PRESIDENT'S GUIDANCE

DEFECTIVE DIVORCE PETITIONS/DECREES

This Guidance, reflecting the recent decisions in *M v P* [2019] EWFC 14 and *Re 4 Defective Divorces, Baron v Baron and others* [2019] EWFC 26, replaces the Interim Guidance issued by Sir James Munby P on 23 April 2018.

1 Section 3 of the Matrimonial Causes Act 1973 provides as follows:

> "Bar on petitions for divorce within one year of marriage.
>
> (1) No petition for divorce shall be presented to the court before the expiration of the period of one year from the date of the marriage.
>
> (2) Nothing in this section shall prohibit the presentation of a petition based on matters which occurred before the expiration of that period."

2 Included among the facts as a basis for divorce set out in section 1 of the 1973 Act are, as provided by section 1(2)(c):

> "that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition;"

and, as provided by section 1(2)(d):

> "that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition … and the respondent consents to a decree being granted;"

and, as provided by section 1(2)(e):

> "that the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition"

3 In 2018 a number of cases were brought to the attention of the President where decrees nisi and absolute had been granted notwithstanding that:

(i) the petition, in breach of section 3, had been issued within one year of the marriage, or

(ii) although there had been no breach of section 3, the relevant period prior to the presentation of the petition specified in section 1(2)(d) or 1(2)(e) had not elapsed.

In some of these cases it was necessary for the President to refer the file to the Queen's Proctor: *M v P* [2019] EWFC 14.

4 It is clear from the decisions of Sir Stephen Brown P in *Butler v Butler, The Queen's Proctor Intervening* [1990] 1 FLR 114, [1990] FCR 336, and of Sir James Munby in *Re 4 Defective Divorces, Baron v Baron and others* [2019] EWFC 26 (and see also the decision of Barnard J in *Woolfenden v Woolfenden* [1948] P 27) that:

(1) Where a petition has been issued in breach of section 3, it is null and void and the court has no jurisdiction to entertain it; with the consequence that any decree nisi or decree absolute purportedly granted is likewise null and void.

(2) The defect cannot be cured by amendment of the petition.

(3) The court has no power to grant discretionary relief.

(4) In consequence, if a party has subsequently remarried that marriage is invalid (see *Woolfenden*).

5 In *M v P* [2019] EWFC 14, Sir James Munby held that:

(1) In a case where there has been no breach of section 3, but where the relevant period specified in section 1(2)(c), 1(2)(d) or 1(2)(e), as the case may be, had not

elapsed when the petition was issued, the consequence is that any decree nisi or decree absolute purportedly granted is only voidable and *not* null and void.

(2) The court has power to grant discretionary relief based on the circumstances of the particular case.

(3) If there was another fact in existence at the date of the petition which, if properly pleaded, would have justified the court granting a decree nisi and thereafter making the decree absolute, the court may, and normally should, permit amendment of the petition to plead that fact.

(4) If the petition is so amended the decree nisi can, and should, be amended to bring it into accord with the amended petition.

6 The following practice should be followed in any case in which it is discovered that a decree has been granted notwithstanding a breach of section 3 or non-compliance with section 1(2)(c), 1(2)(d) or 1(2)(e):

(1) The file must immediately be put before a salaried judge (a District Judge or a Circuit Judge, *not* a deputy or a legal adviser).

(2) If the judge is uncertain how to proceed, or is minded to invite the intervention of the Queen's Proctor, the judge should first contact the President of the Family Division.

(3) In a straightforward case where there has been a breach of section 3 but no decree has yet been granted, the judge can simply make an order dismissing the petition, ensuring that a suitable explanatory letter is sent to the parties indicating that, if desired, a further petition can be issued in due course.

(4) In a straightforward case where, although there has been no breach of section 3, there has been non-compliance with section 1(2)(c), 1(2)(d) or 1(2)(e), but no decree has yet been granted, the judge should consider whether it may be possible and appropriate to permit the petition to be amended to plead another fact in accordance with section 1(2)(a) or 1(2)(b), as the case may be.

(5) In a case where there has been a breach of section 3 and a decree (whether nisi or nisi and absolute) has been granted, the judge should not, however plain and obvious the case may appear, make an order without giving the parties an opportunity to be heard.

(6) In a case where there has been no breach of section 3 but non-compliance with section 1(2)(c), 1(2)(d) or 1(2)(e) and a decree (whether nisi or nisi and absolute) has been granted, the judge should not, however plain and obvious the case may appear, make an order without giving the parties an opportunity to be heard (i) on the question whether the court should grant discretionary relief and (ii) on the question, whether, if the facts warrant it, it may be possible and appropriate to permit the petition to be amended to plead another fact in accordance with section 1(2)(a) or 1(2)(b), as the case may be.

7 If a new petition is to be issued:

(1) The petition should be sent to and issued in the court which dealt with the previous petition.

(2) To avoid possible confusion, the new petition must be issued under its own number (*not* the number of the previous petition).

(3) HMCTS will waive payment of the issue fee on the new petition.

(4) The new petition should be processed and determined and (where appropriate) a new decree nisi should be granted as quickly as possible. In such cases it will generally be appropriate in accordance with section 1(5) to fix a very short period,

measured in days not weeks, for the decree nisi to be made absolute: *Re 4 Defective Divorces, Baron v Baron and others* [2019] EWFC 26.

8 HMCTS and judges will wish to be alert to the potentially devastating impact on litigants of being informed that there is a 'problem' with their decree, especially if (and this is unlikely to be known to the court when the first communication is made) a litigant who believes that they have been validly divorced has remarried or is due very shortly to remarry. Communications should accordingly be expressed in appropriately sympathetic and apologetic language.

9 I am assured by HMCTS that the software now in use on the online divorce system means that an online application for divorce cannot be made where:

- the date of marriage entered into the system by the applicant, and/or
- in a case to which section 1(2)(c), (d) or (e) applies, the date of separation or desertion entered into the system by the applicant,

indicate that the statutory criteria have not been met.

Sir Andrew McFarlane, President of the Family Division

29 July 2019