Potential pitfalls

Philippa Davies and Anna Shadbolt navigate the more problematic aspects of divorce procedure and provide a reminder of the remedies available

Philippa Davies (pictured top) is a solicitor and Anna Shadbolt is an associate at Dawson Cornwell

'For the purposes of an application for deemed service, it is essential that the petitioner keeps written evidence of their attempts to obtain information regarding the respondent's whereabouts.'

Divorce law and procedure can appear easy to navigate, yet for the new (or even seasoned) practitioner there are oddities along the way that require careful consideration. This article explores some of the more unusual elements of divorce law and procedure. With the assistance of key case law, we work through the process from service of a petition to decree absolute, summarising the principal stages and highlighting particular considerations that are sometimes easy to miss. Particular attention is paid to any international considerations that are all too important when advising in today's increasingly global society. This article highlights the alarm bells that should be ringing where, for example, a respondent avoids acknowledging service, or if there is a dispute as to whether a decree should be granted or rescinded, and provides insight as to how such issues can be dealt with both on a practical and a legal level.

Service of the petition

This is often a straightforward exercise, and one that many practitioners expect the court to undertake on their behalf. However, under the Family Procedure Rules 2010 (FPR 2010) service by the court is not intended to be standard procedure. In fact, r6(5), FPR 2010 provides that the petitioner is to effect service of the petition, rather than the court, unless they specifically request it. If the petitioner does request that the court effects service then it will be done in the usual way via first class post. For those solicitors who have chosen to effect service on a respondent themselves, the question is then timescale. Although it may appear odd, given the increasing desire of the family courts to ensure adherence to deadlines, under the FPR 2010 there is actually no time limit within which a petition must be served once it has been issued. However, petitioners must of course be made aware that they may face an application by the respondent for the petition to be stayed or dismissed if they delay service to such an extent that it can be successfully argued that the delay was so strategic as to be an abuse of process. This is especially relevant where the issue of a jurisdiction race arises. This matter was considered in *Thum v Thum* [2016], which is essential reading if considering delaying service for some time.

Service outside the jurisdiction

The process of effecting service outside of England and Wales can be fraught with problems. The inevitable delay to proceedings, the cost of securing service abroad, and the severity of a failure to properly serve documents are all commonly encountered issues by family practitioners dealing with international couples. There is a helpful table set out in FPR 2010, PD 6B that is of assistance. One of the trickier aspects of service is perhaps knowing when it is acceptable to serve by email. Email service is an ambiguous area for extra-jurisdictional service. Practitioners are referred to *Maughan v Wilmot* [2016] in which it was held that service by email could be validly effected, although there must be a good reason for using email rather than the conventional methods of service.

Application for deemed service

Practitioners are likely to, at some point in their careers, face a respondent who is unwilling to engage in the proceedings. In circumstances where

a respondent has not returned the acknowledgement of service to the court and has not engaged with the proceedings, a (sometimes costly) application may be made for deemed service. Reassurance can be given to the petitioner that they will still obtain a decree nisi if the court is satisfied that the petition has been received by the respondent (r6(16), FPR 2010). When making the application, it is important to try and exhibit documentary evidence since the progression to decree nisi is an important stage in the proceedings and not something that a judge will allow without being satisfied that a respondent has had full notice of the proceedings. Posting a copy of the proceedings a number of times (and also by recorded delivery or similar) can be an effective way of persuading a court that a respondent has had proper notice. If there is no definitive documentary evidence to exhibit, some judges may be reluctant to make an order for deemed service as it is possible that a dishonest applicant may wish to ensure that the respondent has no knowledge of the divorce proceedings.

Practitioners should also bear in mind that r6.16(1), FPR 2010 provides that an order for deemed service will not be made in respect of a petition based on two years' separation with consent unless the petitioner can provide evidence to the court that the respondent had previously consented to a decree of divorce. Therefore, it is best practice to ensure that written confirmation of the respondent's consent to a decree is obtained at the outset where a petition is based on this fact.

Application to dispense with service of the petition

Although it is uncommon, a situation may arise where a petitioner does not know where the respondent is living and therefore cannot provide an address for them, but this is not necessarily a bar to obtaining a divorce. As a first step, the petitioner must include the respondent's last known address in the petition. Then, on the basis that it is 'impracticable' to serve the respondent in accordance with Pt 6, FPR 2010, a petitioner may make an application to the court to dispense with service. The requirements of Form D13B (statement in support of request to dispense with service) are fairly strenuous, involving provision of evidence of efforts to trace and serve the respondent such as making enquiries with that person's family, friends and last known employer, as well as contacting the respondent's bank and so on. For the purposes of an application for deemed service, it is essential that the petitioner keeps written evidence of their attempts to obtain information regarding the respondent's whereabouts.

Some judges may be reluctant to make an order for deemed service as it is possible that a dishonest applicant may wish to ensure that the respondent has no knowledge of the divorce proceedings.

Setting aside decree nisi

The court's power to rescind a decree nisi takes various forms. Perhaps the simplest way to set aside the decree nisi is via an application by either party under r7.28(2), FPR 2010 on the ground that the parties are reconciled and both consent to the rescission. The second route is only available to a respondent who has consented to a divorce after a two-year separation period and who is able to rely on s10(1), Matrimonial Causes Act 1973 by demonstrating that they were misled by the petitioner when providing consent. A further route is more ambiguous: the court's residual inherent power.

There are two helpful cases on rescission. The first is *S v S (Rescission of Decree Nisi: Pension Sharing Provision)* [2002], which explores one of the statutory routes. The facts in brief were: the wife's petition did not include an application for pension sharing since this remedy was not available at the time of issue back in 1998, but both parties wished her to take advantage of the new pension remedies. Decree nisi had already been pronounced by the time that the provisions came into effect. The court held that its 'ability to control proceedings implies and justifies the need to bring them to an end'. It was clear that neither party wished to proceed to decree absolute, so the court simply rescinded the decree nisi, dismissed the wife's petition and allowed her to submit a fresh petition.

The second key case is *W v H* [2012]. This is a useful case to consider if parties have reconciled following decree nisi but then separated again. In this case, the parties cohabited for four years following decree nisi, but upon their final separation the husband argued that neither of them was now habitually resident or domiciled in the jurisdiction so the wife's petition ought to be dismissed. Parker J held that cohabitation for more than six months does not necessarily force the court to dismiss a petition, and that public policy considerations apply when there is a 'stalemate', with there being no realistic possibility that decree absolute will be made. Given that the wife could not rely on this jurisdiction, her petition was deemed to be stale. She would not be able to lodge a supplemental petition and in consequence the decree nisi would be rescinded and her petition dismissed.

It is best practice to ensure that written confirmation of the respondent's consent to a decree is obtained at the outset where a petition is based on this fact.

Delaying decree absolute

Among practitioners it is generally accepted that it is often safest to delay an application for decree absolute until any financial matters are concluded. However, for a variety of reasons one party may wish to obtain the formal dissolution of the marriage before that point. Should a party make such an application, there are circumstances in which the court can delay the pronouncement of decree absolute. Two key cases regarding such circumstances are *Re G (Decree Absolute: Prejudice)* [2002] and *Thakkar v Thakkar* [2016]. To delay the pronouncement of decree absolute, the court needs to be satisfied that there will be a serious prejudice to one party if there is no such delay. The mere fact that financial proceedings have not concluded is not reason in itself to prevent the decree absolute from being pronounced.

Respondent's application for decree absolute

It is well known that an applicant may apply for the decree absolute six weeks after the pronouncement of decree nisi (s1(5), MCA 1973) but if they do not do so, the respondent may also make an application. The earliest date that a respondent may apply for decree absolute is three months after the earliest date on which the applicant could have applied (s9(2), MCA 1973). As such, the earliest date a respondent may apply for decree absolute is three months and six weeks after decree nisi is pronounced. A respondent's application for decree absolute should be made on notice and a short hearing will be listed to enable the applicant to explain why they have not yet applied for decree absolute. The reasons why a court may delay the pronouncement of decree absolute are discussed above.

Declaration of decree absolute as void

While it is rare, it is possible for a decree absolute to be declared void. Practitioners may recall the curious case of *Rapisarda v Colladon (Irregular Divorces)* [2014] which should stand as a warning to those seeking to use this jurisdiction without meeting its jurisdictional requirements. In this case, 180 petitions were issued between August 2010 and February 2012 on behalf of Italian residents fraudulently citing habitual residence in England and Wales. Their mistake was to use the same address on each petition (referred to in the judgment as 'Flat 201' and later found to be a mail box). The petitions went undetected for some years because at that time there was no centralised issuing system and the petitions were spread across 137 courts.

It was argued that the petitions should be dismissed due to having been issued on the basis of fraud. The president of the Family Division, Sir James Munby, held that there is a distinction between 'jurisdiction to entertain the petition' and 'jurisdiction to grant a decree', and the principle that '[a] decree absolute is generally considered to be good against all the world… [h]owever if it has been obtained by fraud, there is a fundamental defect' was approved. The law can be summarised as follows:

- perjury without more does not suffice to make a decree absolute void on the ground of fraud;
- perjury which goes only to jurisdiction to grant a decree and *not* to jurisdiction to entertain the petition likewise does not without more suffice to make a decree absolute void on the ground of fraud; and
- a decree, whether nisi or absolute, will be void on the ground of fraud if the court has been materially deceived, by perjury, forgery or otherwise, into accepting that it has jurisdiction to entertain the petition: the latter example was key in this case, since the petitions were supported by a sworn affidavit stating that the party was habitually resident in England and Wales, which was clearly fraudulent.

Conclusion

While for the majority of cases the divorce procedure is straightforward, it is likely that almost all practitioners will encounter some of the more unusual elements that can arise during the divorce suit at some point. It is crucial therefore that new practitioners of family law are aware, right from the outset, of the quirkier elements of the divorce process that may arise. ■

Re G (Decree Absolute: Prejudice) [2002] EWHC 2834 (Fam)
Maughan v Wilmot [2016] EWHC 29 (Fam)
Rapisarda v Colladon (Irregular Divorces) [2014] EWFC 35
S v S (Rescission of Decree Nisi: Pension Sharing Provision) [2002] 1 FLR 457
Thakkar v Thakkar [2016] EWHC 2488 (Fam)
Thum v Thum [2016] EWHC 2634 (Fam)
W v H [2012] EWHC 1103 (Fam)