estate.

Part IV - Variation and disclaimer of interests

Article 25 is a new provision empowering the Court, with the consent of interested parties, to make an order varying a disposition (whether made by will or under the law of intestacy) within two years of the death of the deceased person, and providing that any such variation has effect as if made under the deceased's will or intestacy and directing to whom and how the deceased's estate is distributed.

Article 26 enables a beneficiary to disclaim his interest, before it is distributed to him, by giving notice to the Judicial Greffier and to the executor or administrator.

Part V - Miscellaneous and supplemental

Article 27 provides that all wills must be deposited and kept under the direction of the Court and that all other documents must be deposited and kept in accordance with rules of court. Wills and copies of grants will be open to inspection, and access to other documents will be regulated by rules of court.

Article 28 provides that an official copy of a will or grant may be obtained from the Judicial Greffier.

Article 29 is a new provision as to the law a will must conform to in order to be treated as properly executed.

Article 30 provides that, for the purposes of a grant in and the distribution of movable estate, the domicile of a woman who is or has been married shall not be the same as that of the person who is or was her husband by virtue only of marriage but shall be ascertained in the same way as that of any individual, and that a person first becomes capable of attaining an independent domicile at the age of 16 or upon marrying under that age.