

Purpose and type of consultation

This Consultation Paper seeks to elicit the views of Islanders on a proposed amendment to the Jersey law of succession which would ensure that on the death of a spouse or civil partner a wife, husband or civil partner would have the legal right to continue living in the matrimonial home.

Closing date: 30th November 2014

1 Summary

1.1 As part of the Legislation Advisory Panel's continuing work to modernise the Jersey law of succession, an amendment to the Wills and Succession (Jersey) Law 1993 ("the 1993 Law") is being considered that would establish in law the right of a surviving spouse or civil partner to continue living in the matrimonial home, or the civil partnership home, as the case may be, during the lifetime of that survivor. Such legal right would take precedence over the will of the deceased provided certain conditions were met.

2 Historical background

2.1 The Wills and Successions (Amendment) (Jersey) Law 2010 reformed the treatment of illegitimate children for succession purposes. The Wills and Successions (Amendment No. 2) (Jersey) Law 2013 ("the 2013 Law") took the reform of succession law into the field of matrimonial law by establishing the equivalent of a right of dower between spouses irrespective of gender, and abolishing the right of a male surviving spouse to *viduité*.¹

2.2 Dower, or *douaire*,² in the form it takes today is a right to the life enjoyment – the *usufruit*³ – of one third of the late spouse's or civil partner's immovable estate.⁴

3 Modern day considerations

3.1 Whilst the adoption of a universal right equating to *douaire* sought to protect the position of surviving spouses (irrespective of gender) and surviving civil partners where the deceased spouse/civil partner had made a will under which the surviving spouse/civil partner might receive nothing, there remain in practical

¹ The 2013 Law also amended Articles 8 and 8AA of the 1993 Law in relation to the forfeiture of succession rights in cases of desertion or judicial separation.

² The French word *douaire* and English word *dower* tend to be used interchangeably

³ 'usufruct' in English

⁴ immovables means both land all things such as a house and fixtures attached to the land (hence 'immovable estate')

terms potential situations in which the right to the life enjoyment of one-third of the deceased spouse's/civil partner's property would not prevent the surviving party from being forced out of his or her home. Such a situation might arise, for example, if a surviving party were unable to maintain a financial agreement to pay rent to the individual or individuals who had inherited the remaining two-thirds of the property.

- 3.2 The Legislation Advisory Panel has noted Articles 5, 6 and 7 of the 1993 Law. Under Article 5, where a spouse or civil partner dies intestate as to the matrimonial home or civil partnership home (for convenience referred to hereafter collectively as 'the family home'), the surviving spouse or surviving civil partner is entitled to the usufruct of the family home. This is assuming that the surviving spouse or surviving civil partner is not entitled absolutely to the family home under Article 6 or 7.
- 3.3 The family home means a dwelling place situate in Jersey occupied as the principal residence of the parties which is owned⁵ by one or both of them⁶ or held under a 9 year + lease.
- 3.4 Under Article 6 of the 1993 Law, on an intestacy of the immovable estate generally, the surviving spouse or the surviving civil partner is entitled as follows:
- (a) if there are no children, to the whole of the immovable estate;
 - (b) if there are children, to an equal share with each of the children.⁷
- 3.5 Where a spouse or civil partner dies intestate as to immovable estate, the surviving spouse/civil partner is not entitled to dower in that immovable estate. Only when there is a will relating to the immovable estate does the right of dower come into play.
- 3.6 Article 7 of the 1993 Law relates to the devolution of movable estate which may still be relevant to a family home which is owned by share transfer – *see 3.3 above and footnote 5*. Where a spouse or civil partner dies intestate as to movable estate it devolves as follows:
- (a) where the deceased leaves a surviving spouse/civil partner, but no children, the surviving spouse/civil partner takes the whole of the net movable estate;
 - (b) where the deceased leaves a surviving spouse/civil partner and children, the surviving spouse/civil partner is entitled to –
 - (i) the household effects,
 - (ii) other movable estate to a value of £30,000, and
 - (iii) one-half of the rest of the net movable estate,
 and the children take the other half of the rest of the net movable estate.
- 3.7 Where a person dies having made a will as to movable estate and is survived by –

⁵ including by share transfer

⁶ as tenants in common

⁷ including any grandchildren of the deceased, if their parent died before the deceased spouse/civil partner

- (a) a spouse or civil partner but no children, the surviving spouse/civil partner may claim as *légitime* –
 - (i) the household effects,⁸ and
 - (ii) 2/3^{rds} of the rest of the net movable estate;
- (b) a spouse or civil partner and children –
 - (i) the surviving spouse/civil partner may claim as *légitime* the household effects and one-third of the rest of the net movable estate, and
 - (ii) the children may claim as *légitime* 1/3rd of the rest of the net movable estate;
- (c) children but no spouse or civil partner, the issue may to claim as *légitime* 2/3^{rds} of the net movable estate.

3.8 As has been mentioned (see 3.5 above) only when there is a will relating to the immovable estate does the right of dower come into play. It gives the surviving spouse/civil partner a ‘stake’ in the immovable estate from which he or she might otherwise have been cut out altogether by the will. Douaire was of course the traditional protection or ‘safety net’ in Jersey customary law for the widow. Its operation is reflected in the architecture of traditional Jersey farmhouses to which the dower cottage was added for the enjoyment of the widow until her death, whilst the main house was inherited outright by the principal heir who was able to work the land, and so the cycle continued.

3.9 It has to be accepted, however, that what was suited to a Norman rural community cannot realistically serve the needs of the modern, diverse and egalitarian society into which Jersey has evolved. Properties are not constructed in such a way that they can be partitioned conveniently into two-thirds/one-third, and so the dower entitlement becomes little more than a lever in negotiations with the heirs, rather than a right that properly secures enjoyment for the surviving spouse/partner of the family home for the remainder of his/her life. The legal cost of negotiating, reaching and implementing settlement in such circumstances may be so high as to outweigh the benefit that the right of dower confers in the first place.

4 Possible reform

Automatic right to life enjoyment of family home

4.1 The proposal under consideration is that a surviving spouse/civil partner should have the legal right to the life enjoyment of the whole of matrimonial home (as already defined in the 1993 Law – see 3.3 above), whether or not the deceased made a will, and irrespective of any contrary provision in any will of the deceased.

Safeguards where parties separated etc.

4.2 It is important to note Articles 8 and 8AA of the 1993 Law in this context. Article 8 disqualifies spouses living apart from what are termed “the surviving spouse provisions”. Article 8AA disqualifies civil partners living apart from what are termed “the surviving civil partner provisions”). These are the provisions of the 1993 Law – and of customary law (which effectively means *douaire*) – that operate to confer

⁸ generally articles of household or personal use or ornament normally situate in or around the matrimonial/civil partnership home

property or any *usufruit*, interest, right or title in or to property on a surviving spouse or civil partner.

4.3 The relevant statutory provisions are the right of a surviving spouse or civil partner to –

- the life enjoyment of the matrimonial/civil partnership home (under Article 5 of the 1993 Law);
- the appropriate share of the immovable estate on intestacy (under Article 6); and
- part of the movable estate – known as *légitime* (under Article 7).

4.4 These provisions do not apply (*i.e.* the surviving spouse/civil partner is excluded from claiming these automatic rights in the estate) where –

- (a) at the date of death, the deceased and the surviving spouse/civil partner were not residing together; and
- (b) either –
 - (i) the surviving spouse/civil partner had deserted the deceased without cause and such desertion was continuing, or
 - (ii) a judicial separation with respect to the surviving spouse/civil partner had been granted by a court to the deceased spouse/civil partner.

4.5 It is equally important to note that, above and beyond Articles 8 and 8AA of the 1993 Law, there is a power in the Royal Court on any other ground at customary law, to exclude a person from the right to succeed to an estate. It has been held *e.g.* that a claim for dower will not be allowed where a widow has been convicted of the manslaughter of her husband.⁹ The rationale of that judgment would apply with equal force to a claim by a surviving spouse/civil partner to any one of the rights referred to in 4.3 *above*.

4.6 Were a surviving spouse/civil partner to have the automatic right to the enjoyment of the family home referred to in 4.1 *above*, it would need to be clear that that right –

- (a) fell within the ‘surviving spouse/civil partner provisions’ to which Articles 8 and 8AA of the 1993 Law apply; and
- (b) was subject to the customary law discretion of the Royal Court referred to in 4.5 *above*.

Abolition of dower

4.7 It would be a corollary of such a reform that *douaire* would cease to serve any purpose, and would require to be formally abolished.

4.8 It should be noted that Article 7 of the Loi (1880) sur la propriété foncière confers on spouses and civil partners the benefit of a legal hypothec on the immovable property of the other spouse/civil partner as security for their respective dower rights. This means in practical terms that, in the event of a *dégrévement*

⁹ *In Re Estate Poole* 25 GLJ 48 was a case in the Royal Court of Guernsey but it is submitted that the decision would hold good in Jersey law

(bankruptcy) of such property (i.e. the rough equivalent of foreclosure), the spouse/civil partner has certain rights of priority over other creditors. If dower is to be abolished, attention will need to be given to an equivalent means of securing the position of the spouse/civil partner in relation to dégrèvement (bankruptcy) proceedings.

5 Conclusion

5.1 The Legislation Advisory Panel is of the opinion that the suggested amendment would be an important one and would help to ensure that Jersey's law of succession provided a greater measure of security than at present to surviving spouses and civil partners.

5.2 Furthermore, it is believed that it would reduce the scope for disputes within families because it would at once simplify and further clarify the rights of surviving spouses and of surviving civil partners.

5.3 As such the Panel would like to receive general comments to the suggested amendment as well as more specific feedback on –

- any perceived drawbacks or unfairness in the workings of the possible reform,
- any additional provision that might need to be made in connection with such a reform, and
- the criteria for exclusion from automatic entitlement (4.2 to 4.6 *above*).
- preserving the effect of Article 7 of the Loi (1880) sur la propriété foncière in relation to hypothecary rights (4.8 *above*).

Please send your comments to:

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This consultation paper has been sent to the following individuals / organisations:

- Institute of Directors
- Jersey Bankers' Association
- Jersey Association of Trust Companies
- Jersey Citizens Advice Bureau
- Jersey Finance Limited
- Jersey Financial Services Commission
- Law Society
- Law Commission
- Social Security Department
- Treasury and Resources Department