

# RECOGNITION OF FOREIGN MARRIAGES AND DIVORCES

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## **Overview**

*Issues of recognition in England of a foreign marriage, divorce, nullity or judicial separation, including polygamy, is of fundamental importance for the status of the parties and any children, for possible other proceedings and other aspects of personal and community life. It is often a preliminary in family law to deciding on other courses of action. Public policy considerations are strongly to the fore in England endeavouring to recognise foreign marriages and divorces wherever possible. The note also looks at religious divorces, which has an international element*

## Introduction

In general terms, what is English public policy?

England strives to recognise both foreign marriages and foreign divorces. English courts may ignore incapacities due to, for example, racial laws. They are tolerant of other cultures and social customs, for example marriages to “children”, even though they may be invalid here. The Court balances marriages which would be “*offensive to the conscience of the English Courts*” (*Cheni (otherwise Rodriguez) v Cheni* [1962] 3 All ER 873) with the need for “*common sense, good manners and reasonable tolerance*” and international comity.

Just as English public policy may change, so international family law practice changes, and has especially changed dramatically over the past few years. The public policy, perhaps even political dimensional, is as present now as in the past. There is a much greater awareness of international judicial comity and cooperation. Moreover, there is strong encouragement for judges in different countries to liaise together regarding a particular case. *Abbassi* (2006) 2 FLR 415 was an English divorce case which required investigation in Pakistan about whether the husband had previously brought an end to the marriage by a talaq, an Islamic divorce. The Court of Appeal said that in such international family law cases, opportunities and communication resources existed for judges which did not arise in earlier decades. There was considerable liaison between judges of England and Pakistan. Either the parties themselves or the judge himself at first instance should have made use of the collaboration to approach the liaison Judge in Islamabad to seek assistance regarding the status of the divorce in Pakistan.

Recognition of foreign same sex and cohabitation relationships are not dealt with in this note. See “*A Practical Guide to Interntional Family Law*” (Jordans 2008) by David Hodson.

Reference should be made in all recognition cases to Dicey and Morris “*Conflicts of Law*” (14<sup>th</sup> Edition) for the very considerable and often very historic detail and case law.

## Recognition of Foreign Marriages

Why is recognition important?

- a client knows whether he or she is married in accordance with the local English law
- the legitimacy of children
- the availability of divorce claims – if a marriage is not recognised locally there is no opportunity for a divorce or divorce claims

- wills and inheritances
- nationality
- immigration
- tax
- to determine eligibility for state/welfare benefit payments

Whether the English Courts recognise a marriage which has taken place in a foreign jurisdiction depends on two independent factors being separately satisfied. First, the marriage must be “*formally*” valid and secondly each of the parties to the marriage must have “*capacity*” to marry. The common law stance on both of these factors has been helpfully distilled into a table of rules, with commentary, by Dicey and Morris. Often local legal advice will be needed where the marriage took place.

“*Form*” relates to the manner in which the marriage is established and is governed by the law of the country in which the marriage takes place, the “*lex loci celebrationis*”, with certain exceptions. By way of example, if the local law of the country where the marriage is contracted requires a particular type of ceremony which would not be required in England and Wales then unless that ceremony has been performed in accordance with the local law, the marriage will not be recognised here, even if it was perfectly correct under the formalities of English law.

“*Capacity*” relates to the legal ability of one person to marry another. For example, a brother does not have the capacity to marry his sister under the law of England and Wales.

#### Formalities

Rule 66 of Dicey and Morris “codifies” the English common law with regard to the formalities required before the English Courts will regard a foreign marriage as being formally valid. Rule 66 states:

*“A marriage is formally valid when (and only when) any one of the following conditions as to the form of celebration is complied with:*

- (i) if the marriage is celebrated in accordance with the form required or recognised as sufficient by the law of the country where the marriage was celebrated (known as the lex loci celebrationis rule);*
- (ii) if the marriage is celebrated in accordance with the requirements of the English common law in a country where the use of the local form is impossible;*
- (iii) if the marriage is celebrated in accordance with the requirements of the English common law in a country in the belligerent occupation of military forces and one of the parties is a member of those forces or of other military forces associated with them (see Taczanowska (otherwise Roth) v Taczanowski [1957] 2 All ER 563);*
- (iv) if the marriage is celebrated in accordance with the provisions of s 22 Foreign Marriage Act 1892, as amended by s 7 Foreign Marriage Act 1988, between parties of whom at least one is a member of Her Majesty’s Forces serving in any foreign territory or employed in such a territory in such other capacity as may be prescribed by order in council;”*
- (v) if the marriage, being between parties of whom at least one is a UK national, is celebrated outside the Commonwealth in accordance with the provisions of, and the form required by, the Foreign Marriages Acts 1892 – 1947 as amended by the Foreign Marriage (Amendment) Act 1988*

Although the five rules outlined above cover, to date, the entirety of the situations in which the Court has had to recognise a foreign marriage, the most important approach is the “*lex loci celebrationis*” rule ((i) above). The rule was recently cited with approval by the President, Sir Mark Potter, in Wilkinson (No 2) 2007 1 FLR 295. See also on capacity below.

## The Law of the Place of Celebration, “Lex loci celebrationis”

This precisely describes the approach of the English Courts, i.e. a foreign marriage will only be formally valid and recognised if it complies with the formalities of the country in which it was celebrated. So, despite a marriage taking place in a foreign jurisdiction being invalid under the formalities required under English law, an English Court will still hold the marriage to be valid and recognised if it complies with the rules laid down by the place in which it is celebrated. Where a couple were married in a foreign jurisdiction contrary to the rules of that jurisdiction, the marriage will be invalid irrespective of the fact that it complied with the rules of the jurisdiction in which both parties were domiciled: Berthiaume v Dastous [1930] AC 79.

Viscount Dunedin expounded the approach of the English Courts when he said: *“If a marriage is good by the laws of the country where it is effected, it is good all the world over, no matter whether the proceedings or ceremony which constituted marriage according to the law of the place would not constitute marriage in the country of the domicile of one or other of the spouses. If the so-called marriage is no marriage in the place where it is celebrated, there is no marriage anywhere, although the ceremonial proceedings if conducted in the place of the parties’ domicile would be considered a good marriage”*.

Although in theory this approach appears abundantly straightforward, in practice this is not always so easy. In England, a marriage can be obtained by either a religious or a civil ceremony. However, in some jurisdictions the only method of getting married is by way of a religious ceremony and sometimes a prerequisite of this, as in Israel, is that both parties are members of a particular religious creed. In such cases, the English Courts have a difficulty over classification of the precondition of belonging to a religious group. The tendency has been to view such requirements as one of form related to the marriage ceremony rather than capacity, although clearly such a requirement is often regarded, in countries such as Israel, as one of capacity.

There is sometimes confusion over marriage in foreign Embassies or consulates. Which country’s law’s formalities apply? There is minimal authority but Radwan (No. 2) [1972] 3 All ER 1026 says that it is the law of the country where the Embassy is situated, not the law of the country of the Embassy.

Unlike many other countries, the law of England and Wales views a civil ceremony and certain religious ceremonies as two ways of achieving the same goal of marriage. However, if the place where the marriage was celebrated requires a civil ceremony, a purely religious marriage will be invalid, even if it would be valid in the country of the parties’ domicile.

A marriage in Hindu form in England, with no attempt to comply with the Marriage Acts, was not a valid marriage: Gandhi v Patel (2002) 1 FLR 602. For the purposes of the Inheritance Acts, it was not a void marriage, but no marriage at all.

In A – M (Divorce Jurisdiction: Validity of Marriage) (2001) 2 FLR 6 the parties twice went through ceremonies in England, first a marriage in Islamic form which did not comply with the English formalities and the secondly a ceremony to revoke an early Talaq which was equally insufficient to constitute a marriage. Nevertheless it was held to be a marriage which the English courts could dissolve, the court referring to cohabitation and repute (but with no discussion of choice of law issues) and the fact that the parties could have entered into a marriage in an Islamic country without any ceremony.

Similarly, see Chief Adjudication Officer v Bath [2000] 1 FLR 8, where the fact that a 1956 wedding in a Sikh temple, which location was possibly not registered was not enough to make a marriage void when endorsed by parties who lived together as man and wife for the next 28 years until the death of the husband. A common law presumption of extended cohabitation as a married couple was applied. The Benefits Agency could not refuse to pay to the widow.

In Burns, (2008) 1 FLR 813, Coleridge J, the marriage had taken place in a hot air balloon in California. It seems that even this strays beyond permitted marriage under the liberal Californian law and was invalid. The wife would not have been entitled to a decree of nullity in California. The husband argued that under the doctrine of *lex loci celebrationis*, since she would not have been entitled to a decree of nullity in California she was not entitled to such a decree in England either. However the judge held that the ambit of the doctrine was limited to considering whether the ceremony was valid or not. The consequences of the invalidity including the availability of any remedies were to be determined under English law. This may be very important in looking at outcomes.

In Alphonso-Brown v Milwood 2007 2 FLR 265, there was a ceremony in Ghana. The court held that if it was a marriage, it was bigamous. However in nullity proceedings the court looked to see if it was a marriage ceremony under Ghanaian law or an engagement ceremony. The nature of the ceremony and the intention of the parties were governed by local law.

For the formalities of customary marriage see McCabe [1994] 1 FLR 410, where consideration for marriage was £100 and a bottle of gin even though the parties were not present! The money was distributed amongst the wedding guests and the gin consumed in the absence of the Ghanaian bride and Irish bridegroom. However, the Court of Appeal held that on the evidence of local law, the essential components of a marriage ceremony, namely the consent of both parties and of their families, was present so it was a valid marriage ceremony and so would be recognised here.

The formality rules of English marriage law are historic and contain curious anomalies. Due to the reference back to common law forms of marriage i.e. as existed before Lord Hardwicke's Marriage Act of 1753, it is possible to have a marriage celebrated abroad between persons domiciled in a yet other country who have never visited England yet whose marriage is recognised as valid because it complies with formal requirements which, in England itself, were brought to an end 250 years ago!

### Capacity

Once again, Dicey and Morris helpfully codifies, in Rule 67, the English common law position. This states, R 67 (1), that "*capacity to marry is governed by the law of each party's ante nuptial domicile*", adopting the comments of the Divisional Court in R v Brentwood Superintendent Registrar of Marriages ex parte Arias [1968] 2 QB 956.968, and Sir Jocelyn Simon in Padolecchia [1968] P 314.336 and Szechter (1971) P 286.295

The effect of this rule is that a marriage between two parties with different pre-marriage (ante nuptial) domiciles celebrated in a foreign country will be void (and not recognised) where the law of the ante nuptial domicile of one of them denies the individual the requisite capacity to marry, (Sottomayor (otherwise De Barros) v De Barros (No. 1) [1877] LR 3 PD 1). A marriage is normally invalid when either of the parties lacks, according to the law of his or her pre marital domicile, the capacity to marry the other.

But the Courts have not carried this distinction through to its bitter conclusion with the consequence of more non-recognitions. To escape the effect of applying this rule too strictly, the English Court has shown itself willing to classify a matter of capacity (or more often a lack of capacity) as one of form. This is part of the public policy of striving to recognise foreign marriages.

The English Courts, in an attempt to facilitate the validity and recognition of marriages, have temporarily at least adopted a mutated form of the dual (pre-marriage) domicile theory. Known as the "intended matrimonial home" theory, where parties to a marriage have capacity under the law of the country with which the marriage has its most "*real and substantial connection*" (i.e. usually the place of the intended matrimonial home), then the marriage will be regarded as valid, notwithstanding its invalidity under the dual domicile rule. See the reasoning of Lincoln J in Lawrence v Lawrence [1985] 2 WLR 86

(first instance). He held that the question of capacity to marry, being one of “*quintessential validity*”, was to be governed by the law with which the marriage had the most “real and substantial” connection - normally the country of the intended matrimonial home. Lincoln J held that if the dual domicile test made the marriage invalid and the real and substantial test made it valid, the latter should prevail. In the Court of Appeal, in Lawrence v Lawrence [1985] 2 All ER 733, Sir David Cairns expressed the view that the Court should try to uphold the marriage, if necessary by adopting either basis of recognition. Both should be regarded as available. In 1985, the Law Commission in its paper “Choice of Law: Rules of Marriage” supported the alternative test but later held back from recommending it was embodied in statute. It was felt that doing so would inhibit the courts from feeling free to develop the law in this area.

Despite its attraction, this concept does not lend itself to certainty especially where, as is often the case, a real and substantial connection is difficult to ascertain. As yet, it has not gained widespread judicial (and textbook) approval although, in the light of the Courts’ public policy desire to validate marriage, it is one which may yet regain increasing popularity.

See also Wilkinson v Kitzinger (No 2) 2007 1 FLR 295. Although a valid Canadian civil partnership was recognised as such in England, it was between two parties domiciled in England and so they lacked the capacity to marry each other as they were of the same sex. The court rejected an argument that the English capacity law should be set aside on the basis of incompatibility with the Human Rights legislation. Also s11(c) MCA was clear and it was contrary to public policy to recognise as marriage.

In KC v City of Westminster Social and Community Services Dpt (2008) EWCA 198, it was held that a 26 year old man with the mental capacity of a 3 year old was incapable of entering into a marriage conducted over a speaker telephone by him in England with the other party in Bangladesh at the time. The court said it had a duty to protect the man. This was despite the “marriage” having already taken place and it being valid under both Sharia law and Bangladeshi law. The marriage would have enabled the new wife to obtain a UK visa.

### Consent

See r 68 of Dicey and Morris, “*no marriage is valid if, by the law of either party’s domicile, he or she does not consent to marry the other*”. See also Matrimonial Causes Act 1973, s 12(c) which states that if the marriage is celebrated after 31 July 1971, then the lack of valid consent by either party in consequence of duress, mistake, unsoundness of mind or otherwise renders a marriage voidable. See below for issues on forced marriages.

### Other considerations

There are exceptions to the rule on capacity as follows:

- where the marriage takes place in England and one of the parties is domiciled in England and has the necessary capacity under English law, the validity of the marriage will not be affected if the law of the domicile of the other party gives rise to an incapacity which the English law would not recognise. So a marriage in England involving an English domiciled party trumps any incapacity of the other spouse by their own national law
- the Court will refuse to recognise a capacity or incapacity to marry imposed by the law of domicile if it is to be regarded as penal, discriminatory or contrary to public policy, described as “*unconscionable*” in Cheni (above)
- public policy. The English Courts may ignore incapacities due for example to racial, caste, religious, ethnic or discriminatory laws.

It is also necessary to consider:

- capacity to remarry: see recognition of divorce (below) and the Family Law Act 1986, s 50
- Capacity to marry relies also on consanguinity and affinity, a very historic area of the law. Recently England has changed and relaxed its laws after a successful objection to the European Court of Justice in B v UK 2006 1 FLR 35, where a marriage forbidden between a father-in-law and daughter-in-law was held contrary to Article 12 ECHR and as a consequence English law was changed.
- capacity to enter into a polygamous marriage (see below)
- what is capacity and what is formality – it is crucial to work out the difference locally to where the marriage occurred, which may sometimes need help from local advisers. Impotence is probably capacity, whereas refusal to consummate may be a formality: argued in Ponticelli (1958) 1 AER 357.361 and Robert (1947) 2 AER 22. What is the difference between lack of parental consent if the spouse is under age which is considered as a method of giving consent and therefore a question of formality and the lack of spousal consent which is considered a matter of capacity and so by reference to the premarital domicile law of the parties?
- procedure for declaration of status of marriage: see FLA 1986, s 55(1) and FPR 1991, r 3.12 and below
- In some countries prohibitions on remarriage after divorce exist. Sometimes they are imposed to prevent the parties from remarrying until the time for appeal against the divorce decree has expired or any appeal has been disposed of. Such provision will be recognised in England and Wales regardless of where the parties are domiciled

Finally, none of the provisions on marriages celebrated abroad applies to marriages to members of the Royal Family (technically, a descendant of George II), Schedule 1 para 6 MCA, as their marriage arrangements are governed worldwide by the Royal Marriages Act 1772.

#### Court procedure when there is a foreign marriage

If the marriage takes place abroad, see FPR r 10.14 generally. Where a marriage is celebrated outside England and Wales and its evidence and validity are not in dispute, the marriage may be proved by *“the production of a document purporting to be a marriage certificate or similar document issued under the law in force in that country, or a certified copy of an entry in a register of marriages kept under the law in force in that country.”* (r 10.14 (1)). *“Where such document is not in English, it shall, unless otherwise directed, be accompanied by a translation certified by a notary public or authenticated by affidavit.”* FPR r 10.14 (2)

Obtain a certified translation of the marriage certificate if the document is not in English. Some family courts do not always require a translation to be notarised.

Where there is no marriage certificate or the marriage was by local custom, it is usual to obtain an affidavit of local law from a local lawyer. The Petitioner should provide an affidavit describing the ceremony. Where there are two marriage ceremonies, e.g. religious and civil, or one in a consulate, state the first in time if it is properly and locally valid but it is advisable to include details of the other one. Invariably the civil ceremony details will be needed. Local law advice may be needed as to which ceremony was locally valid.

If a court is satisfied that a marriage was duly celebrated according to the law of the place of celebration, or formally valid for any other reason, it can dispense with the production of a marriage certificate in an appropriate case e.g. if it is unobtainable or difficult to obtain: see Rakauskas (1962) Argus LR 525 and Terryl (1948) 2 WWR 152 (Sask).

A rebuttable presumption of marriage can take place in 2 forms, (1) if a couple go through a ceremony of marriage together and live thereafter as man and wife, the marriage is valid in all respects; and (2) a couple who cohabit with the reputation of being married are validly married. Much care is needed

before relying on either.

Special and detailed provisions exist for proof of marriages in Scotland, Ireland, the Channel Islands, Isle of Man, India and Pakistan, in Commonwealth and other countries, in Jewish marriages and for soldiers abroad etc. For a very helpful comment on proof and requirements for valid marriages including in a number of countries and locations outside of England and Wales, see sections 7.14 – 7.28 and 8.33 – 8.38 of Rayden and Jackson on Divorce and Family Matters (18<sup>th</sup> edition). See also “Getting Married Abroad” by Levy and Kashi, [2000] Fam Law 191

An original or certified marriage certificate must be filed at the same time as the divorce petition, alternatively leave of the court obtained to file the certificate subsequently: Rule 2.6 (2) FPR,

A number of sensible, pragmatic courts including the PRFD, frequently issuing in cases where the marriage certificate is not available yet there is an urgency to issue, will accept the undertaking of the law firm acting for the petitioner to file the original marriage certificate before the special procedure application. Care and circumspection is obviously needed in giving such an undertaking when the marriage took place abroad and it is good practice not to give such undertakings for a foreign marriage as obtaining the original certificate may not always be easy or possible.

If it is believed the respondent does not understand English, the documents to be served must be translated: see full procedure and requirements in r 10.6 (4) (b).

### Marriages in Paradise

It is now quite commonplace for couples from England to get married in exotic locations, often near a beach and in a warm climate, surrounded normally by a couple of friends, some “hotel-paid” guests and a cast of sun-oil drenched onlookers. A significant industry exists to provide these weddings and related wedding day services. The family lawyer is rarely invited. Nevertheless a number of family law issues arise for careful consideration; the family lawyer does not want to be a wedding party pooper but some issues can arise which can have a big impact many years later

- Have all the residential and other qualifications been complied with for the wedding? Does the “*form*” of the wedding comply with the local law? Reliance is normally placed on the holiday company with damages having been paid when mistakes have been made, but it is good practice to double-check the form is correct. If the wedding is not valid locally because of non-compliance with local form, even accidental non-compliance, it will not be recognised in England.
- Does the country where the wedding is taking place impose any statutory matrimonial financial regimes? Normally these will have no relevance in a country such as England where any subsequent divorce may occur. However they may have some relevance if the divorce were to be in civil law countries and enquiries should be made in advance
- are there any religious or other “capacity” requirements as a preliminary either to the wedding or to the particular form of wedding? Some countries have different marriage laws and ceremony procedures according to the religion of the parties. Non-compliance will make the marriage invalid. Some media reports indicate that the marriage of Mick Jagger and Jerry Hall in Bali was not recognised in England because they had not complied with the necessary religious requirements as a consequence of which the marriage ended in nullity, not divorce.
- If possible obtain several certified copies of the marriage certificate locally at the time of the wedding, as these may be needed for the future during the marriage and may be much more difficult to obtain subsequently

Polygamy (Actual or Potential)

### Validity and Capacity

The accepted definition by Lord Penzance in *Hyde v Hyde* [1866] LR 1 P&D 130 is that marriage as known in Christendom is:

*“the voluntary union for life of one man and one woman to the exclusion of all others”.*

Historically, there was a view that the English Court will not recognise a polygamous marriage. Now a validly or actually polygamous marriage may be recognised here. The government estimates that there are about 1000 polygamous marriages in England. A marriage is not void just because it is potentially polygamous. The capacity to contract is based on law of pre-nuptial domicile (see above).

Rule 69 of Dicey and Morris states that *“a marriage is regarded as polygamous if either party to it is entitled to have another spouse, even if it is de facto monogamous”* at the time of the ceremony. The formalities of the ceremony is according to the law of the place of celebration, not the law of either party’s domicile, and so the local law *“determines whether a marriage is monogamous or polygamous at its inception”*. A *“marriage celebrated in a form which is monogamous under the law of the place of celebration is a monogamous marriage, whatever the personal law of the parties at the time of the marriage. A marriage celebrated in a form which is polygamous under the law of the place of celebration is a polygamous marriage; whatever the personal law of the parties at the time of the marriage”* (Rule 69 (2)), and whether either spouse intends to have further spouses.

An exception to this rule is that *“a marriage celebrated in a form which is polygamous under the law of the place of celebration (but which is not actually polygamous at the time i.e. neither already married) is monogamous if neither party has, under his or her personal law, the capacity to marry a second spouse”*: Dicey and Morris Rule 69 and *Hussain* [1983] Fam 26 CA. A polygamous marriage can be converted into a monogamous marriage: see Dicey and Morris Rule 70

*“A marriage celebrated in England in accordance with polygamous forms, and without any civil ceremony as required by English law is invalid, whatever the domicile of the parties”* (Dicey and Morris R 71). So a civil ceremony in England followed by a polygamous marriage ceremony performed in a mosque or Sikh temple is a monogamous marriage. If there is no civil ceremony, it is not a valid marriage.

*“An actually”* - and not a potentially – *“polygamous marriage”* celebrated after 31 July 1971 is void if either party is domiciled in England at the time of the marriage: Dicey and Morris R 72 and s 11 (d) MCA 1973 as amended by the Private International Law (Miscellaneous Provisions) Act 1995. Section 11 (d) only applies to actually polygamous. A marriage is actually polygamous if one of the parties is a party to a prior subsisting marriage. It is irrelevant where the marriage takes place and whether it was under a system of law which permitted polygamy. It is also irrelevant if the previously unmarried party was the one with English domicile.

Where there is a marriage abroad between parties who are domiciled abroad and the law of each of those countries permits polygamy, the marriage will be valid and recognised in England, *“unless there is some strong reason to the contrary”*: Dicey and Morris R 73. The effect of this rule is limited with regard to issues of succession where there are children and it may have an effect on matrimonial relief (see recognition of divorce below).

A marriage abroad between two parties not already married and both domiciled in England and Wales is not void merely because it is in a country which permits polygamy: s5 Private International Law (Miscellaneous Provisions) Act 1995

In *Marks* (2004) 1 FLR 1069, Thorpe LJ in the Court of Appeal assumed that where parties to a valid

polygamous marriage went through a second ceremony of marriage at a registry office in England, that second ceremony was a nullity. This was not commented upon by the House of Lords in the same case at Marks (2005) 2 FLR 1193

Finally and peripherally, see also Rampal (No. 2) [2001] 2 FLR 1179, the husband could claim ancillary relief even though it was a bigamous marriage because for 22 years his second wife had embraced the desire of respectability and had engineered the initial ceremony of marriage.

### Contents of Divorce Petition

FPR 1991 r 3.11 relates to proceedings in respect of polygamous marriages. Where “*a petition or originating application or originating summons asks for matrimonial relief*” in respect of a marriage where either party to the marriage “*is, or has during the subsistence of the marriage been, married to more than one person*”, then “*the petition, originating application or originating summons (a) shall state that the marriage in question is polygamous, (b) whether or not there is to the knowledge of the Petitioner or Applicant any living spouse ... additional to the Respondent, or any living spouse of the Respondent additional to the Petitioner*” and (c) if there is any such spouse then “*give his or her full name and address and the date and place of the marriage*” or state that such information is unknown. FPR r 3.11 (2).

R 3.11(3) provides that the Court may order that any additional spouse be added as a party to the proceedings or be given notice of the proceedings. Such an order can be made at any stage of the proceedings and by r 3.11(4) there is a duty upon the Petitioner/Applicant, when making any application in the proceedings for a request for directions for trial, to ask whether an order should be made under rule (3). Any person to whom notice is given is then entitled, without filing an answer or affidavit, to be heard in the proceedings to which the notice relates, r 3.11(5)

### Some Effects of Polygamous Marriage

Under the Social Security Contributions and Benefits Act 1992, s 121 (1) (b) and s 147 (5), a potentially, but not actually, polygamous marriage is treated as valid whilst in reality monogamous. A reform of benefit laws in winter 2006 concluded extra benefits should be paid to members of polygamous marriages

A husband is bound to support his wives and children: Social Security Act 1986. But in Bibi v Chief Adjudication Officer [1988] 1 FLR 375, a first wife in a polygamous marriage was not entitled to a widowed mother's allowance under the Social Security Contributions and Benefits Act 1992 on the death of her husband if survived by a second wife.

Children are legitimate: see The Sinha Peerage Claim (1939) 171 Lords Journals 530 and Bamgbose v Daniel [1954] 3 All ER 263.

Although survivors (certainly of potentially polygamous marriages) are entitled under the Inheritance Act 1975, Administration of Estates Act 1925 and Intestate's Estates Act 1952, take great care in inheritance claims to title. Case law is historic and very complex.

Spouses are entitled to remedies under MWPA 1882 s 17, Matrimonial Homes Act 1983, to acquire British citizenship by naturalisation under s 6 (2) British Nationality Act 1981 and to tax relief for a married spouse (but only once!).

A spouse (wife) cannot allege adultery by a respondent (husband) with another (first or second wife as appropriate) spouse if actually polygamous at the time of the marriage. But it could be unreasonable behaviour if the marriage was potentially polygamous and the husband married against the wife's wishes: Quoraishi [1985] FLR 780.

## Recognition of Foreign Divorces

Why is this relevant/important?

- a former spouse can make financial claims in England after (recognised) foreign divorce after proceedings by Pt III MFPA 1984
- a divorced spouse can remarry here
- if the divorce is not recognised, a spouse may be able to divorce in England and make financial claims here
- a widow(er) is not entitled automatically to pensions, policies and other succession interests if the divorce is recognised
- issues of forced heirship
- wills, including the effect on financial provisions for former spouses
- legitimacy
- nationality
- tax
- entitlement to state/welfare benefits

The recognition of foreign divorces by the English Courts is contained in the provisions of the Family Law Act 1986 and, within Europe, by the provisions of Council Regulation (EC) 2201/2003 known as Brussels II, simultaneously codified by Dicey and Morris R 78 - 86.

A divorce dissolves the marital status, not the solemnisation of a particular marriage. Accordingly, where a local divorce had the effect of dissolving the parties marital status and such divorce was entitled to recognition in England, it was not then for the English court to look at the validity or otherwise of other marriage ceremonies between the same couple, D v D (Nature of Recognition of Overseas Divorce) (2006) 2 FLR 825. Specifically the English court could not grant an English divorce if it had already recognised the foreign divorce. A foreign and recognised divorce has the same status on the parties as in English divorce: Dicey and Morris rule 87

The foreign divorce must be effective to dissolve the marriage. In Maples v Melamund 1987 3 AER 188 a Judgment of Confirmation in Israel certified compliance with the procedural requirements for a get, a Jewish divorce, but was not the divorce itself.

Any recognition under FLA 1986 does not construe recognition of any findings of fault in those proceedings nor of any maintenance, custody or other ancillary orders in the proceedings: section 5(5) FLA 1986

A foreign decree of divorce recognised in England does not necessarily put an end to an English maintenance order previously obtained by either party: Wood 1957 P 254, Quereshi Fam Law 173, Newmarch 1978 Fam Law 79, MacCauley 1991 1 WLR 179 and s4(2) Domestic Proceedings and Magistrates Courts Act 1978. In practice, the court will look to see if there are any Part III MFPA 1984 applications

Considerable care is needed if the local law of the divorce prevents remarriage for a certain period. Remarriage within this period may prevent the marriage being recognised or even being declared invalid in England, unless the restriction is discriminatory e.g. the prevention of remarriage is on one spouse alone in which case England will ignore it.

### Divorces, Annulments and Judicial Separations granted in the UK

These are automatically recognised throughout the UK if they were granted by a court of civil jurisdiction: Family Law Act 1986 s 44(1). This excludes criminal courts or religious courts and ceremonies. A Talaq

pronounced in England is ineffective: Sulaiman v Juffali (2002) 1 FLR 479. See Dicey and Morris Rule 78

### Divorces Obtained by Proceedings outside the UK

There is a fundamental distinction between divorces obtained by “proceedings” and those other than by means of proceedings including “extra-judicial” proceedings and a distinction now with divorces in EU member and non-member states. The provisions relating to recognition are more stringent where the divorce is obtained otherwise than by means of proceedings (FLA 1986 s 46(2)) than if obtained by means of proceedings (FLA 1986 s 46(1)).

### Recognition of a Divorce within the EU

This is contained in Articles 21 and 22 of Brussels II. The procedure is in Arts 24 – 39, see Dicey and Morris rule 79. It provides for automatic recognition in all member states of divorce orders made in one member state. No special procedure for the recognition is required, although some countries insist on the filing of the certificate under Article 34. An interested party can raise issues on the recognition, see Article 21.

*“A judgment [eg divorce, legal separation or annulment] given in a Member State shall be recognised in the other Member States without any special procedure being required.”* (Article 21 (1)). *“Any interested party may, in accordance with the procedures provided for [in BII], apply for a decision that the judgment be or not be recognised”*, Art 21(3). *“Where the recognition of a judgment is raised as an incidental question in a court of a Member State, that court may determine that issue”*. (Article 21 (4))

Recognition proceedings of a divorce order in another member state may be stayed if the order is under ordinary appeal or, in the case of an order given in the United Kingdom or Ireland, if enforcement is suspended by reason of an appeal: Article 27

By Article 25: *“The recognition of a judgment [eg relating to a divorce, legal separation or a marriage annulment] may not be refused because the law of the Member State in which such recognition is sought would not allow a divorce, legal separation or marriage annulment on the same facts.”* The jurisdiction of the court of the member state which made the original divorce order *may not be reviewed*: Article 24. *“Under no circumstances may a judgement [in another member state] be reviewed as to its substance”*: Article 26.

By Art 22, *“a judgment relating to a divorce, legal separation or marriage annulment shall not be recognised:*

*(a) If such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought’.* (NB. There is no definition of public policy in Brussels II. In Hoffman v Krieg (1988) ECR 645, the European Court of Justice held, under the Brussels I convention, that the refusal to recognise a judgment based on public policy should operate only in *“exceptional circumstances”*);

*(b) Where it was given in default of appearance, if the respondent was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable the respondent to arrange for his or her defence unless it is determined that the respondent has accepted the judgment unequivocally;* (See Pellegrini v Italy App 3088/96 20 July 2001 unreported, and article by Nuala Mole: “From Rome to Brussels via Strasbourg” (2002) IFL 9. The Boras Report stated remarriage of the respondent is evidence of unequivocal acceptance!)

*(c) If it is irreconcilable with a judgment given in proceedings between the same parties in the Member State in which recognition is sought; or*

*(d) If it is irreconcilable with an earlier judgment given in another Member State or in a non-member State between the same parties, provided that the earlier judgment fulfils the*

*conditions necessary for its recognition in the Member State in which recognition is sought.”*

It applies to legal proceedings instituted after 1 March 2005 and there are complicated transitional provisions, Article 64. See also Articles 41 and 66 concerning habitual residence, nationality and domicile.

#### Recognition of divorce outside EU countries by means of “Proceedings”

FLA 1986 s 46(1) sets out the grounds for recognition where the divorce etc has been obtained by means of “proceedings” (as defined in FLA 1986 s 54(1)). This states that:

*“The validity of an overseas divorce, annulment or legal separation obtained by means of proceedings shall be recognised if:-*

- (a) the divorce, annulment or legal separation is effective under the law of the country in which it was obtained; and*
- (b) At the relevant date either party to the marriage:*
  - (i) was habitually resident in the country in which the divorce, annulment or legal separation was obtained; or*
  - (ii) was domiciled in that country; or*
  - (iii) was a national of that country”.*

Recognition may be refused if the divorce was obtained FLA 1986 s 51(3)

- *without such steps having been taken for giving notice of the proceedings to a party to the marriage as ... should reasonably have been taken”*
- *without a party having been given (for any reason other than lack of notice) such opportunity to take part in the proceedings as ... he should reasonably have been given or*
- *there is no official documents certifying that the divorce etc is effective under the law of the country in which it was obtained or*
- *where either party... was domiciled in another country at the relevant date, there is no official document certifying that the divorce etc is recognised as valid under the law that country*
- *and in any event recognition would be manifestly contrary to public policy*

It relates to recognition of the divorce by only one party: the other’s country of residence/domicile/nationality need not recognise the divorce.

*“Proceedings”* are defined in FLA 1986 s 54(1) as meaning *“judicial or other”* proceedings but is otherwise (unhelpfully) not defined. It therefore contemplates what Dicey and Morris terms as *“extra judicial divorces”*. Unless there is the involvement of some State official or officially approved agency as recognised by the State under the law of the foreign country, with a degree of formality, there are no recognised proceedings. See Quazi and Chaudhary (both below) and also the Hague Convention of 1968 and the wording of the Recognition of Divorces and Legal Separations Act 1971. The Family Law Act 1986 restates the recognition laws found in the Hague convention and in RDLA 1971. In El Fadl (below) a Talaq registered in the Lebanese Sharia court properly convened and taking formal declarations (as opposed to being registered with the civic authority) was by means of proceedings notwithstanding that the Sharia Court had no judicial determination to make.

Only a limited number of non judicial proceedings will qualify. The rest (i.e. other than by means of proceedings) are under FLA 1986 s 46(2) (below). For “proceedings” leading to transnational divorce, see Berkovits v Grinberg [1995] 2 All ER 681 and below.

*“Effective”* as referred to in s54(1) means effective to bring about the divorce, annulment or legal separation. If the Court granting the divorce has no internal competence to do so, then clearly the

divorce will not be effective : see Adams v Adams [1971] P 188. See also Maples v Melamund above. “**Effective**” connotes a less rigorous standard than “valid”. It could mean a decree which although originally invalid per se in the granting state, is nonetheless to be treated as valid by virtue of some supervening legal decision or equitable principle such as estoppel: Kellman [2000] 1 FLR 785. See D v D (Recognition of Foreign Divorce) [1994] 1 FLR 38 where the High Court held the Ghanaian High Court would have upheld the decree. See also Wicken (below).

In the context of FLA 1986 and reference to “**domicile in that country**”, the meaning of domicile in foreign civil jurisdictions is not the same as in common law jurisdictions, especially England. As a general rule, domicile in civil jurisdictions in practice often equates to the place where a person habitually resides. Moreover, in civil jurisdictions domicile is generally far easier to acquire, or to lose. Consequently, a British citizen may well be considered to be domiciled in the English sense of the word in England whilst at the same time considered to be domiciled in a civil country from the latter country’s point of view. It is often difficult to convince practitioners in civil law countries that their meaning of domicile is quite different from the common law meaning of the word.

To overcome this in issues of recognition of foreign divorces, the Family Law Act 1986 incorporates a double test. FLA 1986 s 46(5) states that an individual **shall be treated as domiciled in a country if he was domiciled in that country according to:**

- “(i) **the law of that country in family matters. or**
- “(ii) **The law of that part of the United Kingdom to which the question of recognition arises; ”**

Practitioners should note different forms of domicile in English law. It is important to consult with tax/trust practitioners. Domicile may be of

- “origin”,
- “choice” or
- “dependence”.

Domicile of origin is acquired at birth and from parents. Domicile of choice places a burden of proof on the Applicant, and involves persuading the Court that a person’s domicile has changed: “**The burden of establishing a change of domicile - from a domicile of origin to a domicile of choice - is a heavy one**”, Stephen Brown LJ in Cramer v Cramer [1987] 1 FLR 116.

In Torok [1973] 3 All ER 101 Ormrod J stated that whether or not an individual was a national of any particular country would depend on the law of that country. It applies to the whole country (FLA 1986 s 49(3) in the context of recognition of foreign divorces) and not to individual federal states. Accordingly, in federal countries, it may be better to rely on a domicile or residence basis.

The “**relevant date**” is the date of commencement of proceedings: s 46 (3) (a)

Divorces in Japan, indeed any family law proceedings in Japan, are some of the most difficult, intricate and complex of any westernised jurisdiction. See therefore H v H (Queen’s Proctor Intervening) (Validity of Japanese Divorce) [2007] 1 FLR 1318. Kyogi rikon, the most common form of Japanese divorce, was to be recognised in the English court as a valid divorce “**obtained by mean of proceedings**” for the purposes of s 46(1) Family Law Act 1986. Although kyogi rikin was a divorce by agreement, it was only effective on registration with the municipal authorities in accordance with Japanese law. This registration was substantive and not merely of probative force, and formative of (and essential to) the divorce. The judgement contains a superb consideration of the relevant recognition law together with a very full examination of the various forms of Japanese divorces.

It is good practice to take particular care in all Anglo Japanese cases. Some forms of Japanese divorce are thoroughly administrative, often through the local town hall, and alarmingly have been known to be without any notice to the respondent yet valid locally. Across the Westernised family law jurisdictions,

very many foreigners still feel highly disadvantaged with family law proceedings in Japan. It is not easy obtaining reliable local advice from specialist Japanese family lawyers who speak English.

#### Recognition of Divorces outside of UK obtained other than by means of Proceedings

Where there are no proceedings of any kind, judicial or extrajudicial, provision for recognition must be more restrictive in law and the procedural and jurisdictional requirements understandably much stricter.

FLA 1986 s 46(2) *“The validity of an overseas divorce, annulment or legal separation obtained otherwise than by means of proceedings shall be recognised if:-*

- (a) the divorce, annulment or legal separation is effective under the law of the country in which it was obtained;*
- (b) at [the date when the divorce etc was obtained]:*
  - (i) each party to the marriage was domiciled in that country; or*
  - (ii) one party was domiciled in that country and the other party was domiciled in a country under whose law the divorce etc is recognised as valid; and*
- (c) neither party to the marriage was habitually resident in the United Kingdom throughout the period of one year immediately preceding that date.”*

So there is no recognition if neither party was domiciled in the country granting the divorce. There is no definition of *“otherwise than by means of proceedings”*. Dicey and Morris state that the distinction with *“judicial and other proceedings”* is unclear.

Some jurisdictions provide for divorce or annulment solely on the informal acts of one party to a marriage. Examples are the Jewish Get and the Islamic Talaq. Further, under certain Muslim law (still in force in Kashmir, Dubai, and some other East African and Arab states), the husband can divorce his wife by bare Talaq simply by saying “I divorce you” three times. Technically, it has to be pronounced on three separate occasions rather than three times on the same occasion but practice differs across the Islamic countries. No reason need be given for the divorce. The presence of the wife is not necessary nor need notice be given to her in advance nor is any other outside organisation be involved. It is important to distinguish between the bare talaq and the talaq with some form of *“proceedings”*. It is very unlikely to be *“proceedings”* if there was a bare Talaq needing no more than a declaration by the husband and which is not subject to judicial or other proceedings: Chaudhary [1985] FLR 476.

Where a foreign legal separation is converted into a divorce which is effective under the law where it was obtained, the divorce is recognised in England and Wales provided the legal separation is recognised in England and Wales according to the rules set out above, whether or not the divorce is entitled to recognition: FLA 1986 s 47(2).

The evidence of the effectiveness of informal procedure to terminate/nullify marriage is very often adduced by experts, see Wicken [1999] 1 FLR 293. In this case, the experts for both parties on an unwitnessed divorce letter by a Muslim husband to a Muslim wife in the Gambia said it was effective under Gambian law. The English Court applied the English law of evidence as to its authenticity as being that of the jurisdiction where the dispute was to be determined. As both parties were domiciled and resident in Gambia at the time of the delivery of the letter and not habitually resident in England, validity was recognised under FLA 1986 s 46(2).

In Pakistan, the Talaq in accordance with the Muslim Family Law Ordinance 1961 is suspended from operation for a period of 90 days as a pre-divorce cooling off period, to allow conciliation proceedings (see House of Lords in Quazi, below). This is viewed as evidence and it seems clear that such a method will be upheld as *proceedings*, provided the parties are domiciled in a country the territorial laws of which permit such a method (see the comments of Sir Jocelyn Simon P in Quereshi [1972] Fam Law

173). A Jewish get, which involves the active participation of members of the Rabbinical Council, is proceedings: Berkovits below

In Lebanon, there can be a simple pronouncement of Talaq. But the fact that a Talaq was before witnesses and registered in a properly convened local Sharia Court made the registration process as “*proceedings*” under FLA 1986 s 46(1) even though no judicial determination had to be made: El Fadl [2000] 1 FLR 175. Reference was made to a test of “*whether the divorce depends on its validity, at least in part, of what can properly be termed proceedings*”. The effect of the words “*at least in part*” is obscure and does not appear in statute.

In H v H 2007 2 FLR 548, a Pakistani talaq that involved notice being given to the relevant chairman of the Union Council amounted to *proceedings* for the purposes of s 46(1). Although a unilateral process that might offend English sensibilities, a talaq divorce would be recognised; it was important that marriages and divorces recognised in one country should be recognised in another. The wife, although domiciled in England, had been born, brought up and married in Pakistan to someone of the same culture. The wife was not entitled to an English divorce but did have a valid claim under Part III 1984 Act, see Chapter XXX. This seems an extension of the case law in this legislation and may be an indication that more informal talaqs will receive recognition in the future. It may depend more in the future on the recognition given to the legal effectiveness in the country where they occurred e.g. see comments by Scarman LJ in Quazi 1980 AC 744.824

Cross-proceedings are treated as if they are original proceedings and are accepted for jurisdiction if the original proceedings are accepted: FLA 1986 s 47(1)(a).

Where both parties took part in the original divorce, any findings of fact will be relied upon in the subsequent recognition proceedings: s 48 (1) (a) FLA 1986.

In Abassi 2006 2 FLR 415, in proceedings concerning the validity of a talaq in Pakistan which required understanding of the local procedure in Pakistan, the English court deferred to the Pakistani court to determine matters locally. The Court of Appeal said courts enjoyed a wide discretion and only in exceptional circumstances would an order deferring to a court in another jurisdiction be an improper exercise of that discretion. “*In family proceedings it is increasingly common to have regard to the sensible transfer by the court acting of its own motion*”. It was said that the International Liaison Judge should be used to facilitate collaboration.

Note that Part III MFPA 1984, financial claims after overseas divorce, only applies to cases where there has been judicial or other proceedings. This is primarily due to the timing in Parliament of amendments to the Family Law Bill 1986. So this remedy is unavailable for recognition of overseas divorces where there have been no proceedings. It may be better in such cases for an order for non recognition and to petition for divorce in England.

This recognition jurisdiction of divorces other than by means of proceedings is outside the United Kingdom, and therefore includes the European Union; recognition of divorces by proceedings within the European Union are covered by BII

Separate arrangements apply in countries with territories comprising different systems of law, see s49.

It will often be good practice to obtain an opinion from a specialist foreign family lawyer to advise on whether the local action taken by one party towards obtaining a divorce has actually invoked and complied with the jurisdiction and formalities of that particular country.

Trans-national divorces

A major, and growing, international issue concerns the so-called “transnational divorce” where the divorce starts and occurs partly in one country and another part, often the more formal part, in another country. In this situation, the efficacy of the “divorce” will be determined by the law of the country in which it was obtained. A “bare” Talaq would seem to be located where the husband speaks the required formula. In Quazi [1979] 3 All ER 897, a Pakistani Talaq would only be recognised in England if the entirety of the relevant proceedings, including the words used, took place in Pakistan. In this case, the Talaq was undertaken before a solicitor in Bolton and so it was disallowed.

A Muslim talaq must be registered in the same country in which it was pronounced: R v Secretary of State for Home Office ex parte Ghulam Fatima [1986] 2 FLR 294,

In Berkovits v Grinberg [1995] 1 FLR 477, a Jewish Get written in London under Jewish ecclesiastical law and delivered to the wife at the Rabbinical Court in Israel, was effective as an Israeli divorce but was not entitled to recognition in England. Proceedings must be a single set of proceedings. **“Proceedings must begin and end in the same place. A transnational divorce could not be recognised”**: Wall J.

In any event, it will not be recognised if either party **“was habitually resident in the United Kingdom throughout the period of one year immediately preceding”** the divorce etc: FLA 1986 s 46(2)(c).

In Sulaiman v Juffali [2001] 1 FLR 479, a Talaq had been valid under Saudi law but both the husband and wife lived in England. The husband pronounced it in England but registered it in the Saudi Sharia Court. The English Court found that it could not be recognised as it was obtained in the UK other than by means of a recognised court, even though subsequently registered abroad. Moreover it was not an **“overseas divorce”** within the meaning of s45 (1) (a) as obtained in the UK.

#### Non-recognition of divorces elsewhere

Where a divorce is validly granted or recognised in any part of the UK, non-recognition in any country does not preclude either party from remarrying in that part of the UK, nor does it cause the remarriage of either party, wherever the remarriage takes place, to be treated as invalid in that part of the UK: FLA 1986 s 50.

#### Refusal of Recognition of foreign divorces

Refusal to recognise a foreign divorce is discretionary and wide and should be exercised sparingly. It may be refused if:

- It is irreconcilable with a previous Court decision regarding the subsistence, recognition or validity of the marriage (FLA 1986 s 51(1)) and res judicata principle, Vervaeke v Smith (1982) 2 AER 144 HOL
- in the case of recognition via proceedings, there is a procedural defect (FLA 1986 s 51(3)) such as the divorce was obtained without reasonable notice being given, D v D (above) or due to a lack of opportunity for one party to take part (see Mamdani (1984) FLR 699, if **“for sound financial reasons the respondent to a divorce could not take part in the proceedings, the English court is given a discretion to refuse to recognise the order or decree”**), and also in the court’s natural sense of justice.
- However notice should be in local form where it is the natural forum of the parties and not English imposed requirements for period and participation: Ei Fadl [2000] 1 FLR 175
- in the case of recognition other than means of proceedings, the lack of official documents to evidence effectiveness of the divorce under local law or the lack of confirmation that it would be valid in the country of one party’s domicile (FLA 1986 s 51(3))
- expert evidence that the divorce was effective under local law was redundant if the recognition would be refused by section 51(3): Duhaur-Johnson 2005 2 FLR 1042, the husband had not taken

reasonable steps to give notice of the Nigerian proceedings to the wife and failed to inform his Nigerian lawyers or the court of the likelihood of the wife being in England and had misled the Nigerian court in a very material way

- no subsisting marriage exists between the parties as recognised by English law (FLA 1986 s 51(2))
- it is the act of an unrecognised state. See the two cases of B v B (Divorce: Northern Cyprus) [2000] 2 FLR 707, where, as a matter of public policy, a divorce obtained in the Turkish Republic of Northern Cyprus was not recognised by the English Court since the Republic is not recognised by Britain, then Emin v Yeldag (Attorney General and Secretary of State for Foreign Office intervening) [2002] 1 FLR 956 held B v B (above) is wrong and it will be recognised. So while the principle that the English courts cannot give effect to the acts of an unrecognised state was well established, there was an exception in relation to private rights, provided that the courts did not act inconsistently with the foreign policy or the diplomatic stance of the UK.
- there are divorces granted prior to certain older statutes, primarily regarding divorces in the mid-1970s and earlier. See s 52(4) FLA 1986. See also retroactive effect to pre FLA 1986 divorces here and abroad
- where it is manifestly contrary to public policy (FLA 1986 s 51(3)) e.g.:
  - In Zaal (1983) 4 FLR 294, the secrecy of the proceedings in Dubai was sufficient to refuse recognition on grounds of public policy. Note Dubai law and procedure has since changed.
  - In Joyce 1979 2 AER 156, a decree in Québec jarred on the conscience of the court so it was not recognised
  - In Kendall [1977] 3 All ER 471, a wife and the Bolivian Court were misled as to the documents she had signed and the use to which they were subsequently put and documents and information he supplied was in any event patently false so the decree was not recognised;
  - In Eroglu [1994] 2 FLR 287, both parties went knowingly through a sham Turkish divorce (thereby deceiving that Court) to minimise the husband's national service so the wife could not, 16 years later, say it was contrary to public policy to recognise it;
  - In Kellman [2000] 1 FLR 785, a mail order divorce in Guam does not render it automatically contrary to public opinion where the country itself has regular procedures: but it is a "**high hurdle to cross**" per Coleridge J.
- Where a foreign law terminates a marriage automatically on a change of religion, the English court will not recognise it as it offends the sense of justice: Viswalingham (1979) 1 FLR 15

#### Declarations as to Marital Status

FLA 1986 s 55(1) gives the Court the power to make declarations as to the validity of a marriage, including those contracted abroad and declare whether it was valid and subsisted as at a certain date or at its inception, or the validity of a divorce, annulment or judicial separation and its recognition or non-recognition. It can also make declarations of parentage, legitimacy and adoption. Other orders are possible e.g. issues concerning a successful application by a local authority to prevent parents removing their adult autistic child to Pakistan for a marriage to his cousin where due to incapacity the marriage would not be recognised, X City Council v MB 2006 2 FLR 968. A declaration of incapacity to marry was made. The cousin would have obtained a visa if allowed.

Jurisdiction arises if either of the parties to the marriage is domiciled in England and Wales on the date of the application or has been habitually resident throughout the period of one year ending with the date of the application or died before that date and was domiciled or habitually resident for one year before the date of death: FLA 1986 s 55(2)

The application is begun by petition and must be made in the prescribed form with the information required under FPR r 3.12. It must be accompanied by a marriage certificate or a decree of divorce, annulment or separation, as applicable, and include authenticated or certified translations, where relevant. In particular, details of any proceedings affecting the marital status must be given, as well as evidence of the jurisdiction of the Court. It must be supported by an affidavit by the Applicant/ Petitioner

verifying the petition and giving particulars of every person whose interest may be affected and his or her relationship to the Applicant, FPR 1991 r 3.16(1). See Procedural Table 14 of Red Book

A party to a marriage or a person with “*sufficient interest*” (FLA 1986 s 55(3)) can apply to the High Court or County Court for the Declaration that a marriage, divorce, judicial separation or annulment obtained outside England and Wales is or is not entitled to recognition here. If a third party is applying for a Declaration, note that the Applicant is the Petitioner and parties to the marriage are the Respondents. The third party must show a “*sufficient interest*”.

As a procedural safeguard, practitioners should ensure that a copy of the petition and every document accompanying it is sent to the Attorney General at least one month before the petition is filed, FPR 1991 r 3.16(4). The Attorney General may intervene in the proceedings, FLA 1986 s 59(2).

The Applicant then issues and serves a request for directions on any other person who should be made a Respondent to the petition. Such persons may apply within 21 days to be joined as parties to the proceedings, FPR 1991 r 3.16 (6) and (8).

Where the truth of the declaration sought is established, the Court must grant a declaration unless *to do so would manifestly be contrary to public policy*, FLA 1986 s 58(1).

The declaration binds all third parties (including Her Majesty!) as opposed to being merely effective between the parties, FLA 1986 s 58(2).

Expert evidence may often be required on the background to any proceedings abroad.

Religious divorces within the United Kingdom

Although religious divorces granted by religious authorities were not purporting to be valid according to English law to dissolve a marriage, injustices were occurring in England with the refusal of one spouse, invariably the husband, to grant a religious divorce. This arose where, by the religion, he alone could apply for the religious divorce. This could leave the wife divorced by civil law yet still married by her religion. It was particularly a problem within the Jewish community where some Jewish husbands prevented their (civil divorced) wives from remarrying according to their faith by refusing to grant them a get, a Jewish divorce.

This was remedied by the Divorce (Religious Marriages) Act 2002, repealing section 9 (3) and (4) Family Law Act 1996 and creating new s10A MCA 1973. It applies if there is a decree nisi and not a decree absolute of divorce and one party married according to certain stipulated religious usages. An English court can order a decree absolute not to be granted until there is a declaration that both parties have taken all steps to dissolve the religious marriage. The order will only be made if it is just and reasonable to do so. It can be revoked at any time.

This is taken from “*A Practical Guide to International Family Law*” (Jordans 2008) by David Hodson, with acknowledgement. Further details can be found within the book and from David Hodson. This is for information only and specialist legal advice should always be taken.

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