

PRESIDENT’S GUIDANCE (INTERIM)
DEFECTIVE DIVORCE PETITIONS/DECREES

- 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 ‘grounds’ 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 Very recently a number of cases have been brought to my attention where decrees nisi and absolute have 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 has been necessary for me to refer the file to the Queen’s Proctor.
- 4 It appears from the decision of Sir Stephen Brown P in *Butler v Butler, The Queen’s Proctor Intervening* [1990] 1 FLR 114, [1990] FCR 336 (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 It would seem to follow (though there appears to be no reported case directly in point) that, even if there has been no breach of section 3, the same consequences will follow in a case 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; except that in such a case it may be possible, if the facts warrant it, to amend the petition to plead one of the grounds set out in section 1(2)(a) or 1(2)(b).
- 6 Pending the outcome of the Queen’s Proctor’s investigations and the issue of further Guidance, 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, if the facts warrant it, it may be possible and appropriate to permit the petition to be amended to plead one of the grounds set out in section 1(2)(a) or 1(2)(b).
- (5) In a case where there has been a breach of section 3 or 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 of whether the decree is null and void and (ii) on the question, 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), whether, if the facts warrant it, it may be possible and appropriate to permit the petition to be amended to plead one of the grounds set out in section 1(2)(a) or 1(2)(b).

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: compare, albeit on very different facts, *Solovyev v Solovyeva* [2014] EWFC 20

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 For the future, I am assured by HMCTS that the software will prevent errors of this kind occurring when the online divorce project is fully operational.

James Munby, President of the Family Division

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