



**The Law Commission  
and  
The Scottish Law  
Commission**

(LAW COM. No. 168)

(SCOT. LAW COM. No. 107)

**PRIVATE  
INTERNATIONAL  
LAW**

**THE LAW OF DOMICILE**

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# THE LAW OF DOMICILE

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## THE LAW OF DOMICILE

### *Summary*

In this joint Report, the Law Commission and the Scottish Law Commission conclude that the present rules for determining a person's domicile are unsatisfactory and make recommendations for improving them. The Report contains a draft Bill to give effect to the recommendations.

**THE LAW COMMISSION  
AND  
THE SCOTTISH LAW COMMISSION**

Item XXI of the Third Programme of the Law Commission  
Item 15 of the Third Programme of the Scottish Law Commission

**PRIVATE INTERNATIONAL LAW**

**THE LAW OF DOMICILE**

*To the Right Honourable the Lord Havers, Lord High Chancellor of Great Britain,  
and the Right Honourable the Lord Cameron of Lochbroom, Q.C., Her Majesty's  
Advocate*

**PART I**

**INTRODUCTION**

*Background to this project*

1.1 The Law Commission and the Scottish Law Commission have undertaken this consideration of the law of domicile as part of their systematic re-examination of the rules of private international law. Over the years the Commissions have become increasingly aware of the need to review the law of domicile<sup>1</sup> and, rather than examine parts of that area of the law as they have arisen in connection with other projects, have preferred "a more general consideration of the whole question of the law of domicile in a United Kingdom context".<sup>2</sup> In January 1984 we set up a Joint Working Party, which included representatives of interested Government Departments, and Professors Anton<sup>3</sup> and McClean,<sup>4</sup> to advise on problems in the existing law and on proposals for reform. The membership of the Working Party is set out in Appendix B and we are very grateful for the advice which they gave. In the light of that advice, it was decided to publish a consultation document to seek views on the need for, and nature of, any reform. The general policy for that paper was agreed by both Commissions, though the responsibility for the detailed preparation of the paper was delegated to three Commissioners from each Commission.

1.2 The Consultation Document<sup>5</sup> was published in April 1985. It raised for discussion whether domicile should be retained as a primary connecting factor in our rules of private international law, or should be replaced by some other link, such as habitual residence or nationality. It went on to examine whether, if domicile is to be retained, reform of the present legal rules which determine the domicile of natural persons would be desirable. The provisional conclusion was that domicile should be retained but that substantial reform was needed. This general approach was supported by most of those who commented on the Consultation Document. This consultation process was most helpful and we are grateful to all who submitted comments to us. A list of the individuals and organisations who commented appears at the end of this Report as Appendix C. We must also thank the British Institute of International and Comparative Law for arranging a Discussion Meeting in June 1985 for consideration of the matters raised in the Consultation Document. The points put forward there have been taken into account in the formulation of our conclusions in this Report. Finally, we would like to express our particular indebtedness to Sir Wilfrid Bourne, K.C.B., Q.C., who helped us in analysing the response to the Consultation Document, and to Dr. P. M. North for the extensive help which he has given us in the preparation of this Report.

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<sup>1</sup> Working Paper No. 83 and Consultative Memorandum No. 56 on Polygamous Marriages (1982) para. 5.35 and Working Paper No. 74 (1979) and Consultative Memorandum No. 53 (1982) on Illegitimacy, Part VIII and paras. 10.6-10.8 respectively.

<sup>2</sup> Reports on Illegitimacy (1982) Law Com. No. 118, para. 13.3 and (1984) Scot. Law Com. No. 82, para. 8.8.

<sup>3</sup> Consultant to the Scottish Law Commission.

<sup>4</sup> Of the University of Sheffield.

<sup>5</sup> Law Commission Working Paper No. 88; Scottish Law Commission Consultative Memorandum No. 63.

1.3 Our Consultation Document was prepared<sup>6</sup> on the basis that any reform of the private international law rules relating to domicile should apply uniformly throughout the United Kingdom. Accordingly, we maintained close contact with the Office of Law Reform in Belfast in the preparation of the Consultation Document, and we have continued that process in the drawing up of this Report. Our proposals for reform of the law of domicile are intended to apply throughout the United Kingdom.

#### *Earlier history of the reform of the law of domicile in the United Kingdom*

1.4 The call for reform of the law of domicile is not a recent development. Modern attempts to achieve it date back to 1952 when the Private International Law Committee was asked to consider "what amendments are desirable in the law relating to domicile...".<sup>7</sup> The Committee reported in 1954<sup>8</sup> proposing that the law of England and Wales and Scotland should conform with the principles set out in a Code appended to the Report. The two particular defects<sup>9</sup> in the present law which it identified were:

- (a) the importance attached to the domicile of origin (in particular, the rule in *Udny v. Udny*<sup>10</sup> that the domicile of origin revives when a domicile of choice is abandoned without another such domicile being acquired) and the heavy burden of proof resting on those who assert that a domicile of origin has been changed; and
- (b) the difficulties involved in proving the intention required to change a domicile.

The Committee recommended that these defects be cured by legislation abolishing the doctrine of the revival of the domicile of origin and establishing certain rebuttable presumptions as to a person's domicile, principally, that a person should be presumed to intend to live permanently in the country in which he had his home.<sup>11</sup>

1.5 In 1958 a Private Members' Bill to give effect to the Report was introduced in the House of Lords. It was opposed on behalf of the foreign business community who feared "unforeseen and unpredictable consequences in the field of taxation",<sup>12</sup> in particular, that the new presumption might make it harder for members of that community to retain their foreign domicile and so might make them liable to pay United Kingdom income tax and estate duty. It was clear that neither the Committee nor the Bill intended that the presumption should be too difficult to rebut. However, these concerns were taken seriously and in 1959 a second Bill, which omitted any presumption as to domicile, was introduced in place of the first. That Bill was, however, dropped by its sponsors as its chances of success had been severely reduced by the controversy which had been aroused.<sup>13</sup> Later the same year, the law of domicile was again referred to the Private International Law Committee for reconsideration in the light of the objections taken to the two Domicile Bills. The Committee reported in 1963<sup>14</sup> reaffirming its original recommendations but with the addition of a "Businessman's Formula" which would have exempted businessmen from the presumption. The Committee, however, concluded that if businessmen were excluded from the effects of any legislation the changes would be hardly worth making and that, in any event, the Formula would probably not entirely allay hostility to the measure.<sup>15</sup>

1.6 The Private International Law Committee also considered the domicile of married women<sup>16</sup> and concluded that to enable women to acquire an independent or separate domicile from their husbands for all purposes would "involve legal complications outweighing any advantages that might accrue".<sup>17</sup> This aspect of the law of domicile was, however, subsequently taken up by a Departmental Committee in

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<sup>6</sup> Para. 1.3.

<sup>7</sup> First Report of the Private International Law Committee (1954) Cmd. 9068. para. 2.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*, paras. 8, 9 and 14.

<sup>10</sup> (1869) L.R. 1 Sc. & Div. 441.

<sup>11</sup> *Ibid.*, n. 7 above, para. 15. and Appendix A, Article 2.

<sup>12</sup> *Hansard* (H.L.) 1958, vol. 211, cols. 206-209.

<sup>13</sup> For an account of the legislative progress of the two Domicile Bills see Mann, (1959) 8 I.C.L.Q. 457 and the correspondence section of *The Times* during March and April 1959, in particular, 2, 13 and 31 March, 2 and 13 April and also Lord Shawcross, "Law Relating to Domicile", *The Times* 3 and 4 June 1959.

<sup>14</sup> Seventh Report of the Private International Law Committee (1963) Cmnd. 1955: Law of Domicile.

<sup>15</sup> *Ibid.*, paras. 17 and 34(3).

<sup>16</sup> First Report (1954) Cmd. 9068 paras. 17-18 and Seventh Report (1963) Cmnd. 1955. paras. 20-33.

<sup>17</sup> Seventh Report, *ibid.*, para. 34(6).



1972<sup>18</sup> whose proposals were enacted in the Domicile and Matrimonial Proceedings Act 1973, section 1 of which abolished a wife's dependent domicile.<sup>19</sup> Other changes in the law of domicile which were effected by that Act are contained in sections 3 and 4 and relate to the age at which an independent domicile can be acquired and to the domicile of children not living with their fathers.<sup>20</sup>

#### *Reform of the law of domicile in other countries*

1.7 Since the failure in 1958 to achieve major reform of the law of domicile in the United Kingdom, important proposals and changes have been made in other parts of the Commonwealth.<sup>21</sup> The Canadian Uniform Law Commissioners produced a Model Domicile Code<sup>22</sup> in the early 1960s based on a single definition of domicile which would apply to all persons including children and the mentally incapable. The Code, in effect, abolished the concept of the domicile of origin and of dependence and introduced a new domicile based on the place where a person has his principal home and intends to reside indefinitely. The Domicile and Habitual Residence Act 1983 of Manitoba<sup>23</sup> very substantially adopts the proposals in the Code. Two of the most notable reforms that have taken place in recent years have occurred in Australia<sup>24</sup> and New Zealand<sup>25</sup> where, amongst other things, the doctrine of the revival of the domicile of origin has been abolished, New Zealand going so far as to dispense with the concept of the domicile of origin altogether. Similar provisions have been subsequently adopted by other Commonwealth countries.<sup>26</sup>

1.8 In 1983 the Law Reform Commission of Ireland published a Report<sup>27</sup> which recommended that domicile, as a connecting factor in the conflict of laws, should be replaced by habitual residence. Habitual residence is widely used as a connecting factor in countries of continental Europe and in international conventions (especially those emanating from the Hague Conference on Private International Law). It has also been adopted in a number of United Kingdom statutes<sup>28</sup> as a factor supplementary to domicile. So far, only Nauru, one of the smallest Commonwealth jurisdictions, has actually legislated<sup>29</sup> to replace domicile with habitual residence.<sup>30</sup>

#### *Scope and structure of this Report*

1.9 The scope of this Report is confined to the domicile of natural persons. It does not examine the law of domicile as it applies to corporations, which, so far as we are aware, causes no serious problem. In addition, we do not think it would be appropriate at this stage to reconsider the concept of domicile as it has been specially defined for the purposes of the Civil Jurisdiction and Judgments Act 1982 which was only brought fully into effect from 1 January 1987.

1.10 The structure of this Report is as follows. Part II outlines the present rules relating to domicile. In Part III we identify the defects in these rules and consider whether domicile should be retained as a connecting factor in the field of private international law. Our detailed recommendations for reform of the rules governing domicile are set out and explained in Parts IV to VIII; and in Part IX we consider what impact the part played by domicile in the field of taxation should have on our recommendations. Finally, our recommendations are summarised in Part X, and a draft Bill to give effect to them is set out in Appendix A.

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<sup>18</sup> Comprising representatives of the two Law Commissions, the Lord Chancellor's Department and the Scottish Office.

<sup>19</sup> In England and Wales, Scotland and Northern Ireland.

<sup>20</sup> See para. 2.4, below.

<sup>21</sup> For a detailed discussion of the Commonwealth position see McClean, *Recognition of Family Judgments in the Commonwealth* (1983) ch. 1.

<sup>22</sup> *Ibid.*, p. 18.

<sup>23</sup> See Castel, *Canadian Conflict of Laws* (1986) 2nd ed., pp. 102-104.

<sup>24</sup> Domicile Act 1982.

<sup>25</sup> Domicile Act 1976.

<sup>26</sup> McClean, *op. cit.*, chap. 1.

<sup>27</sup> On Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws (LRC7-1983).

<sup>28</sup> E.g., the Recognition of Divorces and Legal Separations Act 1971 and the Domicile and Matrimonial Proceedings Act 1973.

<sup>29</sup> Conflict of Laws Act 1974; see McClean, n. 21 above, pp. 31-32.

<sup>30</sup> In Part III below we consider whether domicile should be replaced as a connecting factor by habitual residence or nationality.

## PART II

### THE PRESENT LAW OF DOMICILE IN OUTLINE

#### *Introduction*

2.1 It is not our purpose in this Report to give a definitive account of the law of domicile in the United Kingdom. Such accounts are more than adequately provided in the leading textbooks on private international law.<sup>1</sup> We therefore set out existing rules only so far as is necessary to a proper understanding of the difficulties in the present law. The essential purpose of domicile is to connect a person with the country in which he has his home permanently or indefinitely. The specific rules, however, do not always, and in many cases cannot, achieve that end simply because some people have no home or no settled home in any particular country. Subject to what is said in paragraph 2.2, by "country" is meant a geographical area governed by a single system of civil law, or a "law district" as it has been described.<sup>2</sup> Hence, a composite state, such as the United Kingdom, or a federal state such as Australia, contains a number of countries, for example, England and Wales, Scotland and Northern Ireland in the United Kingdom and New South Wales and Queensland in Australia.

2.2 Whatever the nationality or foreign connections which a person may have, his domicile is determined according to the rules of the law of the forum.<sup>3</sup> In United Kingdom law the rules for determining a person's domicile operate generally to ensure that every person has a domicile, and only one domicile,<sup>4</sup> at all times. There are, however, examples of statutory intervention in areas such as divorce jurisdiction which create domiciles in federal or composite states covering all the constituent countries. For example, for the purpose of matrimonial jurisdiction, Australian legislation has created an Australian domicile.<sup>5</sup> Hence in Australia a person can have two domiciles, one for matrimonial causes and the other for other issues.<sup>6</sup>

2.3 In the rest of this Part we outline the rules by which a domicile is attributed to or can be acquired by various classes of person, beginning with the new born child and working our way through childhood to adulthood, including the domicile of those adults who lack the capacity to acquire a domicile of choice.

#### *Domicile of children*

2.4 A person receives at birth a domicile of origin which it appears is determined as follows:<sup>7</sup>

- (a) a legitimate child born during the lifetime of his father has his domicile of origin in the country of his father's domicile at the time of his birth;
- (b) a legitimate child born after his father's death, or an illegitimate child, has his domicile of origin in the country of his mother's domicile at the time of his birth; and
- (c) a foundling has his domicile of origin in the country in which he is found.

Thereafter, unless the child is adopted (when it appears that he may receive a new domicile of origin derived from the appropriate adoptive parent)<sup>8</sup> the domicile of an

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<sup>1</sup> See *Dicey & Morris, The Conflict of Laws* (1987) 11th ed. (hereinafter referred to as "*Dicey & Morris*") ch. 7, Rules 4-16; Cheshire and North, *Private International Law* 11th ed. (1987), ch. 9, and Anton, *Private International Law* (1967) (hereinafter referred to as "*Anton*") ch. 6.

<sup>2</sup> *Dicey & Morris*, pp. 26-27.

<sup>3</sup> *Dicey & Morris*, Rule 8: "For the purposes of an English rule of the conflict of laws, the question where a person is domiciled is determined according to English law." The rule is similar for Scotland.

<sup>4</sup> *I.R.C. v. Bullock* [1976] 1 W.L.R. 1178, 1184; *Lawrence v. Lawrence* [1985] Fam. 106, 132.

<sup>5</sup> The Family Law Act 1975.

<sup>6</sup> There would seem to be little support for what amounts to a similar suggestion for English law made by Purchas L.J. in *Lawrence v. Lawrence* [1985] Fam. 106, 132-134.

<sup>7</sup> *Dicey & Morris*, Rule 9, pp. 125-126. See also *Anton*, pp. 167-168.

<sup>8</sup> On the basis that an adopted child is treated as if it had been born the legitimate child of its adoptive parents: Children Act 1975, Sch. 1 para. 3 (prospectively repealed and re-enacted in the Adoption Act 1976, s. 39(1)) and the Adoption (Scotland) Act 1978, 39(1); see *Dicey & Morris*, p. 127. Bromley, *Family Law* 6th ed. (1981), however, at p. 12, takes the view that an adopted child's domicile of origin does not change.

unmarried child under the age of 16<sup>9</sup> (or 12 or 14 respectively for girls and boys under Scots law) may be changed only if the parent on whom the child's domicile depends changes his or her domicile.<sup>10</sup> Subject to the exception in section 4 of the Domicile and Matrimonial Proceedings Act 1973, this so-called domicile of dependency appears to be determined as follows:<sup>11</sup>

- (a) a legitimate child's domicile is the same as, and changes with, the domicile of his father during the father's lifetime; and
- (b) subject, perhaps, to the mother's right to elect whether the child's domicile shall change with hers,<sup>12</sup> the domicile of an illegitimate child and of a child whose father is dead is the same as, and changes with, that of his mother.

The statutory exception in the 1973 Act provides that the dependent domicile of a legitimate child<sup>13</sup> whose parents are living apart, or who were living apart when the mother died, is determined as follows:

- (a) if he has his home with his mother and has no home with his father, the domicile of the child is the same as, and changes with, that of his mother;
- (b) if sub-paragraph (a) has applied to him at any time and he has not since had a home with his father, the domicile of the child is the same as, and changes with, that of his mother; and
- (c) if at the time of his mother's death, his domicile was dependent on hers by virtue of sub-paragraphs (a) or (b) and he has not since had a home with his father, the domicile of the child is that of his mother on her death.

#### *Domicile of adults*

2.5 On reaching the age of 16 (or 12 or 14 if a girl or boy respectively in Scotland) or marrying thereunder,<sup>14</sup> a person remains domiciled in the country in which he was domiciled immediately before either event<sup>15</sup> unless and until he abandons that domicile and either:

- (a) acquires a domicile of choice or
- (b) his domicile of origin revives.<sup>16</sup>

#### *Domicile of choice*

2.6 An adult can acquire a domicile of choice only by a combination and coincidence of:<sup>17</sup>

- (a) residence in a country; and
- (b) an intention to make his home in that country permanently or indefinitely.

Residence in this context seems to involve little more than mere physical presence in a country, and a period of days or even less can be sufficient provided that physical presence is accompanied by an intention to make a home in the country from that time on.<sup>18</sup> Conversely, a lengthy period of residence is not, alone, conclusive.<sup>19</sup>

<sup>9</sup> By s. 3 of the Domicile and Matrimonial Proceedings Act 1973, which applies to England and Wales and Northern Ireland (but not Scotland), a person is only capable of acquiring an independent domicile having attained the age of 16 or married under that age.

<sup>10</sup> *Dacey & Morris*, Rule 14, p. 149.

<sup>11</sup> *Ibid.*, Rule 15, p. 153; *Anton*, pp. 170-172.

<sup>12</sup> *Re Beaumont* [1893] 3 Ch. 490. See also Blaikie, "The Domicile of Dependent Children: A Necessary Unity?" 1984 *Jur. Rev.* 1.

<sup>13</sup> This includes an adopted (see n. 8 above) and a legitimated child.

<sup>14</sup> As the minimum age for marriage in the United Kingdom is 16 this rule is only relevant in the case of a marriage abroad by a person domiciled in a country permitting very early marriage, as was the case, e.g., in *Mohamed v. Knott* [1969] 1 Q.B. 1.

<sup>15</sup> *In the Goods of Patten* (1860) 6 Jur. (N.S.) 151; *Re Macreight* (1885) 30 Ch. D. 165; *Gulbenkian v. Gulbenkian* [1937] 4 All E.R. 618.

<sup>16</sup> *Henderson v. Henderson* [1967] P. 77.

<sup>17</sup> *Dacey & Morris*, Rule 10, p. 128; *Anton*, pp. 174-179.

<sup>18</sup> *Fasbender v. Attorney General* [1922] 2 Ch. 850 and *White v. Tennant* 31 W.Va. 790; 8 S.E. 596 (1888).

<sup>19</sup> *I.R.C. v. Bullock* [1976] 1 W.L.R. 1178 (C.A.).

2.7 As to the required intention, at its most rigorous it has been said by earlier authorities that the intention necessary to acquire a domicile of choice must amount to “a fixed and settled purpose”—“a determination”—“a final and deliberate intention”<sup>20</sup> to abandon the country of the erstwhile domicile and settle in the new country of residence. In other words, an unequivocal and positive intention not to remain and an intention to remain respectively are required. Hence, on that basis, if the person does not direct his mind positively and consciously to the question of where his permanent home is, or if he retains some hope of returning one day to the country of his erstwhile domicile,<sup>21</sup> the intention necessary to acquire a new domicile may not be present. More recent authorities, however, have relaxed the rules. For example,<sup>22</sup> it has been said that an intention to return to a country in the event of an unlikely contingency, such as a major win on the football pools,<sup>23</sup> would not prevent the person having the requisite intention to make his home permanently or indefinitely in the country in which he is resident. And a negative intention, in the form of an absence of an intention either to return and settle in an erstwhile country of domicile, or to settle in a third country, has been held to be sufficient to enable a person to acquire a domicile in the country in which he is currently resident.<sup>24</sup> On the other hand, an intention which is merely conditional on some, as yet, unfulfilled event is insufficient.<sup>25</sup>

#### *Burden and standard of proof*

2.8 The burden of proving that there has been a change of domicile falls on the person alleging that a change has occurred.<sup>26</sup> In discharging that burden where the competition is between a domicile of origin and one of choice, it has been suggested<sup>27</sup> that under English law a standard of proof more onerous than the balance of probabilities generally required in civil matters may have to be satisfied, and the necessary elements of residence and intention must be shown with “perfect clearness and satisfaction”<sup>28</sup> to the court. More recent English decisions<sup>29</sup> favour the civil standard of proof; and in Scots law it seems likely that the ordinary standard of proof on a balance of probabilities applies.<sup>30</sup>

#### *Revival of the domicile of origin*

2.9 If a person abandons one domicile of choice (by ceasing to reside in a country and losing the intention to make his home there permanently or indefinitely) without immediately acquiring another domicile of choice, his domicile of origin automatically revives irrespective of where he is or what he may intend for the future.<sup>31</sup> This rule ensures that every person has a domicile at all times.

<sup>20</sup> *Bell v. Kennedy* (1868) L.R. 1 Sc. & Div. 307, 321 *per* Lord Westbury; *Ibid.*, p. 314 *per* Lord Cairns; and *Douglas v. Douglas* (1871) L.R. 12 Eq. 617, 645 *per* Wickens V-C, cited, with approval, by Lord Macnaghten in *Winans v. Attorney-General* [1904] A.C. 287, 291–2.

<sup>21</sup> *Winans v. Attorney-General* [1904] A.C. 287; *Jopp v. Wood* (1865) 4 De G.J. & S. 616.

<sup>22</sup> See also *Gulbenkian v. Gulbenkian* [1937] 4 All E.R. 618, 627 *per* Langton J: “The intention must be a present intention to reside permanently, but it does not mean that such intention must necessarily be irrevocable. It must be an intention unlimited in period, but not irrevocable in character”.

<sup>23</sup> *In the Estate of Fuld (No. 3)* [1968] P. 675, 685 *per* Scarman J. If there is a substantial possibility of the contingency occurring, then the necessary intention is lacking: *I.R.C. v. Bullock* [1976] 1 W.L.R. 1178 (C.A.).

<sup>24</sup> *Re Flynn* [1968] 1 W.L.R. 103.

<sup>25</sup> *Cramer v. Cramer* [1987] 1 F.L.R. 116 (C.A.).

<sup>26</sup> This, of course, merely illustrates the general rule of evidence that conditions proved to have existed are presumed to continue in existence.

<sup>27</sup> *Winans v. Attorney-General* [1904] A.C. 287; *Ramsay v. Liverpool Royal Infirmary* [1930] A.C. 588; *Henderson v. Henderson* [1967] P. 77, 80.

<sup>28</sup> *Bell v. Kennedy* (1868) L.R. 1 Sc. & Div. 307, 321 *per* Lord Westbury; *Winans v. Attorney-General* [1904] 287, 292 *per* Lord Macnaghten.

<sup>29</sup> E.g., *In the Estate of Fuld (No. 3)* [1968] P. 675, 685–686; *Buswell v. I.R.C.* [1974] 1 W.L.R. 1631, 1637; cf. *Lawrence v. Lawrence* [1985] Fam. 106, 110–111.

<sup>30</sup> Although there is old Scottish authority (e.g. *Steel v. Steel* (1888) 15 R. 896; *Main v. Main* 1912 1 S.L.T. 493) to the effect that a particularly heavy onus of proof lies on a person alleging a change from the domicile of origin to one of choice, the Scottish courts have, in recent times, been unwilling to recognise any civil standard of proof other than the usual one of proof on the balance of probabilities. It seems likely that this standard would now apply: cf. *Lamb v. Lord Advocate* 1976 S.C. 110.

<sup>31</sup> *Udny v. Udny* (1869) L.R. 1 Sc. & Div. 441.

*Domicile of the mentally incapable*

2.10 Under the law of England and Wales and of Northern Ireland it appears that the domicile of a mentally incapable adult is determined as follows:<sup>32</sup>

- (a) if his incapacity pre-dates his sixteenth birthday his domicile thereafter continues to be determined as if he were an unmarried person under 16, but
- (b) if the onset of his incapacity post-dates his sixteenth birthday or marrying thereunder<sup>33</sup> his domicile remains that which he had immediately before the onset of his incapacity.

In Scots law it seems likely that the domicile of a mentally incapable person is the domicile he had on reaching the age of 12 or 14 or at the onset of his incapacity, whichever is the later. Certainly, so long as he is incapable of forming the necessary intention he cannot abandon an existing domicile or acquire a new domicile of choice.<sup>34</sup>

2.11 There is no authority on the degree or nature of the mental incapacity which renders a person of full age incapable of acquiring a domicile of choice. It has been suggested<sup>35</sup> that it is inappropriate to link the question of capacity in relation to domicile to the question whether there is an order in force or some form of official constraint relating to his mental state. The better view would seem to be that it is a question of fact in each case whether a person is capable of forming the intention to make his home in a country permanently or indefinitely.<sup>36</sup>

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<sup>32</sup> *Dicey & Morris*, Rule 16.

<sup>33</sup> See n. 14 above.

<sup>34</sup> *Anton*, pp. 174 and 177.

<sup>35</sup> *Dicey & Morris*, p. 161.

<sup>36</sup> *Ibid.*

**PART III**  
**THE NEED FOR CHANGE**

*Introduction*

3.1 Two major issues need to be addressed. The first is whether there are defects in the present rules of law relating to domicile which justify the making of law reform proposals. The second, and more fundamental, issue is whether or not domicile should be retained at all as a connecting factor for the purposes of private international law.

*The defects of the present law of domicile*

3.2 In our Consultation Document we identified, at different points, a variety of defects in the present law of domicile. These included the following:

- (a) The threefold division of kinds of domicile into domicile of origin (acquired at birth), domicile of dependency (which changes with that of a child's parents) and domicile of choice (acquired when no longer dependent) creates unnecessary complexity and results in the drawing of unhelpful legal distinctions.
- (b) The retention of the concept of the domicile of origin has led to the doctrine of the revival of that domicile, with the result that a person may die domiciled in a country which he has never visited.
- (c) There is doubt as to whether the standard of proof necessary to establish a domicile varies according to whether what is in issue is a domicile of origin or one of choice, and in particular whether the change in question is from the former to the latter, or from one domicile of choice to another.
- (d) The rules governing the domicile of children discriminate between legitimate and illegitimate children and between their fathers and mothers. They also fail to deal adequately with the cases where a child is abandoned, his parents die, the child is fostered or is taken into the care of a local authority.
- (e) The rule whereby a mother, on whose domicile that of her child is dependent, may elect whether or not to change the child's domicile if she changes her own is wrong in principle and unhelpful in practice. It is wrong in principle because it makes domicile depend on someone else's choice, and its effect in practice is likely to be to freeze the domicile of the child as at birth because of the very small number of cases in which any election would be made.
- (f) Under the law of England and Wales and of Northern Ireland, a child can acquire an independent domicile at the age of 16; under Scots law the equivalent ages are 12 for girls and 14 for boys. If, in all other respects, the rules of domicile in the different parts of the United Kingdom are the same, there is much to be said for uniformity on this age issue as well, both between the sexes and throughout the United Kingdom.
- (g) The rules for determining whether a domicile of choice has been acquired are criticised as both artificial and uncertain.
- (h) Whilst there is doubt as to what exactly are the rules governing the domicile of a mentally disordered person, such rules as have been suggested are clearly unsatisfactory. They would appear to lead to the result that the domicile of such a person must remain unaltered from the onset of incapacity; and this is particularly unfortunate if he becomes incapable under the age of 16, for then his domicile of dependency continues throughout his life unless and until he recovers capacity.
- (i) Our present domicile rules are ill-adapted to determine whether a person has acquired a domicile in a federal or other non-unitary state, especially if the law of that state allows a domicile to be acquired in the state as a whole, rather than just in one of its constituent territories.
- (j) The present transitional rules relating to the domicile of married women and contained in section 1(2) of the Domicile and Matrimonial Proceedings Act 1973 have been shown to be artificial and undesirable in their operation.<sup>1</sup>

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<sup>1</sup> See paras. 8.4–8.5, below.

3.3 It was clear from the comments received on our Consultation Document that these criticisms of the present domicile rules were broadly accepted and supported. Although, as will be seen, not all our detailed provisional proposals for reform attracted universal support, there was widespread acceptance that the criticisms outlined above justified some reform of the law of domicile. This does no more than confirm the views which the Commissions have expressed in the recent past,<sup>2</sup> and the approach of a number of Commonwealth jurisdictions<sup>3</sup> which have introduced reforming legislation within the last decade.

*Should domicile be replaced by some other connecting factor?*

3.4 If it is accepted, as seems to be the case, that the present domicile rules can be subjected to wide-ranging criticisms, the question has to be asked whether the use of domicile should be abandoned in favour of some other connecting factor. Although domicile is used as the main private international law connecting factor in Ireland, the United States of America, Denmark, Norway and Brazil, as well as in the United Kingdom and many other Commonwealth countries, different connecting factors, and in particular nationality and habitual residence, are preferred by other countries and by some writers. It is, of course, the case that such factors already play a part in our private international law rules. Habitual residence is a relevant factor in determining the jurisdiction of the courts in matrimonial, and other family law, issues;<sup>4</sup> both nationality and habitual residence are relevant connecting factors for the recognition of foreign divorces, annulments and legal separations.<sup>5</sup> However, we have here a rather broader concern, namely whether some other connecting factor such as habitual residence or nationality would be sufficient and appropriate to determine with which legal system an individual should be connected for a wide range of purposes so that the general use of the concept of domicile could be abandoned in the legal systems of the United Kingdom. It is necessary, therefore, to examine separately the claims of habitual residence and nationality to replace domicile as our general connecting factor.

*(i) Habitual Residence*

3.5 Although the concept of habitual residence already appears in United Kingdom legislation<sup>6</sup> and has been employed increasingly as a connecting factor in international conventions, it has not been adopted widely as a general substitute for domicile.<sup>7</sup> The advantages claimed for habitual residence over domicile by its proponents are that it is:

- (a) generally easier to establish than domicile because it is less dependent on the intention of the person concerned;
- (b) simpler to explain to the layman and hence an easier concept than domicile for both members of the public and officials to use; and
- (c) applicable directly to all persons without the need for a complicated concept such as the domicile of dependency to connect a child with a system of law.

3.6 The major criticism of habitual residence is that as a connection between a person and a country it is not sufficiently strong to justify the person's civil status and affairs always being determined according to the law, and by the courts, of that country. The point can be illustrated by the position of persons working or living abroad for prolonged but temporary periods, taking an example which we used in our Consultation Document.

Assume that A is an English domiciled oil man working in Saudi Arabia on a long

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<sup>2</sup> Law Com. No. 146, Scot. Law Com. No. 96 (1985), para. 1.5; Working Paper No. 89, Consultative Memorandum No. 64 (1985), para. 9.3.

<sup>3</sup> E.g., Domicile Act 1976 (New Zealand); Domicile Act 1982 (Australia); Domicile and Habitual Residence Act 1983 (Manitoba); and see para. 1.7, above.

<sup>4</sup> E.g., Domicile and Matrimonial Proceedings Act 1973, ss. 5 and 13; Family Law Act 1986, ss. 3, 9, 20, 55-57.

<sup>5</sup> Family Law Act 1986, Part II.

<sup>6</sup> See para. 3.4, above.

<sup>7</sup> It has only been so adopted in Nauru, one of the smallest Commonwealth countries; Conflict of Laws Act 1974; though the Irish Law Reform Commission has recommended that a similar change should be introduced in Ireland: LRC 7-1983; see para. 1.8, above.

term contract. If habitual residence were to be adopted in place of domicile and were the sole connecting factor then, for example:

- (a) the law governing the essential validity of any marriage<sup>8</sup> contracted by A whilst habitually resident in Saudi Arabia would be the law of that country;
- (b) if already married, A, whilst habitually resident in Saudi Arabia, might be precluded from seeking matrimonial relief in the English courts<sup>9</sup> were his marriage to break down;
- (c) if A died intestate whilst habitually resident in Saudi Arabia, the rights of succession to his moveable property<sup>10</sup> would be governed by Saudi Arabian law.

It can be seen from this that the exclusive use of habitual residence would cut the links between many temporary expatriates and their homeland, isolating them and their dependants from its law and courts despite their remaining closely connected with that country. The results would be particularly dramatic where the cultural background of the country of habitual residence, as reflected in its law, was very different or even alien to the culture of the person's own country.

3.7 A further objection to substituting habitual residence for domicile (as opposed to using it as an alternative connecting factor) is its allegedly undeveloped state as a legal concept. There is no broad agreement as to the degree of importance which is to be given to intention in determining whether residence is habitual; nor is it clear how long residence must persist to become habitual. Further, it has been argued that a person may have more than one habitual residence, or indeed none. In these circumstances, it might well be regarded as undesirable to substitute habitual residence for domicile unless special statutory provision were made to clarify the part played by intention and length of residence in establishing whether a residence was habitual and to cover cases where in fact a person might have no habitual residence or have more than one. In any event, if legislation did not make such provision at the outset it is clear that the courts would have to do so subsequently. Surrounding habitual residence with such provisions, especially if they were also aimed at meeting the difficulties of expatriates raised in paragraph 3.6 above, would seriously risk jeopardising the simplicity of the present concept and its claimed advantages. Furthermore, it might make it more difficult in the future to use habitual residence as a simple and appropriate alternative or supplement to domicile as a connecting factor in particular cases.

3.8 The concerns just voiced as to the suitability of habitual residence as a general connecting factor were shared by those who commented on our Consultation Document. Despite the fact that the Irish Law Reform Commission has proposed the abandonment of domicile in favour of habitual residence, there was virtually no support for the adoption of such an approach in the United Kingdom. We remain of the view that the greater fluidity of modern society, and especially the increasing trend for businessmen and others to serve tours of duty abroad, calls not so much for a concept which allows their and their families' civil status and rights to fluctuate as they move from country to country, but rather for a concept which, without undue rigidity, promotes a stable legal background against which such people can conduct their domestic affairs. Although habitual residence will continue in certain circumstances to be a most important connecting factor as an alternative or supplement to domicile, it is not in our view appropriate as a connecting factor of broad operation. Consequently, we do not recommend that domicile be replaced generally by habitual residence.

#### *(ii) Nationality*

3.9 In the nineteenth century nationality replaced domicile as a connecting factor in most countries of continental Europe from where its use has spread to Japan and to a

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<sup>8</sup> At present the law governing the essential validity of a marriage is, in general, the law of the parties' domicile.

<sup>9</sup> The English court has jurisdiction to grant matrimonial relief, e.g., divorce, annulment or judicial separation, if either of the parties to the marriage is domiciled in England and Wales at the date when the proceedings are begun or was habitually resident there throughout the period of one year ending with that date. The jurisdictional rules in Scotland and Northern Ireland are similar.

<sup>10</sup> At present intestate succession to moveable property is governed by the law of the deceased's last domicile.



number of South American States. As the Law Commission pointed out in their Report on Jurisdiction in Matrimonial Causes:<sup>11</sup>

“The vast majority of persons do have a close connection with the State of which they are nationals. If ‘belonging’ is the test, nationality occupies a position very close to that now filled by domicile and is entitled to consideration as a basis of jurisdiction.”

The advantages which may be claimed for nationality over domicile include the following:

- (a) it is a concept more easily understood by laymen and lawyers alike;
- (b) it provides a degree of certainty in that it is more easily ascertained and proved, not least because when it is changed the process is usually a public and conscious act of record, whether involving the direct process of naturalisation or a marriage which brings a new nationality in its wake, a fact more readily determined than the state of a person’s intention; and
- (c) because taking up a new nationality usually involves consent on the part of both the person and the country, the connection created by it and its consequences are less susceptible to criticism by those whose rights are affected by the change.

3.10 Although adopting nationality as the prime connecting factor in place of domicile would not affect temporary expatriates in the same adverse way as adopting habitual residence would, it would nonetheless itself have significant drawbacks as a substitute for domicile, namely:

- (a) there would have to be an additional structure of special rules (perhaps based on domicile) to deal with such cases as stateless persons, and those with more than one nationality;
- (b) special rules would be necessary in federal or composite states, including the United Kingdom, where nationality alone would not indicate with which of the countries comprising the state the person was to be connected;
- (c) because nationality is not dependent on residence, its use would increase the risks of connecting a person with a country which he may never have visited, let alone have lived in on a long-term basis;
- (d) although nationality may be a more stable connecting factor than domicile, it is in principle the wrong sort of link. “The principle of nationality achieves stability, but by the sacrifice of a man’s personal freedom to adopt the legal system of his own choice. The fundamental objection to the concept of nationality is that it may require the application to a man, against his own wishes and desires, of the laws of a country to escape from which he has perhaps risked his life.”<sup>12</sup>

3.11 Having weighed the arguments, we remain of the view that, whilst in general nationality is a proper test of political status and allegiance, domicile being based on the idea of the country where a person has his home is a more appropriate concept for determining what system of law should govern his civil status and certain aspects of the administration of his property. Whilst we do not wish to preclude the use of nationality as an alternative or supplementary connecting factor to domicile in our law in particular cases where that might be helpful, we are not persuaded that it would be a sufficient or appropriate general substitute for it.<sup>13</sup> It would, in our view, be particularly inappropriate to adopt for the United Kingdom a connecting factor which required special additional rules to make it workable for connecting a person with a particular part of the United Kingdom.

*(iii) Conclusions*

3.12 We have posed the question whether it would be desirable to abolish or

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<sup>11</sup> Law Com. No. 48 (1972), para. 19.

<sup>12</sup> *Anton*, p. 160. The basic idea of domicile is that it denotes the country with which a person has the closest ties as a matter of choice. Unlike nationality, domicile does not require the intervention of the state; and although, like nationality, a domicile may not be changed simply because a person so wishes, he may be able to re-arrange the circumstances of his life so as to become domiciled in the country of his choice.

<sup>13</sup> Nationality was considered and rejected as a possible connecting factor in Law Com. No. 48 (1972), paras. 19–26.

discontinue totally the use of domicile as a connecting factor in our rules of private international law and replace it generally with habitual residence or nationality. Our answer to that question is clear, and is well supported on consultation. We recommend that domicile should continue to be available as a connecting factor in the law of England and Wales, Scotland and Northern Ireland.

3.13 It is, however, only right to mention some of the concerns voiced on consultation in relation to the continued use of domicile in our private international law rules. The fact that domicile is to be retained and may well be the best connecting factor to be used in certain contexts or for particular purposes should not, it is said, necessarily lead to the conclusion that it is always the best connecting factor for all purposes. We share that view and believe that it will always be important when jurisdictional or choice of law rules are under review to assess which connecting factor (or combination of factors) is most appropriate in the particular circumstances. Sometimes this will be the general law of domicile; in other circumstances it will be some other connecting factor or combination of connecting factors.

3.14 Another point raised on consultation concerns the inter-relation of the general rules on domicile with those contained in the Civil Jurisdiction and Judgments Act 1982.<sup>14</sup> In our Consultation Document we stated<sup>15</sup> that it would not be appropriate to reconsider the concept of domicile as laid down for the purposes of that Act. As indicated earlier,<sup>16</sup> we remain of that view. The legislation has only been in full operation since the beginning of 1987 and it is too soon to determine whether or not the special statutory definition of domicile for the purposes of the 1982 Act is working satisfactorily. Some commentators did express regret that the 1982 Act, for the purpose of determining jurisdiction under that Act, uses rules of domicile different from those applied more generally, and suggested that the former might be aligned with the latter. We could not support such an approach which would involve abandoning the attempt made in the 1982 Act to try to bring our use of domicile in that legislation more closely into line with the concept as found in the other Contracting States to the Conventions embodied in the Act.

3.15 Two further general suggestions were made on consultation with the objective of making easier the operation of a retained concept of domicile. The first was that any adult of full capacity should be free to select his own domicile, irrespective of his actual or intended home. Furthermore, this idea was coupled with a system of compulsory registration of such chosen domicile. We cannot accept such a scheme. It makes no provision for the many cases in which it has to be decided where someone from overseas is domiciled. It is also open to the objection in principle that it would, in effect, allow a person to choose the governing law or the courts which are to have jurisdiction over him in any case where domicile was the appropriate connecting factor. Whilst it might be right in appropriate cases to confer a choice on a party, this can only be done by determining whether this is appropriate in each context where domicile is relevant and not by such a new sweeping rule.

3.16 The second suggestion put to us in more than one set of comments was that a testator should be able effectively to declare where he is domiciled at the time of making his will, subject to there being some closeness of connection with the country chosen. The central issue raised by this suggestion is not, in our view, one relating to the general rules on domicile, but rather as to whether a testator should be free to choose the law to govern the formal or essential validity of his will. This is an issue worthy of further consideration, but that should take place in the context of the reform and harmonisation of the private international law rules relating to wills, work on which is currently continuing under the auspices of the Hague Conference on Private International Law, and not as part of the reform of the law of domicile.

#### *Scope of reform*

3.17 The rest of this Report examines the case for changes in the detail of the present law of domicile. It will become clear that the present defects in the law require

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<sup>14</sup> Sects. 41-46.

<sup>15</sup> Para. 1.4.

<sup>16</sup> Para. 1.9. above.

substantial changes to be made. In our Consultation Document<sup>17</sup> we invited views on the question whether, if major reform was required, it should take the form of a complete statutory code of domicile or rather statutory amendment or restatement of the major rules. We expressed a preference for the latter approach, a view from which no-one dissented on consultation; and we have decided to adopt that approach in this Report. As a consequence, the draft Domicile Bill appended to this Report provides a statement of the major rules relating to domicile, but it does not seek to provide a fully comprehensive code, nor seek to redefine all terms or concepts which are currently in use. In this approach it follows the pattern of similar reforming legislation in Australia and New Zealand. Examples of rules of the law of domicile excluded from the draft Domicile Bill are the rules that no person may be without a domicile, that no person may have (for the same purpose) more than one domicile and the rule that (subject to statutory provision to the contrary) a person's domicile is to be determined by the law of the forum. It is made clear in the draft Domicile Bill<sup>18</sup> that the new domicile rules replace their common law and statutory<sup>19</sup> equivalents, but that other common law rules, such as those mentioned above, remain unaffected.

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<sup>17</sup> Para. 1.5.

<sup>18</sup> Clause 1(3).

<sup>19</sup> Sections 1, 3 and 4 of the Domicile and Matrimonial Proceedings Act 1973 and s. 9(1)(a) of the Law Reform (Parent and Child) (Scotland) Act 1986 would be repealed by the Domicile Bill appended to this Report: see clause 2(3).

## PART IV

### DOMICILE OF CHILDREN

#### *Introduction*

4.1 As we explained in Part II, a child receives at birth a domicile of origin in the country in which his appropriate parent is domiciled at the time of his birth, or, if a foundling, in the country in which he is found. Thereafter, until the child reaches the age of 16<sup>1</sup> (or marries thereunder) his domicile changes, if at all, with the domicile of the parent on whom his domicile is in law dependent.

4.2 The present state of the law poses two major questions. First, is there a case for according some or all children a domicile independent of their parents? Second, what need or advantage is there in retaining two sets of rules, one for determining a person's domicile of origin at birth and another for determining a person's domicile during childhood, namely his domicile of dependency? In addition, we consider in this Part the powers of parents and courts to override the general rules governing children's domiciles, the domicile of under-aged mothers and the different age limits of dependency in England and Wales and Northern Ireland, and in Scotland.

4.3 It is, however, worth bearing in mind from the outset that it will be rare for it to be necessary during childhood to determine the domicile of a child. Issues of capacity to marry or relating to matrimonial causes will be rare indeed in relation to a child under 16. The most likely circumstances (and even that will be unusual) is probably the case of succession to the estate of a deceased child. At the moment it is also important in adult life to look back to childhood domicile because the domicile at birth, the domicile of origin, can have a pervasive effect through adult life, especially as a result of the doctrine of the revival of the domicile of origin. If, however, our later recommendation<sup>2</sup> to abandon the idea of revival of the domicile of origin is accepted, it will rarely be necessary to look back to determine a childhood domicile in the case of an adult.

#### *Should dependency be retained?*

4.4 Under the present law the domicile of children is dependent on that of their parents. Why is this so and can it be justified? Most children live with their parents, or at least with one of them. Therefore, it accords with reality and common sense that such a child should normally be linked with his parent or parents for the purposes of determining the law with which, for status and similar purposes, he is to be connected. The problem is whether such a rule of dependency will always achieve a desirable and appropriate result. One limitation of the present law governing the domicile of children is that, if a child is abandoned (in the sense that the identity or whereabouts of his parents are not known) or his parents die, his domicile (whilst a minor) becomes frozen no matter what change may subsequently occur in his circumstances. We gave the following example in our Consultation Document:<sup>3</sup>

A baby, A, is taken from England to New Zealand with his emigrating parents and his domicile changes with theirs from England to New Zealand. Shortly after arriving, the parents are killed in a motor accident and A is returned to England to be brought up by his grandparents. Under the present law, A would remain domiciled in New Zealand and issues of status or relating to the distribution of his movable property on intestacy would, for example, be governed by the law of New Zealand until he was capable as an adult of acquiring a domicile of choice in England, irrespective of the fact that after his return to England he had no further connection with New Zealand.

Another perceived drawback of dependency is that the child's domicile may continue to follow that of a parent, even though the child has been taken into the care of a local authority or has gone to live permanently with a third party whether under a private arrangement or under a court order in respect of his custody.

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<sup>1</sup> In Scotland 12, in the case of a girl and 14, if a boy: see paras. 4.27-4.28, below and see n. 14 (to para. 2.5) above.

<sup>2</sup> See para. 5.25, below.

<sup>3</sup> Para. 4.2.

4.5 We considered in our Consultation Document whether these difficulties should be met by according all children a separate domicile based on, for example, their habitual residence or the country of their closest connection. Our provisional conclusion<sup>4</sup> was in favour of a middle way, neither full independence nor complete dependence, which would preserve the dependency where the link between the child and parents was continuing, but allow the child whose links with his parents had been weakened or extinguished to receive a domicile independent of theirs. We sought to achieve this middle course by provisional recommendations which varied according to whether the child had his home with both parents, with one parent or with neither. Where the child had his home with both parents and they had a common domicile it was suggested that the child would have that domicile; if their domiciles were different, the child's domicile would be dependent on that of the mother. Where the child had his home with one parent, his domicile would be dependent on that of that parent; and where he had his home with neither parent, the child would be domiciled in the country with which he was for the time being most closely connected. In substance, the child's domicile would be that of his mother if he had his home with her at all.

4.6 This approach has clear merits. It provides a degree of certainty in determining the domicile of a child, whilst providing a more realistic rule than that of the present law in the case of the child who lives with neither parent. It would ensure that the child's domicile would most often reflect where and with whom he has his home in fact; and it would mean that the rules governing the domicile of legitimate and illegitimate children would be the same. It does have disadvantages, however. It requires a fairly rigid set of rules dealing with different circumstances, even though it may be rare that, in the future, the domicile of a child will need to be determined. Furthermore, it includes one rule which is hard to justify in principle, namely the rule that a child who has his home with both parents, they having different domiciles, should be dependent on the domicile of his mother. Whilst, as our Consultation Document pointed out,<sup>5</sup> it may be preferable to select the domicile of the mother to that of the father, it is unfortunate that the law should, in the case of a happy united family, be forced to single out one parent rather than another. Indeed, in our Consultation Document we attempted<sup>6</sup> to see whether there was some other way by which to avoid the need to introduce such a "tie-breaking" rule; but we had to admit that alternatives based on habitual residence or closest connection carried, in this context, at least as many drawbacks, particularly of complexity and uncertainty, as the rule we were trying to avoid. We concluded, therefore, that the best solution to this difficult problem was to select the domicile of the mother as the tie-breaking rule.

4.7 The response on consultation to our general scheme of rules for determining the domicile of children embodied a good deal of support for the retention of a basic dependency approach, for the attempt to steer a middle course between complete reliance on, or full abandonment of, the test of dependency, and for the detailed rules proposed. Whilst there was widespread acceptance of the desirability of steering a middle course, anxieties were expressed both about the retention of a basic dependency rule and about the detail of some of the individual rules. These expressions of concern have caused us to re-examine the general approach of the provisional recommendations in the Consultation Document to see whether we can achieve the same main objectives in a way which meets most, if not all, of the concerns voiced to us. This involves giving further thought both to whether the concept of dependency should be retained and to the detailed formulation of the domicile rules relating to children.

4.8 The dependency test has the obvious advantage of certainty, and we have little doubt that it will provide the appropriate answer in many cases. It is in the nature of things that the younger the child, the stronger the case for a dependency test; but it will be most unusual that it would prove necessary in the future to determine the domicile of a very young child. Moreover, even in the case of such a child, there is no avoiding the problem of the choice between parents with different domiciles. Is it possible to avoid the twin difficulties of a dependency test—namely, the need for a tie-breaker rule and the inappropriateness of the test where the parents are dead or the child lives with neither of them, whilst at the same time not abandoning the advantages of certainty and

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<sup>4</sup> Para. 4.18.

<sup>5</sup> Para. 4.6.

<sup>6</sup> Paras. 4.7–4.9.

clarity in determining the domicile of a child in many cases? Our conclusion is that this balance can be achieved better by abandoning the fixed dependency rule, introducing a new basic rule, and also introducing presumptions as to domicile to deal with the usual case of the child living with both or one parent.

#### *Test to replace dependency*

4.9 If the general dependency approach is to be abandoned, as we propose, there are a number of approaches which could be adopted in its place. We examine three of them here: (a) using the same test as for determining the domicile of adults; (b) adoption of a test based on residence; or (c) employing a wide test under which a child would be domiciled in the country with which he is, at the relevant time, most closely connected.<sup>7</sup>

##### *(i) Independent domicile*

4.10 We do not recommend that the domicile of a child should be determined by the same rules as determine the domicile of an adult. A vital element in the rules governing the domicile of adults is the intention to make a home indefinitely in the country of residence. It follows that such rules could not operate in respect of young children who are incapable of forming the requisite intention. Even where a child could form the necessary intention, according primacy to his intention would be artificial in many cases because the child's affairs would in fact be under the control of an adult so that the adult's intention, rather than that of the child, would be decisive in determining where he would live and for how long.

##### *(ii) Habitual residence*

4.11 Turning next to residence as a criterion for determining the domicile of a child, we have argued in Part III that habitual residence is sometimes an insufficiently strong connecting factor for determining the civil status and rights of adults. That led us to reject it as a substitute for domicile generally. Furthermore if, as we have suggested earlier, there may be circumstances in which a person may have no habitual residence or possibly have an habitual residence in more than one country it would be necessary, in the present context, to introduce secondary rules to deal with those problems or to propose a special definition of habitual residence which would of course complicate the law. We think that the case for so doing is no stronger in the context of determining the domicile of children than more generally.

##### *(iii) The recommended test: country of closest connection*

4.12 The broader, if less objectively verifiable, test of treating the child as domiciled in the country with which he has the closest connection would avoid the difficulty of attributing an intention to a young child or of treating an older child's intentions as of prime importance. It would also avoid the artificial results of so narrow a test as habitual residence. More positively, it would allow the courts or other persons seeking to determine the child's domicile to reach the most appropriate conclusion taking into account all the circumstances of the case including, for example, the intentions of the child, if any, and of his parents or of those who have control over him; his and his parents' nationality; where he is or was in fact resident at the time in question; his family background and his education.

4.13 A further attraction of a closest connection test is that, in the case of a child who lives with neither parent, it provides a certain amount of built-in protection against a third party attempting to manipulate the child's domicile for some improper purpose. In such a case, we suspect that the courts would scrutinise with particular care any argument that the child had become most closely connected with a country to which he had been removed solely or largely for some ulterior and improper purpose. Our conclusion is that a test of closest connection would be more appropriate than any other for determining the domicile of a child under the age of 16, given our decision to recommend the abandonment of the doctrine of dependency. We recommend,

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<sup>7</sup> In our Consultation Document (paras. 4.13-4.16) we canvassed these options as relevant to the case where the child had a home with neither parent.

therefore, that the basic rule should be that a child under the age of 16<sup>8</sup> is domiciled in the country with which he is for the time being most closely connected.

*Rebuttable presumptions for determining country of closest connection*

4.14 One of the clearest advantages of a dependency test is the degree of certainty that it provides. If one knows the domicile of the relevant parent, then it is possible to determine the domicile of the child. We do not think that this advantage should be abandoned. In our view, however, a more appropriate technique is to combine the basic test of closest connection<sup>9</sup> with rebuttable presumptions as to the domicile of a child to deal with the most likely case, namely where the child lives with one or both parents. We believe that it is preferable to approach this problem through presumptions rather than fixed rules. This would provide a high degree of certainty whilst still allowing the court to reach an appropriate result in a difficult case through the closest connection test, and thereby also avoiding the arbitrary allocation to a child of the domicile of the father or of the mother. The present law, in section 4(1) of the Domicile and Matrimonial Proceedings Act 1973, has special rules to deal with the case of the child who has his home with the mother and has no home with the father. We think that this idea of looking to the child's home is one which can be built upon in devising appropriate presumptions, though it is necessary if the issue of dependency is abandoned as a legal rule to make provision also for the case where the child has his home with both parents.

4.15 In our Consultation Document we made provisional proposals for firm legal rules for determining the domicile of a child which again relied on the concept of the child having his home with his parents. We there suggested<sup>10</sup> that a child who had his home with both parents should, as a matter of law, have their domicile if the parents shared a common domicile. This was warmly welcomed on consultation and we are clear that it would be entirely appropriate for such an approach to be embodied in a presumption relating to a closest connection test. Furthermore, a similar approach seems appropriate if, although the parents are separated and the child has his home with only one of them, they are in fact both domiciled in the same country. We recommend, therefore, that where the child's parents are domiciled in the same country and he has his home with either or both of them, it is to be presumed unless the contrary is shown, that the child is most closely connected with that country.

4.16 We turn now to the case where the child has his home with only one parent and the parents are not domiciled in the same country. In our Consultation Document we suggested,<sup>11</sup> following the approach of section 4 of the Domicile and Matrimonial Proceedings Act 1973, that such a child should take the domicile of the parent with whom he has his home. This approach was welcomed on consultation and, again, we think that it forms an appropriate and satisfactory basis for a presumption in relation to a closest connection test. We recommend that, where the child's parents are not domiciled in the same country and he has his home with one of them, but not with the other, it is to be presumed, unless the contrary is shown, that the child is most closely connected with the country in which the parent with whom he has his home is domiciled.

4.17 There is, finally, the difficult case of the child who has his home with both his parents, but they have different domiciles. In our Consultation Document we considered<sup>12</sup> whether it would be more appropriate to provide that the child's domicile should, in such a case, continue to be dependent on that of his father or whether it would be better to change to dependency on that of the mother. Although, having examined other alternatives, we provisionally proposed the latter, we were conscious of the degree of arbitrariness involved and that such tie-breaker rules carry within them the seeds of disagreement. The comments received on consultation bore out this latter conclusion and a number of grounds have been expressed for unease with our provisional recommendations. The most obvious is that no good case has been made

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<sup>8</sup> See paras. 4.27-4.28, below.

<sup>9</sup> See para. 4.13, above.

<sup>10</sup> Para. 4.5.

<sup>11</sup> Para. 4.10.

<sup>12</sup> Paras. 4.6-4.9.

out for changing from reference to the domicile of the father to that of the mother, given that in many cases the father will still provide the main economic support in the family, which is likely to be located and have its roots and home where he is. Perhaps the most significant argument is the one advanced already, namely that a rule which requires a discriminatory tie-breaking provision to make it work cannot convincingly be shown to be a desirable rule. We think that argument is as persuasive in a context of presumptions of closest connection as it is in that of laying down fixed rules for determining dependent domiciles. We do not, therefore, believe that it would be helpful to introduce a presumption to guide the court in the case where the child has his home with both parents, but they have different domiciles. In this fairly unusual case, as with that of the child who has his home with neither parent, the basic test of closest connection should be applied without the aid of any presumption.

4.18 There are two further points. The first is whether it is necessary to give specific guidance as to how the closeness of connection is to be determined. We think that it would be undesirable for legislation to single out any specific factors for emphasis; such a provision might serve to mislead. The court should be able to look at all the child's circumstances in order to decide his domicile. We gave thought to whether legislation should provide expressly that all the circumstances of the case are to be taken into account. We decided, on balance, that such a provision would add nothing to the general statement of the rule which leaves the court free to look at all factors. Our main recommendation<sup>13</sup> is that a child should be domiciled in the country with which he is for *the time being* most closely connected. The emphasised words indicate that the court seeks to find the closest connection as at the time when the domicile has to be determined. This does not, however, mean necessarily that all previous events in the child's life are to be ignored. Indeed, in examining all the factors relevant to deciding the present closest connection the court may need to look at elements of the child's past history. It might be appropriate, for example, to determine whether the child is more closely connected with the country in which he is now living or with that which he seems only temporarily to have left.

4.19 The second point is that the presumptions we recommend take as one of their criteria the fact that the child has his home with one or both parents. The concept of "home" is already used in section 4 of the Domicile and Matrimonial Proceedings Act 1973<sup>14</sup> to cover cases where the parents of a legitimate child are living apart and the child has his home with his mother. In that situation, he receives by way of exception under the current law his mother's domicile. In that context, "home" appears to have caused no problem and we think that it would cause none in the context of the presumptions which we recommend. We expect a child to be treated as having his home with his parents not only where they live together day to day, but also where there are temporary separations even on a regular basis. Examples would be where the child attended a boarding school or was hospitalised or where the parent was absent in the course of his work, say, as a diplomat, a member of the armed forces, a business executive in a multi-national company or a construction worker. In particular, we consider that having his home with a parent would embrace the period after birth during which a child may remain in hospital. We considered whether it might be desirable to make express legislative provision<sup>15</sup> for these types of case. We have concluded, however, that, as the Private International Law Committee commented in a slightly different context, "what constitutes a home must depend on the facts of each case".<sup>16</sup> And we believe that such an issue should be left to the courts. In so recommending, we are conscious that, as we said earlier, no difficulty has arisen with the use of the concept of "home" undefined in the Domicile and Matrimonial Proceedings Act 1973.

4.20 It may be possible for a person to have more than one home<sup>17</sup> and we have debated whether the reference to "home" in the presumptions should be to "principal home", "a home" or "his home". We have decided that the phrase "his home" is to be preferred. It conveys most effectively the combined ideas of physical presence and

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<sup>13</sup> See para. 4.13, above.

<sup>14</sup> See also Children Act 1975, s. 9 [Adoption Act 1976, s. 13] and s. 33.

<sup>15</sup> On the analogy of the Children Act 1975, s. 87(3).

<sup>16</sup> First Report (1954) Cmd. 9068, para. 13; see also n. 18, below.

<sup>17</sup> See *Re Y (Minors) (Adoption: Jurisdiction)* [1985] Fam. 136.



emotional link;<sup>18</sup> it is also a phrase which has already been used in legislation without difficulty;<sup>19</sup> and it does not preclude the conclusion in appropriate cases that a child may have his home with both parents in different places, or that he may still have his home with his parents even though he is living for a while with foster parents or in care.

#### *Domicile of origin*

4.21 The second major question raised at the beginning of this Part was whether it is still necessary or desirable to retain two separate sets of rules—one for determining the domicile of a child at birth, his domicile of origin, and the other for determining his domicile during the rest of childhood. We reached the provisional conclusion in our Consultation Document<sup>20</sup> that the rules there proposed for determining the domicile of a child were equally appropriate for determining the domicile at birth as well as during the rest of childhood. In the result our provisional recommendation was that the domicile of origin as a separate type of domicile determined according to a separate set of rules should disappear from the laws of the United Kingdom.

4.22 We have given further thought to that conclusion in the light both of comments received on consultation and of the fact that our recommendations for determining the domicile of a child differ from those put forward in the Consultation Document. The case for or against retention of the idea of a domicile of origin is, in our view, unaffected by our decision to move away, in the case of the domicile of children, from a test based on dependency to one based on a closest connection criterion, coupled with presumptions.

4.23 There was no dissent from the view expressed in our Consultation Document<sup>21</sup> that the abolition of the domicile of origin would cause no particular difficulty in the context of the closest connection test there proposed for the child who does not have his home with either parent. Looking more broadly at the consultation on the question whether the idea of the domicile of origin had outlived its usefulness, there was almost universal support for our provisional recommendation that it should disappear from the law. There were, however, those who felt that it was a concept which had existed in our law for a long time, that it should not lightly be discarded and that it had a useful role as a “long-stop” to play in the rules for the determination of domicile. Longevity is not in itself a convincing argument if no other case for its retention can be made. The real issue is whether the concept of the domicile of origin has a useful practical role to play. We are convinced that, in the light of our recommendations<sup>22</sup> for determining domicile during childhood, the domicile of origin is no longer necessary for determining the domicile of a child. The closest connection test, with its attendant presumptions, is in our view entirely suitable for determining a child’s domicile from the moment of birth up to the age of 16.

4.24 There are two further characteristics of the domicile of origin. It is said to be harder to change from a domicile of origin than from one of choice<sup>23</sup> and, if a domicile of choice is abandoned without another being acquired, the gap is filled by the revival of the domicile of origin.<sup>24</sup> Looking forward to recommendations made later in this Report, we have concluded that no special tenacity should be given to the domicile acquired at birth and that the doctrine of the revival of the domicile of origin (or the domicile acquired at birth) should be abandoned.<sup>25</sup> That being so, we can see no case for the retention of the domicile of origin and we recommend that, as a separate type of domicile determined according to a separate set of rules, it should disappear from the laws of the United Kingdom.

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<sup>18</sup> *Ibid.* In that case, Sheldon J. indicated that whether a child has his home with his parent or parents will depend on the facts of each case, and that factors such as the duration or regularity of the residence with his parent(s) and whether the child regards the parent’s house as his base or proper abode will be important.

<sup>19</sup> Domicile and Matrimonial Proceedings Act 1973, s. 4; Children Act 1975, s. 9 [Adoption Act 1976, s. 13] and s. 33; and see clause 5 of the Foreign Marriage (Amendment) Bill appended to Law Com. No. 165, Scot Law Com. No. 105 (1987).

<sup>20</sup> Paras. 4.20–4.22.

<sup>21</sup> Para. 4.21.

<sup>22</sup> See paras. 4.13–4.16, above.

<sup>23</sup> See para. 2.8, above.

<sup>24</sup> See para. 2.9, above.

<sup>25</sup> See Part V below. The abandonment of the revival rule also reflects the view that there should be no “long-stop” role for the domicile of origin: see para. 4.23 above.

### *Powers of election*

4.25 There is some authority that, if a child's domicile is dependent on that of its mother, it will only change with that of the mother if she so intends.<sup>26</sup> Such a rule would disappear with our recommendation to abandon the doctrine of dependency and we believe that that is right. Furthermore, commentators on our Consultation Document agreed with the provisional conclusion there expressed<sup>27</sup> that no individual should have power to override the general rules governing the domicile of a child. However, the Private International Law Committee, in 1954, recommended that—

“a court of competent jurisdiction shall have power to make such provision for the purpose of varying an infant's domicile as it may deem appropriate to the welfare of the infant.”<sup>28</sup>

We think that it would be wrong in principle for the court to have such a power because domicile is a conclusion of law drawn from the facts of a case irrespective of a person's direct intentions as to domicile. It is not something which a person can choose directly for himself, though he may of course rearrange the circumstances of his life to effect this conclusion of law. Accordingly it would seem wrong that a child's domicile should be capable of being chosen directly by an individual or a court. Furthermore, it is not clear to us that, even if it were desirable in principle for the court to have such a power, it would be proper or practicable to exercise the power solely on the basis of the child's welfare. Our provisional conclusion in the Consultation Document<sup>29</sup> that no person or court should have power to abrogate or override the general rules governing the domicile of a person who is under 16 was supported on consultation by all who referred to this issue. We confirm that conclusion here.

4.26 It is important to note that, even in the absence of a direct power to override the general rule, parents and the courts will continue to have wide powers available to them to determine indirectly where a child is to be domiciled. So far as a parent is concerned he would, under the relevant presumption, continue to be able to control the domicile of a child who has his home with him simply by controlling his own domicile. Even where the child did not have his home with him, and would under our recommendation be domiciled in the country of his closest connection, the parent could often exercise his power to control the affairs of the child, including where he lived, and thus indirectly decide where the child would be domiciled. As regards the courts, they already have power in various proceedings, such as custody and matrimonial proceedings, to decide with whom and where a child should live. Hence, where a child is the subject of such proceedings, the courts already have and would continue to have power to control the child's connection with a country and thus to determine his domicile.

### *Age limits*

4.27 In the law of Scotland the age at which a child can acquire an independent domicile is not 16, as it is in the rest of the United Kingdom, but is 12 for girls and 14 for boys.<sup>30</sup> These are the ages, derived from Roman law, at which children cease to be pupils and become minors in Scots law. The Scottish Law Commission has published a consultative memorandum on the legal capacity of pupils and minors<sup>31</sup> in which one of the options considered was the replacement of the ages of 12 and 14 by the age of 16 for the purposes of legal capacity in private law matters generally. The Scottish Law Commission expressed the view in our Consultation Document<sup>32</sup> that, in any event, 16 was more appropriate than 12 or 14 as the age at which an independent domicile could be acquired. Below the age of 16 children in the United Kingdom are generally still at school and dependent on adults. Above that age they may have left school, taken employment, married and moved to another jurisdiction. Not only is 16, in the conditions of the present time, a more suitable age in itself for this purpose but there

<sup>26</sup> *Re Beaumont* [1983] 3 Ch. 490; *Re G.* [1966] N.Z.L.R. 1028; and see *Blaikie* 1984 Jur. Rev. 1.

<sup>27</sup> See paras. 4.23–4.25.

<sup>28</sup> First Report (1954) Cmd. 9068, App. A, Article 4(3), and see para. 20. The Committee also recommended that the power of a parent to choose the child's domicile should be extended from the mother to the father.

<sup>29</sup> Paras. 4.26–4.27.

<sup>30</sup> *Anton*, pp. 171–172.

<sup>31</sup> Consultative Memorandum No. 65 on *Legal Capacity and Responsibility of Minors and Pupils* (1985). A report containing final recommendations is likely to be published later this year.

<sup>32</sup> Para. 4.30.

will also be advantages in having the same age throughout the United Kingdom. If, for example, a family consisting of father, mother, son of 15 and daughter of 13 moved from Scotland to England it would be unfortunate if the children were held by an English court to be domiciled in England and by a Scottish court to be domiciled in Scotland.

4.28 There was one doubt expressed on consultation over our provisional recommendation that, in Scotland, as is already the case in other parts of the United Kingdom, 16 should be the age at which an independent domicile can be acquired. It was suggested that it might be desirable not to make any change in Scotland until the Scottish Law Commission had completed its broader examination of legal capacity. On reflection, it does not seem essential for the age limits in the law of domicile to be the same as elsewhere in the law. So the adoption of 16 in this context would not prejudice the broader work of the Scottish Law Commission and would have the desirable consequence of uniformity of approach throughout the United Kingdom. We recommend, therefore, that in Scotland, as is already the case in other parts of the United Kingdom, 16 should be the age at which an independent domicile can be acquired.

#### *Marriage under the age of 16*

4.29 Under the present law in England and Wales and in Northern Ireland, special provision is made for the domicile of a person marrying under the age of 16. Section 3(1) of the Domicile and Matrimonial Proceedings Act 1973 provides that:

“The time at which a person first becomes capable of having an independent domicile shall be when he attains the age of 16 or marries under that age . . .”

This provision does not apply to Scotland where, not surprisingly in view of the low ages at which an independent domicile can be acquired, there is no authority on the effect on domicile of a marriage under those ages.

4.30 Cases involving the domicile of persons who married under the age of 16, and whose domicile has to be determined with reference to a time when they were still under 16, will be extremely rare in practice. They could only arise if it was necessary to establish the domicile of a person who married under that age in a country outside the United Kingdom at a time when he or she was domiciled in a country which permitted marriage below that age.<sup>33</sup> In addition, we have proposed that the domicile of a child under 16 should be based on the test of closest connection<sup>34</sup> and the proposed presumptions<sup>35</sup> are less likely to operate in the case of a married child. Such arguments led us in our Consultation Document<sup>36</sup> to suggest that it seemed unnecessary to have a separate rule applying the adult domicile rules to a child under 16 merely because he was married. Although most of those who commented supported the view that marriage under the age of 16 should be irrelevant to capacity to acquire a domicile, some commentators saw merit in the present rule and wished to retain it. We have, in the light of these fully argued views, given careful thought to whether our provisional recommendation was right.

4.31 There are two main arguments in favour of retaining the present law. First, if we accept that our choice of law rules may require the recognition of capacity to marry under the age of 16, it is inconsistent to regard such a person as being too immature to have capacity to acquire a domicile; and, secondly, to change the law as we provisionally recommended would involve taking away a capacity which currently exists and such a step should only be taken for clear and convincing reasons. Cogent though these arguments may seem to be, they have not convinced us to change our approach.

4.32 We do not think that, in the field of domicile, it is justifiable in principle to draw a distinction between those who are and who are not married. It is not, in our view, obviously the case that a person under the age of 16 does have the required capacity to

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<sup>33</sup> See n. 14 (to para. 2.5) above.

<sup>34</sup> See para. 4.13. above.

<sup>35</sup> See paras. 4.15–4.16. above.

<sup>36</sup> Para. 4.32.

form the necessary intention to acquire a domicile of his own simply because he is closely connected with a country where the age of capacity to marry is under 16. Such age may have been fixed for religious or social reasons quite unconnected with maturity of intention. Furthermore, the differences between the rules for determining the domicile of a child and of an adult will, under our recommendations, be less striking in the case of a married child than under the present law. No longer will the domicile of a married child living away from home be legally dependent on that of his parent or parents. It will be determined by reference to the closest connection test.<sup>37</sup> For these reasons, we believe that our provisional recommendation was right and we recommend that no special provision is required for determining the domicile of a person who marries under the age of 16.

#### *Domicile and Parenthood*

4.33 In our Consultation Document<sup>38</sup> we raised for consideration the question whether an unmarried person<sup>39</sup> under the age of 16 should, if a parent, be capable of acquiring a domicile as if an adult. There may appear to be an anomaly under the present law<sup>40</sup> in that the domicile of the child is dependent on that of his mother which in turn is dependent on that of her parents. We expressed ourselves unconvinced by any arguments for change and no consultee dissented from this view. Our conclusion is strengthened by the recommendations which we have made for determining the domicile of a child under the age of 16 (including one who is married) by reference to a closest connection test.<sup>41</sup> Under those rules the idea of a child having, as a matter of law, his domicile determined by a double dependency rule, through his mother to his grandparents, will fall away. We recommend therefore that the domicile of a person under the age of 16 should be determined by the general rules applying to such a person, irrespective of the fact that she or he is a parent.

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<sup>37</sup> The test would enable all the circumstances of the case to be taken into account, including the intentions of the married child: see para. 4.12. above.

<sup>38</sup> Para. 4.33.

<sup>39</sup> If married, there is presently capacity to acquire an independent domicile by reason of the Domicile and Matrimonial Proceedings Act 1973, s. 3(1).

<sup>40</sup> See Palmer (1974) 4 Fam. Law 35, 38.

<sup>41</sup> See paras. 4.13 and 4.32, above.

## PART V

### DOMICILE OF ADULTS

#### *Introduction*

5.1 In this Part we examine the following matters: the burden and standard of proof for acquiring a new domicile, the requirement of residence, the requirement of intention and whether it should be supplemented by a presumption as to intention and the doctrine of the revival of the domicile of origin.<sup>1</sup>

5.2 Before looking at these detailed matters there is a broader issue to be discussed, namely whether in general terms it should be made easier, as a matter of legal rules, for a domicile to be changed. The formulation of views on this broad issue will establish the context for the discussion of some of the more specific issues.

5.3 The effect of many of the provisional proposals in our Consultation Document would, if implemented, make it easier for a new domicile of choice to be acquired. They would reduce the tenacity of the domicile of origin, or the domicile acquired at birth, and would generally move in the direction of ease of change of domicile. We have no doubt that it is desirable for the legal rules relating to domicile to be amended in this direction, and the great majority of those who commented on the Consultation Document took the same view. The greater mobility in the world should be mirrored in the law of domicile—to avoid the result that a person is held to be domiciled in a country which he has in truth long abandoned. This can only be achieved, because of the rule that a person must always have a domicile, if it becomes a little easier to acquire a new one. It is also the case that the more tenacious a domicile is, the greater the need to examine the whole of a person's life with, in particular, the need to deduce from his conduct the intention lying behind it at different stages in his life. It is in the light of this general approach that we examine the particular issues relating to the domicile of adults.

#### *Burden and standard of proof*

5.4 The burden of proving the acquisition of a new domicile falls on the person alleging it. Although this rule in itself plainly favours the retention of an established domicile, we believe that it is the appropriate rule and propose no change in it.

5.5 Turning to the standard of proof, the extra power of adhesion of the domicile received at birth, currently the domicile of origin, derives in part in England and Wales from the unusually high standard of proof seemingly required of a person seeking to show that such a domicile has been displaced by the acquisition of a domicile of choice.<sup>2</sup> It is said that the necessary intention in such a case must be shown with "perfect clearness and satisfaction"<sup>3</sup> to the court, or "beyond a mere balance of probabilities",<sup>4</sup> a standard of proof clearly higher than that usually employed in civil disputes including cases where what is alleged is a change from one domicile of choice to another such domicile.<sup>5</sup>

5.6 In our Consultation Document we could find no justification for rules which imposed a higher standard of proof when alleging a change from the domicile acquired at birth to a domicile of choice as compared with change between two domiciles of choice. Whilst most who commented agreed with us that such a distinction could not be justified, there were those who felt that the courts had already moved in the direction we welcomed. Nevertheless, it is not, in our view, possible to assert with any real

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<sup>1</sup> We have already recommended (para. 4.24, above) that the domicile of origin, as a separate type of domicile, should disappear from the laws of the United Kingdom. However, the question still remains whether the domicile received at birth, whether or not described as the domicile of origin, should be more tenacious than any other and whether it should revive to fill a vacuum when one domicile of choice is abandoned without another being acquired.

<sup>2</sup> In Scotland it is not clear that any standard other than the normal standard of proof on a balance of probabilities applies: see para. 2.8, above.

<sup>3</sup> *Bell v. Kennedy* (1868) L.R. 1 Sc. & Div. 307, 321 per Lord Westbury; *Winans v. Attorney General* [1904] A.C. 287, 292 per Lord Macnaghten.

<sup>4</sup> *Henderson v. Henderson* [1967] P. 77, 80 per Sir Jocelyn Simon P.

<sup>5</sup> *Re Flynn* [1968] 1 W.L.R. 103.

confidence that the standard of proof is now as a matter of law the same no matter what change of domicile is involved. We think that it should be, and we recommend that the normal civil standard of proof on a balance of probabilities should apply in all disputes about domicile. This will have the effect, for example, that a person will be taken to have the necessary intention to acquire a new domicile if it is shown on a balance of probabilities that he had that intention.

#### *Residence or Presence*

5.7 It is said to be a requirement of the present law that a new domicile can only be acquired if the person in question is *resident* in the country in question with the requisite intention.<sup>6</sup> However, residence here has a very special meaning and has been described as “little more than physical presence”.<sup>7</sup> There is authority, for example, that an immigrant may acquire a domicile in a country immediately on his arrival there with the requisite intention;<sup>8</sup> and “residence” for part of a day has been held to satisfy the requirement.<sup>9</sup> If the main rules relating to domicile are to be embodied in legislation, the question arises whether it would be more appropriate for the requirement of physical connection to be expressed as presence or residence. We are clear that, when combined with the requirement of an intention to settle in the country in question for an indefinite period,<sup>10</sup> the right term to use is “presence”. This will leave no doubt that a person arriving in a country with the requisite intention will, as we think is right, acquire a domicile there immediately on arrival.

#### *Intention*

5.8 The present law as to the content and nature of the intention necessary for an adult to acquire a new domicile is unclear.<sup>11</sup> Some of the older authorities have interpreted the requirement of an intention as an intention to make a home “permanently” in a country. Furthermore, this has been held to mean “perpetually”, so that even a vague hope of returning to a country of an erstwhile domicile has precluded a person from being treated as having acquired a domicile of choice in the new country of residence. As regards a case involving an alleged change of domicile from one received at birth, currently the domicile of origin, to one of choice, it has been held that the quality of the intention must amount to “a fixed and settled purpose”—“a determination”—“a final and deliberate intention”<sup>12</sup> to abandon the country of the domicile of origin and settle permanently in the new country of residence and that any hint of equivocation in the mind of the person concerned is enough to prevent the acquisition of a domicile of choice. More recent authorities have taken a less rigorous view. For example, Scarman J. in *In the Estate of Fuld (No. 3)* has observed that:

“... a domicile of choice is acquired only if it be affirmatively shown that the propositus is resident within a territory subject to a distinctive legal system with the intention, formed independently of external pressures, of residing there indefinitely. If a man intends to return to the land of his birth upon a clearly foreseen and reasonably anticipated contingency, e.g., the end of his job, the intention required by law is lacking; but, if he has in mind only a vague possibility, such as making a fortune (a modern example might be winning a football pool), or some sentiment about dying in the land of his fathers, such a state of mind is consistent with the intention required by law. But no clear line can be drawn: the ultimate decision in each case is one of fact—of the weight to be attached to the various factors and future contingencies in the contemplation of the propositus, their importance to him, and the probability, in his assessment, of the contingencies he has in contemplation being transformed into actualities.”<sup>13</sup>

5.9 In our Consultation Document we reached two provisional conclusions relating to the requisite intention. The first was that “no higher or different quality of intention

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<sup>6</sup> *Dicey & Morris*, pp. 128–130.

<sup>7</sup> *Ibid.*, p. 128.

<sup>8</sup> *Bell v. Kennedy* (1868) L.R. 1 Sc. & Div. 307, 319.

<sup>9</sup> *White v. Tennant* 31 W. Va. 790, 8 S.E. 596 (1888).

<sup>10</sup> See para. 5.14 below.

<sup>11</sup> See para. 2.7, above.

<sup>12</sup> *Winans v. A.G.* [1904] A.C. 287, 291–292; and see n. 20 (to para. 2.7) above.

<sup>13</sup> [1968] P. 675, 684–685; and see *Cramer v. Cramer* [1987] 1 F.L.R. 116.

should be required when the alleged change of domicile is from one received at birth than from any other domicile".<sup>14</sup> In other words, the requirement of an intention to acquire a domicile should be the same whatever the context. This proposal was widely, though not universally, welcomed on consultation. We believe that there is no justification for making it more difficult to change from a domicile acquired at birth than to change from a domicile of choice; and no reason which we found convincing for maintaining such a distinction was given on consultation. Furthermore, the abandonment of any such distinction is another factor enabling the law of domicile to be simplified by abandoning the concept of the domicile of origin. We recommend, therefore, that no higher or different quality of intention should be required when the alleged change of domicile is from one acquired at birth than when it is from any other domicile.

5.10 The second provisional recommendation addressed the more fundamental issue of the nature of the intention necessary to acquire a new domicile. Should it be an intention to reside permanently in the new country, or to reside there indefinitely, and how should the law deal with the problem of future contingencies which may arise and which may affect a person's state of mind? In our Consultation Document<sup>15</sup> we expressed anxiety about the rigours of a test which required an intention to reside permanently in a new country before a new domicile could be acquired. We felt that so rigorous a requirement was unrealistic and that to adopt it might well mean that "no man would ever have a domicile at all, except his domicile of origin"<sup>16</sup> and would enhance the risk of artificial decisions, such as that in the *Ramsay* case,<sup>17</sup> continuing to be reached. We preferred the approach in *In the Estate of Fuld (No. 3)*<sup>18</sup> and this led us to the provisional recommendation that "to establish a domicile it should be sufficient to show an intention to make a home in a country indefinitely".<sup>19</sup>

5.11 A variety of views were expressed on this issue by commentators. Whilst many supported a simple requirement of intention to reside indefinitely, others expressed doubts, often on the question whether it was possible to reconcile such an intention with an intention to leave the country on the happening of a more or less probable contingency. Other comments indicated concern over such a simple test in the context of long-term employment abroad, or even in relation to prisoners abroad. Some concern was also expressed that the test was not certain enough. On the other hand, a test based on intention to reside indefinitely has the merit of simplicity, whilst leaving a degree of flexibility to courts to deal with "hard cases". It would also provide a measure of harmonisation with legislation in other Commonwealth countries in the sphere of domicile where the criterion "indefinitely" is used. Furthermore, it can be argued that to provide fuller guidance would lead to very detailed and complex rules to deal with the infinite variety of personal circumstances which the law of domicile has to cover. These conflicting arguments have led us to look once again at this issue.

5.12 Whilst we have no doubt that it is more appropriate to require an intention to live indefinitely rather than permanently in a country, we are anxious to ensure that any new legislation should provide clear and appropriate guidance to the courts and others concerned with determining a person's domicile. "Indefinitely" by itself is insufficient: it could, on one view, cover an intention to live in a country for a short time for some temporary purpose, for example a short holiday of indefinite duration.

5.13 Our policy, which would confirm the approach adopted in *In the Estate of Fuld (No. 3)*,<sup>20</sup> can be summed up as follows:

- (a) A man who makes his home in country A and has no present intention to return in the future to the country of his earlier domicile or to move on to establish a home in another country should be regarded as domiciled in country A. The intention need

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<sup>14</sup> Para. 5.17.

<sup>15</sup> Para. 5.10.

<sup>16</sup> *A.G. v. Pottinger* (1861) 30 L.J. Ex. 284, 292.

<sup>17</sup> *Ramsay v. Liverpool Royal Infirmary* [1930] A.C. 588, in which a man who had moved from Glasgow to Liverpool in 1892, where he lived until 1927, was held to have retained his domicile in Scotland, despite never having returned to that country and having arranged to be buried in Liverpool.

<sup>18</sup> [1968] P. 675; see para. 5.8, above.

<sup>19</sup> Para. 5.17.

<sup>20</sup> [1968] P. 675, 684-685; see para. 5.8, above.

not be immutable or irrevocable; nor need the intention be one to live in the new country until the end of his days.

- (b) An intention to reside in the new country merely for a limited time or for some temporary or special purpose, e.g. employment, medical treatment, completing one's studies, or vacation should not suffice for the acquisition of a new domicile. A person who goes to another country to take up employment without knowing how long that job will last but with the intention of leaving at the end of his job (whenever that happens) should not be domiciled in the country of his employment.
- (c) The intention to reside at the moment of acquisition of the domicile must not be conditional on a future event.<sup>21</sup> However, contingencies which are vague or indefinite ought to be disregarded. Thus a person who contemplates departure from the new country of residence on the happening of an ill-defined or indefinite event, or where the contingency is no more than a vague hope or aspiration, such as "when I have made a fortune" or "if my health should deteriorate", would not be precluded from acquiring a new domicile in that country. On the other hand, if the person in question intends to depart on the happening of some clearly defined event and there is a real likelihood or sufficiently substantial possibility<sup>22</sup> that it might occur, he should not be held to be domiciled in the new country of residence.

5.14 Whilst it is possible fairly readily to state the general policy which we think should be adopted, it is a different and difficult task to select statutory language which will both embody the essential policy and be clear to understand and straightforward to operate. In our Consultation Document we suggested that the test should be an intention "to make a home" in a country indefinitely,<sup>23</sup> and this phrase is also to be found in the Australian Domicile Act 1982.<sup>24</sup> We are, however, uneasy about relying on the concept of "home" in determining the domicile of an adult, as it might preclude the establishment of a domicile in a country by a person who is an itinerant but who intends to live indefinitely in the country throughout which he wishes to wander. We have concluded that the best term to embody our policy is "to settle" in a country for an indefinite period. Testing that phrase against the various problem cases of contingency, overseas employment and the like, we believe that it provides adequate guidance as to our policy. Our recommendation is, therefore, that to establish the necessary intention for the acquisition of a new domicile by an adult, it should be sufficient to show that he intended to settle in the country in question for an indefinite period.<sup>25</sup>

#### *Presumption as to intention*

5.15 The Private International Law Committee suggested that there should be a rebuttable presumption as to intention based on where a person has his home at the relevant time. Specifically they proposed that:

- (a) subject to evidence to the contrary, a person should be presumed to intend to live permanently in the country in which he has his home;
- (b) where he has more than one home he should be presumed to intend to live permanently in the country where he has his principal home;
- (c) where a person is in a country to carry on a business, profession or occupation, and any wife and children have their home in another country, he should be presumed to intend to live permanently in that other country; and
- (d) no presumption should be raised in respect of diplomats, members of the armed

<sup>21</sup> See, e.g. *Cramer v. Cramer* [1987] 1 F.L.R. 116 (C.A.) where an intention to live in England was held to be insufficient because it was conditional on the person in question being free to marry in the future.

<sup>22</sup> See *I.R.C. v. Bullock* [1976] 1 W.L.R. 1178, 1186-1187. Buckley L.J. said that there must be "a real likelihood of the contingency occurring" and formulated the question as follows where the contingency is not itself of a doubtful or indefinite character: "Is there a sufficiently substantial possibility of the contingency happening to justify regarding the intention to return as a real determination to do so upon the contingency occurring rather than a vague hope or aspiration?". In *the Estate of Fuld (No. 3)*, see n. 20 above, Scarman J. refers to "a clearly foreseen and reasonably anticipated contingency".

<sup>23</sup> Para. 5.17.

<sup>24</sup> S. 10.

<sup>25</sup> See rule 2(2)(b) of the draft Domicile Bill appended to this Report.



and civil services of any country or persons working for an international organisation.<sup>26</sup>

5.16 The detailed proposals of the Committee are open to a number of criticisms. First, the extent of the presumption's utility is dependent on how much easier it is to establish the facts giving rise to it than it is to prove the required intention itself. We have expressed unease in paragraph 5.14 over using the idea of "home" in determining an adult's domicile. Looking at the Committee's proposals, we consider that employing the concept of "home" in raising a presumption would give rise to disputes about where a person's home was which would often be no easier to resolve than a full investigation of where the person was domiciled. Indeed, the Committee in saying that "what constitutes a home . . . is in the last resort determined by the intention of the party, so that a type of residence which might constitute a home in one case would not necessarily do so in another"<sup>27</sup> came close to recognising that fact.

5.17 In our Consultation Document<sup>28</sup> we supported the general idea of introducing a presumption as to the intention necessary to acquire a domicile, but concluded that the concept of habitual residence is more susceptible to objective verification than that of a home would be, though like the Committee we are aware that it is capable of some ambiguity. Furthermore, the concept of habitual residence is already widely used as a connecting factor in international conventions and in United Kingdom and Commonwealth legislation.<sup>29</sup> We expressed the view that to use habitual residence as the basis for the raising of a presumption of intention would build upon already well established foundations in private international law. We came to the provisional conclusion that a presumption as to the intention necessary to acquire a domicile would, if based on habitual residence, prove useful.

5.18 We did not think that proof of habitual residence alone could provide sufficient evidence of domicile to justify raising a presumption as to intention. However, we felt that there must come a time when a person has been habitually resident in a country for such a period that the likelihood of his intending to stay there indefinitely must be high. This led us to the provisional recommendation<sup>30</sup> that a rebuttable presumption of an intention to make a home indefinitely in a country based on seven years habitual residence as an adult should be introduced. In our view, a presumption based on such residence would largely exclude the possibility of it being raised in respect of members of the foreign business community who are required to serve a tour of duty in the United Kingdom or, indeed, in respect of British businessmen or others working temporarily abroad.

5.19 This proved to be the most controversial of the provisional recommendations made in our Consultation Document. It attracted strongly expressed views both in favour of and against its introduction. Its great merit is that it might be thought to provide an effective and helpful way for courts, lawyers, administrators and individuals to determine a person's domicile without the need, in every case, to undertake a detailed examination of a person's past life in order to discover his intention at the relevant time. In many cases, it was thought, such an investigation would lead to the conclusion that he intended to live indefinitely in the country in which he had been habitually resident for the last seven years. Any danger of an inappropriate conclusion being reached might adequately be met by making clear that the presumption as to intention was rebuttable.

5.20 The opposition on consultation to the proposed presumption was based on a variety of grounds. Some commentators thought that it was wrong in principle to determine domicile by means of a presumption, because the onus should always be on the person seeking to establish a change of domicile. There were fears that the presumption proposed might lead to a "negative presumption", i.e. that a new domicile had not been acquired if the habitual residence was for less than seven years. Others were anxious that the presumption would operate unfairly against those who are unable

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<sup>26</sup> First Report (1954) Cmd. 9068, para. 15 and Appendix A. Article 2.

<sup>27</sup> *Ibid.*, para. 13.

<sup>28</sup> Paras. 5.13-5.14.

<sup>29</sup> Para. 3.5, above.

<sup>30</sup> Para. 5.17.

to have ready recourse to legal advice and who would not appreciate its significance or how it might be rebutted. It was also suggested that the operation of the presumption might bring about unfair, or unexpected, changes in the incidence of taxation where that was based on domicile. If there was to be a presumption, some felt that habitual residence was the wrong basis for it because habitual residence is itself an uncertain concept and thus its use would not lead to the greater certainty claimed as a benefit of the presumption. There was also doubt as to whether seven years habitual residence was the right period on which to found the presumption—though suggestions of alternative periods ranged from two to twenty years. Finally, and probably most significantly, there was anxiety as to whether the presumption would too frequently produce the wrong result, i.e. a result other than that which would be reached had there been no presumption, or would put the person concerned to much trouble and expense in seeking to rebut the presumption and prevent a wrong conclusion being reached.

5.21 We see force in some, if not all, of these concerns and we have, as a consequence, re-examined the question whether a presumption as to intention would be beneficial in aiding the determination of a person's domicile. We have not found it easy to reach an agreed conclusion on this. Many of the criticisms made ignore the fact that the presumption is intended to assist in the wide range of cases where the issue of domicile is unlikely ever to go to court but where domicile nevertheless has to be determined. One can readily think of a number of administrative matters where this is the case. At the moment, in many such instances whole life histories have to be investigated to determine intention, with the eventual outcome that the person is domiciled in the country where he has been habitually resident for at least the last seven years. The presumption would make it easier to reach that conclusion, always bearing in mind that any presumption would be rebuttable.

5.22 The anxiety that remains is the fundamental one as to whether the benefits to be gained by making it easier to determine the intention necessary to acquire a domicile, and thus reduce the number of cases where this has to be conjured out of an analysis of long and complicated life histories, are outweighed by the risk of injustice to too many people. We have to be convinced that any presumption will operate fairly. This means being confident that it will in most cases point to the correct conclusion, thus minimising the number of instances where those who wish to rebut it are put to trouble and expense in so doing. It must also be borne in mind that there is a particular difficulty in rebutting the presumption if the person whose domicile is in issue is dead. In the light of the criticisms which have been made of the proposals in our Consultation Document and of the continuing anxieties which we have been unable, in our discussions, satisfactorily to allay, we have concluded that it would be unwise to retain the idea of a presumption of intention based on seven years habitual residence. We recommend, therefore, that the intention necessary for the acquisition of a new domicile should be determined without reference to any presumption.

#### *Revival of domicile received at birth*

5.23 If a person abandons a domicile of choice without acquiring another such domicile, the domicile he received at birth, currently his domicile of origin, revives to fill the gap.<sup>31</sup> As with the entrenchment of that domicile, the rationale underlying the doctrine of revival would appear to be the identification of the country of the domicile at birth with the homeland of the person concerned in which, in the absence of any substantial connection with another country, it is arguably most appropriate that he should be treated as domiciled. Despite the persuasiveness of that rationale, the doctrine has a potential for artificiality in cases where the connection with the country of the domicile at birth was never substantial or where it has been greatly weakened. In our Consultation Document<sup>32</sup> we gave examples to illustrate the weakness of the doctrine.

5.24 It would seem that it was the potential for artificiality which led the Private International Law Committee in their First Report to describe the doctrine of revival as "undesirable" and to propose that it be replaced by a rule to the effect that an existing

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<sup>31</sup> See para. 2.9, above.

<sup>32</sup> Para. 5.18.

domicile "shall continue until another domicile is acquired".<sup>33</sup> Although, as the American experience has shown,<sup>34</sup> the continuance rule is itself capable of producing artificial results in some circumstances, we concluded in our Consultation Document that there was a range of matters which weighed strongly in its favour. We identified the following:<sup>35</sup>

- (a) by providing that a domicile could never be abandoned but could only be displaced by the acquisition of a new domicile, a continuance rule would simplify the law by obviating the need to provide rules for abandonment;
- (b) a rule of continuance has been widely recommended in law reform proposals and accepted in legislation in some common law and other jurisdictions<sup>36</sup> and for the sake of international uniformity there is an argument for the United Kingdom to follow that trend;
- (c) adopting a continuance rule would ensure that a person was at least domiciled in a country in which he had at one time lived, whereas revival can result in a person having a domicile in a country in which he has never lived;
- (d) the idea of a domicile continuing until another replaces it is a simpler concept than is the doctrine of revival and should, for example, make it easier for those seeking legal advice or dealing with administrative officials to understand the law involved; and
- (e) replacing the doctrine of revival with a continuance rule would remove the cases of acute artificiality which result from temporary revivals of the domicile received at birth when a person is between domiciles of choice.

5.25 These factors led us in our Consultation Document to make the provisional proposal that the doctrine of revival should be replaced by a rule of continuance.<sup>37</sup> On consultation, there were some who opposed such a change. They felt that no clear benefits could be shown to come from the provisional proposal, given especially that it can be shown that a continuance rule, like the revival rule, can produce anomalous results. There was also concern that a continuance rule might work injustice in the case of the political refugee who would be held to remain domiciled in the country from which he had fled until he could be shown to have acquired a domicile in a new country. However, there is no guarantee that the revival rule will, in such a case, provide an answer any better than a continuance rule. If the refugee has fled from the country of his domicile of origin, as will often be the case, the result will be the same. Furthermore, if the domicile which the refugee has just abandoned is different from his domicile of origin, there is no guarantee that he would prefer the latter to the former. There are, in our view, clear arguments which favour a preference for a continuance rule and there was general support for such a rule on consultation. We see force in the argument that a person should at least be held to be domiciled in a country with which he has or has had some real connection; a continuance rule will guarantee this whilst the revival rule does not. A continuance rule would also be simpler. We recommend, therefore, that the doctrine of the revival of the domicile received at birth should be abandoned and that an adult's domicile should continue until he obtains another domicile.

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<sup>33</sup> (1954) Cmd. 9068, para. 14.

<sup>34</sup> E.g., *Re Jones' Estate*, 192 Iowa 78, 182 N.W. 227 (1921).

<sup>35</sup> Para. 5.20.

<sup>36</sup> See, e.g., New Zealand Domicile Act 1976, s. 11; Australian Domicile Act 1982, s. 7.

<sup>37</sup> Para. 5.22.

## PART VI

### DOMICILE AND MENTAL INCAPACITY

#### *Introduction*

6.1 The effect of the current rules governing the domicile of adults who lack the mental capacity to acquire a domicile of choice<sup>1</sup> appears to be that:

- (a) a mentally incapable person cannot acquire a domicile of choice and, subject to (b) below, retains while his incapacity lasts the domicile he had at the onset of his incapacity or (in Scotland) on the attainment of the age when his domicile of dependency ceases, whichever is the later; but
- (b) in England and Wales and Northern Ireland, where the onset of the incapacity pre-dates the person's sixteenth birthday, his domicile of dependency continues thereafter unless and until he recovers his capacity.

#### *Criticisms of the existing law*

6.2 The first limb of the rule governing the domicile of a mentally incapable adult is open to the criticism that by freezing his domicile, irrespective of changes in his circumstances, the law is likely to create artificiality and unfairness. In our Consultation Document<sup>2</sup> we gave the following example:

A, a young man born and domiciled in England, goes to live in Canada after he reaches the age of 16 and acquires a domicile in British Columbia. Soon after acquiring that domicile of choice he becomes mentally incapacitated and his parents secure his return to England where he lives with them. Under the present rules, A would nonetheless remain domiciled in British Columbia until he died unless he regained his capacity at some future time.

As to the second limb of the rule, (applicable to England and Wales and to Northern Ireland), it is arguably inappropriate that the domicile of a mentally incapable person should remain dependent on his parents long after any legal duty on the parents' part to care for him may have ceased and when indeed he may have ceased to live as part of the family.

6.3 We are conscious how uneasily the current rules governing the domicile of an adult who is mentally incapable would sit with our recommendations in respect of the domicile of children. Under those recommendations, the basic rule would be that a child is domiciled in the country with which he is for the time being most closely connected.<sup>3</sup> If we take a case where the presumptions which we recommend<sup>4</sup> would not apply<sup>5</sup> and where, accordingly, a child's domicile would depend on the country of closest connection, then there would be an unhappy relationship between the present law on the domicile of a mentally incapable person and our recommended rules for determining the domicile of a child. The domicile of a mentally disordered child would change as the closeness of his connection changed, but on reaching the age of 16 his domicile would either become immutable whilst mental incapacity continued or perhaps, in England and Wales, become dependent on his parents under the second limb of the existing rule. In our Consultation Document<sup>6</sup> we provided another illustration which showed how unsatisfactory it would be to change the law on the domicile of children generally, yet retain the present law on the domicile of a mentally incapable person.

B, a mentally handicapped child lives in a residential home in Scotland and is domiciled in that country. When his parents move to settle in England, B, aged 10, is transferred to a home in England so as to be close enough to his parents to be visited by them. He becomes domiciled in England, that country being the one with which he is now most closely connected. However, when B's parents die 20 years

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<sup>1</sup> See para. 2.10. above.

<sup>2</sup> Para. 6.2.

<sup>3</sup> See para. 4.13, above.

<sup>4</sup> See paras. 4.15-4.16, above.

<sup>5</sup> E.g., in cases where a child has his home with both parents who have different domiciles, or where the child does not have his home with either parent.

<sup>6</sup> Para. 6.3.

later and B, now aged 30, returns to Scotland to live with his surviving relations, he would under the present law remain domiciled in England.

6.4 These criticisms of the present law led us in our Consultation Document to the provisional conclusion that reform of the rules relating to the domicile of the mentally incapable was desirable. This conclusion was supported by almost everyone who commented on this issue and we confirm the view that reform is needed.

#### *Reform proposals*

6.5 There are, in our view, significant parallels between the situation of a child (especially one who does not have his home with his parent or parents) and that of an adult who is mentally incapable. Both lack the legal capacity to acquire an independent domicile under the rules governing the domicile of persons of full age and capacity; both, however, may well not have such a close relationship with their parents, even if they are alive and can be found, as would make it appropriate that their domicile should necessarily depend on that of their parents. However, in both cases freezing the domicile irrespective of changes in the person's circumstances is likely to lead to artificiality.

6.6 In our view, the way forward is to adopt an approach to the domicile of the mentally incapable adult similar to that which we have recommended<sup>7</sup> in relation to ascertaining the domicile of children, namely reliance on the test of closest connection. The effect of the adoption of such a test would be that a mentally incapable person would, as a child, have his domicile determined by the closest connection test (subject to the operation of any relevant presumption) and, on reaching the age of 16, this criterion would continue to be applicable. This approach avoids the domicile of such a person becoming immutable and enables it to be changed as his circumstances change. We recommend therefore that a person who has reached the age of 16 but who lacks the mental capacity to acquire a domicile of choice should be domiciled in the country with which he is for the time being most closely connected.<sup>8</sup>

6.7 Acceptance of our general recommendation does, however, require a number of subsidiary or consequential issues to be examined. That general recommendation deals with the circumstance where the adult is mentally incapable. Happily, this state may not be permanent and provision needs to be made for determining the domicile of an adult who has recovered full mental capacity. What domicile should he then have—that which he had before losing capacity or that, if different, which he had by operation of the closest connection test during the period of incapacity? We have no doubt in recommending the latter. The adult will then be free to change his domicile for himself if he so wishes. The former approach could have the result that he was, on restoration of capacity, domiciled in a country which he had long left and to which he had no intention of returning; and that approach would also be inconsistent with the general policy of the proposed rule about the continuity of an existing domicile. We recommend, therefore, that an adult who lacked the capacity to acquire a domicile should, on restoration of that capacity, retain the domicile he had before his capacity was restored.

6.8 It may be the case that an adult who lacks the mental capacity to acquire a domicile of choice is the parent of a child under the age of 16. Does the main recommendation made in paragraph 6.6 above require amendment to accommodate such a case? We do not think that it does. The domicile of the child will be based on the same closest connection test as that of the parent. If the child has his home with the parent then the relevant presumption<sup>9</sup> will operate and if he does not then the domicile of each will, appropriately in our view, be governed by the closest connection test. This may result in their having different domiciles, but such might also be the case where a child lives apart from a fully capable parent.

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<sup>7</sup> See para. 4.13, above.

<sup>8</sup> We envisage that all the circumstances of the case will be taken into account in determining the country of closest connection: see paras. 4.12 and 4.18, above.

<sup>9</sup> Paras. 4.15–4.16, above.

6.9 One issue on which there would seem to be no authority is as to the degree or type of mental incapacity which renders an adult incapable of acquiring a new domicile. There are, of course, many kinds and degrees of mental disorder and a variety of ways in which such disorder is treated, ranging from treatment in the community to compulsory detention in hospital.<sup>10</sup> We believe that the essential question in the case of a mentally disordered person is: did this person have the ability to form the necessary intention for the purpose of the law of domicile? In other areas of the law, such as contract, succession and even crime, the general approach of our law is to treat the capacity to form an intention as a question of fact in each case. We think that the same approach should be adopted in the context of the domicile of the mentally disordered. This was the provisional view expressed in our Consultation Document<sup>11</sup> and was accepted on consultation. We confirm that view here but have concluded that it is unnecessary to make express legislative provision to this effect.

6.10 A final issue is whether it is desirable to make special and separate provision to avoid any danger that the closeness of a mentally disordered person's connection with a particular country might be manipulated to the advantage of some other person. In our view the concept of country of closest connection provides a degree of built-in protection<sup>12</sup> against what we regard as the unlikely risk of a third party seeking to manipulate the domicile of the mentally disordered, for example, to attract rules of succession which would be more beneficial to him on the death of that person. We believe that the courts in such cases would have little trouble in finding that a change of residence brought about solely for such an ulterior purpose did not sever the connection between the mentally disordered person and the country of his erstwhile domicile or create a closer connection with the country to which he had been moved.

6.11 One suggestion which was canvassed in our Consultation Document<sup>13</sup> was that the domicile of a mentally disordered person should only be changed with the consent of a competent authority. This idea attracted only very limited support on consultation. In our view, such a power in any authority would be inappropriate. If the power were limited to a court, it is not easy to see what practicable criteria can be laid down for the exercise of judicial power to determine a person's domicile. Domicile is a conclusion of law drawn from the facts of each case irrespective of what the person concerned may directly wish in the matter, and whether or not it is to his advantage or disadvantage. Hence, if a person has his home indefinitely in a country he becomes domiciled there, irrespective of whether he wishes to be, and irrespective of any advantage or disadvantage to him. We reiterate the view expressed in our Consultation Document that giving a court or some other authority an express power to refuse to recognise a change of domicile in circumstances where a person would otherwise be treated as having received a new domicile would significantly add to the potential for artificiality in the law.

6.12 We also feel unable to accept the suggestion made to us that the place of residence of a mentally disordered person determined by a court should be conclusive as to his closest connection. We are not convinced of the merits of such a rule. The courts have no general jurisdiction, for example under the law of England and Wales, to order where mentally disordered persons shall live. Further, if the person is in fact most closely connected with the country where he is ordered to reside, the rule is unnecessary; if he is not so connected, then in our view such a rule would get the wrong answer. This would obviously be so if the mentally disordered person died before the court order had been put into effect. We have concluded, therefore, that it is unnecessary to introduce any special protective provisions to qualify our general recommendation that the domicile of a mentally incapable person should be in the country with which he has for the time being the closest connection.

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<sup>10</sup> See *Dicey & Morris*, pp. 160-161.

<sup>11</sup> Para. 6.8.

<sup>12</sup> See para. 4.13, above.

<sup>13</sup> Para. 6.7.

## PART VII

### DOMICILE IN FEDERAL OR COMPOSITE STATES

#### *Introduction*

7.1 A person may acquire a domicile of choice by a combination of residence in a country and an intention to make his home in that country permanently or indefinitely.<sup>1</sup> In this context "country" usually means "a territory subject . . . to one body of law" or what has become known as a "law district".<sup>2</sup> Hence, a federal state such as Australia, Canada or the United States of America is not a "country" for the purpose of domicile, and neither is a composite state such as the United Kingdom. Rather, such states themselves contain a number of "countries", for example California or New York in the United States of America, and in the United Kingdom, England and Wales, or Scotland or Northern Ireland.

#### *Assessment of the existing law*

7.2 It follows from what is said above that an immigrant coming to a federal or composite state does not acquire a domicile until he is present in one of the countries comprising that state with an intention of settling there indefinitely.

Take, for example, A, whose domicile from birth has been in Scotland, but who leaves Scotland intending never to return but rather to settle permanently in Canada. He spends some months in Ottawa trying to decide in which Canadian province to make his home, but dies before he has reached a decision on this. Under the present law he would die domiciled in Scotland.

Given that the fundamental purpose of domicile is to connect a person with a system of law in the country with which he is most closely connected, it can be argued that the present rules produce artificiality in cases such as that just exemplified by continuing to connect A to a country which he has abandoned.

7.3 The most extreme cases of artificiality under the present law occur because in the period between the abandonment of one domicile of choice and the acquisition of another the domicile of origin revives. In those circumstances, it is arguably better to treat the person as domiciled somewhere in a composite state which he has entered (even if he has not settled in one of its constituent countries) than to treat him as domiciled in the country of his domicile of origin in which he may never have been present or which he may have abandoned many years before. Though the force of this criticism is mitigated by our proposal<sup>3</sup> to move from a revival to a continuation rule, the main criticisms still remain.

7.4 The arguments, however, are not all one-sided. It is possible to envisage cases<sup>4</sup> where a change in the law which allowed a new domicile to be recognised once a person became resident in a federal state with the intention of living somewhere within its boundaries indefinitely could result in persons with fairly tenuous links with a country acquiring a domicile there.

#### *Reform proposals*

7.5 In our Consultation Document we reached the provisional conclusion<sup>5</sup> that, although the arguments were fairly evenly balanced, the case was not made out for introducing into our law of domicile special rules to deal with federal or composite states. We thought that much of the difficulty might disappear with the abandonment of the doctrine of revival of the domicile of origin and, indeed, that any remaining problems might be resolved by the courts. We are persuaded by comments made on consultation that it would not be satisfactory to leave the law unclear on this issue, especially when the present opportunity of making general proposals for the reform of the law of domicile presents itself. In particular, there would be advantage in

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<sup>1</sup> Para. 2.6. above.

<sup>2</sup> *Dicey & Morris*, pp. 26-27.

<sup>3</sup> Para. 5.25. above.

<sup>4</sup> We gave an example in para. 7.3 of Working Paper No. 88, Consultative Memorandum No. 63 (1985).

<sup>5</sup> Para. 7.8.

introducing new rules in this context. This would ensure that the proposed rule that a domicile continues until a new one is acquired<sup>6</sup> would not unreasonably link a person to a country which he has abandoned, if he has arrived in a federal state but is as yet undecided as to where in that state he wishes to settle. We recommend, therefore, that new rules be introduced to determine the domicile of a person who is present in a federal or composite state intending to settle there but without yet having acquired (under the general rules) a domicile in any one of the constituent territories of that state.

7.6 There remains the question of how the general recommendation just made should be formulated in terms of detailed rules. In our Consultation Document we gave<sup>7</sup> as examples of solutions to this problem the legislation on federal domiciles which has been enacted in New Zealand and Australia. The New Zealand approach which is to be found in section 10 of their Domicile Act 1976 looks to residence or physical presence and provides that:

“A person who ordinarily resides and intends to live indefinitely in a union but has not formed an intention to live indefinitely in any one country forming part of the union shall be deemed to intend to live indefinitely—

- (a) in that country forming part of the union in which he ordinarily resides; or
- (b) if he does not ordinarily reside in any such country, in whichever such country he is in; or
- (c) if he neither ordinarily resides nor is in any such country, in whichever such country he was last in.”

7.7 We concluded in our Consultation Document, and commentators agreed, that the New Zealand approach has serious drawbacks, not the least being that a person who becomes ordinarily resident in the union and who is physically present in the country of entry may be treated as domiciled there despite intending to make his permanent home in another country of the union. Further, as has been pointed out, “where the propositus is for example outside the union for a period of months, his domicile may turn on the identity of the port or airport by which he found it convenient to leave”.<sup>8</sup> The result is that the New Zealand law seems to purchase simplicity at the cost of an extreme degree of artificiality in some cases. We cannot recommend it as a model for legislation in this country.

7.8 We believe that the Australian legislation provides a more appropriate model for the approach to be adopted here. Section 11 of the Australian Domicile Act 1982 provides that:

“A person who is, in accordance with the rules of the common law relating to domicile as modified by this Act, domiciled in a union, but is not, apart from this section, domiciled in any particular one of the countries that together form the union, is domiciled in that one of those countries with which he has for the time being the closest connection.”

This “closest connection” approach has advantages. It would enable those seeking to determine a person’s domicile to reach the most appropriate conclusion taking into account all the circumstances of the case,<sup>9</sup> including the intentions of the person concerned. For example, it would prevent a person who has arrived in one country in a federal state from becoming domiciled there if his ultimate destination and hence his closest connection is with another country in that federal state. It would also avoid the complexities consequent upon the reference in the New Zealand legislation to ordinary residence. We recommend, therefore, that a person who is present in a federal or composite state with the intention to settle in that state for an indefinite period should, if he is not held under the general rules to be domiciled in any country within that state, be domiciled in the country therein with which he is for the time being most closely connected.

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<sup>6</sup> Para. 5.25. above.

<sup>7</sup> Paras. 7.6–7.7.

<sup>8</sup> McClean, *Recognition of Family Judgments in the Commonwealth* (1983), p. 27.

<sup>9</sup> See para. 4.12, above.



## PART VIII

### TRANSITIONAL ARRANGEMENTS

#### *Introduction*

8.1 One result of amending the law of domicile is that the domicile of some people will be different from what it had been under the unamended law. The question therefore arises whether the amended law should have retrospective effect and, if not, what form the transitional bridge between the pre-amendment and post-amendment law should take.

#### *Retrospectivity*

8.2 We expressed the view in our Consultation Document<sup>1</sup> that the introduction of any new rules governing the domicile of persons under United Kingdom law should not operate retrospectively. This approach was strongly supported on consultation and we now confirm it. To adopt any other approach could involve re-opening past transactions in areas such as succession, marriage, divorce and taxation. Retrospection could seriously prejudice people who had reasonably and properly conducted their affairs in the light of the prevailing law and their status under it.

### TRANSITIONAL PROVISIONS

#### *The General Problem*

8.3 It is necessary to consider how, if the domicile rules are to be reformed, the transition is to be made from the operation of the existing law to that of the new reformed rules. In other words, in what circumstances and in what way will the new rules operate in relation to a person's status before and after the new rules come into effect? There are two different approaches to this issue. The first is exemplified by that adopted in the Domicile and Matrimonial Proceedings Act 1973, and the second by that to be found in the more recent Australian Domicile Act 1982.

#### *(i) The approach of the Domicile and Matrimonial Proceedings Act 1973*

8.4 Section 1(1) of the Domicile and Matrimonial Proceedings Act 1973, in abolishing the dependent domicile of married women, posed the problem of how to deal with the domicile of women married before the commencement of that Act who until that time had a domicile dependent on their husbands. Section 1(2) of that Act provides the following solution:

“Where immediately before this section came into force a woman was married and then had her husband's domicile by dependence, she is to be treated as retaining that domicile (as a domicile of choice, if it is not also her domicile of origin) unless and until it is changed by acquisition or revival of another domicile either on or after the coming into force of this section.”

8.5 There is a problem with the approach in section 1(2) in that, rather than determining a person's domicile at a date after commencement by simply applying the new rules to the person's history and circumstances up to that date, it imposes an artificial domicile on a person which can be shaken off only by that person taking appropriate steps after commencement. The results of that approach are well illustrated by *Inland Revenue Commissioners v. Duchess of Portland*.<sup>2</sup> In that case the respondent was born in Quebec in 1911 to parents resident and domiciled in that province. In 1948, at the age of 37, she married the Duke of Portland, thereby acquiring an English domicile of dependence. Throughout her marriage she maintained strong links with Quebec, visiting the country annually for two or three months and staying in a house which she owned and maintained, otherwise unoccupied, for that sole purpose. She also retained her Canadian passport and a bank account in Quebec. She persuaded her husband to agree to retire to Quebec when he stopped work and firmly intended to return there if he predeceased her. After the coming into force of the 1973 Act it was held that, despite a never foresaken intention to return to Quebec and her strong links

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<sup>1</sup> Para. 8.2

<sup>2</sup> [1982] Ch. 314.

with it, the respondent had not satisfied the criteria necessary to acquire a domicile of choice in Quebec after 1973 nor had her domicile of origin in Quebec revived because she had not since that date abandoned her deemed domicile of choice in England under section 1(2). Accordingly, her domicile of dependence continued, though nominally as one of choice under the Act. It seems almost beyond question that, had the respondent not married her husband or had the domicile of dependence of married women been abolished before her marriage, the facts of the case would have established that she had retained, uninterrupted, her Quebec domicile of origin. However, given the type of transitional provision in section 1(2), she remained domiciled in England.

*(ii) The approach of the Australian Domicile Act 1982*

8.6 A rather different approach to this transitional problem can be found in section 5(1) and (2) of the Australian Domicile Act 1982. Those subsections provide that:

“The domicile of a person at a time before the commencement of this Act shall be determined as if this Act had not been enacted.”

and

“The domicile of a person at a time after the commencement of this Act shall be determined as if this Act had always been in force.”

If the Australian approach had been adopted in the 1973 Act the Duchess of Portland would most probably have been held to have been domiciled in Quebec at all times after the commencement of the Act.

*(iii) Conclusion*

8.7 In our Consultation Document<sup>3</sup> we expressed the view that the approach reflected in the Australian legislation was to be preferred to that in section 1(2) of the 1973 Act, and our provisional proposal was widely supported on consultation. We recommend therefore that the new domicile rules which we propose should, first of all, apply to determine the domicile of a person as at any time after the new rules come into force. Furthermore, those rules should also apply to times before the legislation comes into force but only for the purpose of determining where, at a time after the legislation comes into force, a person is domiciled. However, this general approach to transitional problems will involve again changing (to a very minor degree) the rules governing the domicile of married women. Nevertheless, we have concluded that it would be a beneficial side-effect of our proposed general transitional provisions that for the future, at least, the undesirable results of section 1(2) would not endure. That being so, we recommend that the transitional provisions in the draft Domicile Bill<sup>4</sup> appended to this Report should replace the provision in section 1(2) of the 1973 Act in relation to the domicile of married women for the purpose of determining such a woman's domicile at a time after our proposals come into force.

*Detailed issues*

8.8 There are two issues raised on consultation in the general context of transitional arrangements which need to be addressed. The first is the question when any new legislation should take effect. It will be seen that the commencement provision in our draft Domicile Bill<sup>5</sup> provides for the Act to come into force on 1 January of a year which is, as yet, unspecified. There are two reasons for this form of commencement provision. The first is that we believe it desirable that the legislation should make clear on its face exactly when it is to come into force. The second is that it may be thought desirable to allow more than the usual two or three months period between Royal Assent and commencement to enable persons who may regard themselves as affected by any changes in the rules relating to domicile to organise their affairs appropriately. We refer to this matter in Part IX in the particular context of the effect of changes in the law of domicile on tax legislation.<sup>6</sup> It is, of course, the case that domicile is used as a connecting factor in other areas of our law, for example in matrimonial law, the law of

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<sup>3</sup> Para. 8.5.

<sup>4</sup> Clause 1(2).

<sup>5</sup> Clause 2(4).

<sup>6</sup> Para. 9.15. below.

succession and also in copyright law. As the common law of domicile has developed, so has its impact in those contexts. The same will happen, rightly in our view, with the changes we propose in this Report. Whilst we do not believe it would be appropriate to preserve, by saving provision, the old defective law of domicile in any of these contexts, their existence strengthens the case for a delay longer than two or three months between Royal Assent and the coming into force of any new domicile legislation.

8.9 The second issue relates to judicial proceedings which are pending at the time of commencement of the new legislation. We have given some thought to whether it is desirable to make express provision that jurisdiction already assumed under the unamended law of domicile is unaffected by the bringing into force of the new rules. Our conclusion is that such provision would be unnecessary because the jurisdiction of the court is always determined as at the commencement of the proceedings. Similarly, we think it unnecessary to make special transitional provisions in relation to any other matters where domicile is relevant in pending proceedings, for example as to the choice of the applicable law. Our reasoning is as follows. The new domicile rules will apply only in relation to times after they come into effect. If proceedings are pending at the time of commencement, those proceedings will relate to past events and domicile is to be determined as at the earlier relevant time of the past event, such as the date of a marriage or of a death (in relation to succession issues). The law of domicile to be applied in such proceedings will be the old unamended law.

## PART IX

### DOMICILE AND TAXATION

#### *Introduction*

9.1 In this Part of the Report we examine the significance of domicile as a connecting factor in current taxation legislation and consider what impact that should have on the recommendations for reform of the law of domicile made earlier in this Report. We start by examining the major taxation provisions in which domicile is of some relevance.

#### *Relevance of domicile in taxation legislation*

9.2 For most United Kingdom tax purposes, residence or ordinary residence are the relevant connecting factors. There are, however, a few areas where domicile is relevant. These are:

- (1) determining the basis upon which an individual's liability to income tax under Schedule D, Cases IV and V (income from foreign securities and possessions) is to be assessed;
- (2) determining whether or not property is "excluded property" for the purpose of inheritance tax;
- (3) determining the basis of assessment for capital gains tax;
- (4) the application of certain Schedule E<sup>1</sup> provisions relating to income tax;
- (5) the taxation of "offshore income gains";
- (6) the operation of the anti-avoidance provisions contained in section 478 of the Income and Corporation Taxes Act 1970 and in section 45 of the Finance Act 1981; and
- (7) the operation of some double taxation agreements.

#### *(i) Income Tax: Schedule D, Cases IV and V*

9.3 Cases IV and V of Schedule D<sup>2</sup> relating to income tax create a charge to tax in respect of income derived from foreign "securities"<sup>3</sup> or "possessions". Together, they cover a wide range of income. By section 122(1) of the Income and Corporation Taxes Act 1970, the tax chargeable under Cases IV and V is, as a general rule, to be computed on an "income arising" basis, that is, on the full amount of the income derived from the foreign source in question, regardless of whether or not the tax payer receives it in the United Kingdom. However, subsection (2) of that section provides, by way of an exception to this general rule, that subsection (1) shall not apply:

"(a) to any person who satisfies the Board that he is not domiciled in the United Kingdom, or that, being a British subject or a citizen of the Republic of Ireland, he is not ordinarily resident in the United Kingdom."

By section 122(3), the basis for the computation of tax in cases falling under subsection (2) is the full amount of sums *received in the United Kingdom*, that is, on a "remittance" basis. Clearly, in many cases, this will be a more favourable basis of computation than the "arising" basis.<sup>4</sup>

#### *(ii) Inheritance Tax*

9.4 Inheritance tax is an integrated gifts and estate tax primarily charging transfers

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<sup>1</sup> See Income and Corporation Taxes Act 1970, s. 181.

<sup>2</sup> See Income and Corporation Taxes Act 1970, s. 109.

<sup>3</sup> Except certain foreign government stocks chargeable under Schedule C.

<sup>4</sup> For further discussion of the meaning of the remittance basis, see *Butterworths U.K. Tax Guide 1986-87*, paras. 34:09-34:20; *Simon's Taxes* paras. E1.302-303 and 312.

on death but also taxing some lifetime gifts.<sup>5</sup> It replaces the earlier capital transfer tax.<sup>6</sup> Domicile is relevant in determining the property which is chargeable to inheritance tax. Inheritance tax falls due when property is transferred out of a person's estate, the tax being charged on the net loss of value to the estate. However, certain property is excluded from the valuation of the estate for certain purposes; and such exclusion can, of course, reduce liability to inheritance tax.<sup>7</sup> The two main categories of excluded property<sup>8</sup> for present purposes are as follows:

- (a) property situated outside the United Kingdom where the person beneficially entitled to it is an individual domiciled outside the United Kingdom,<sup>9</sup> unless the property is an interest in or comprises a settlement, for which see (b), below;
- (b) certain interests in "settlements".<sup>10</sup> The inheritance tax rules relating to settlements are intricate;<sup>11</sup> but generally, property comprised in a settlement is only excluded property if it is situated outside the United Kingdom and the *settlor* was domiciled outside the United Kingdom at the time he or she made the settlement.

9.5 It is important to note a special domicile provision in section 267 of the Inheritance Tax Act 1984 which deems persons who satisfy certain conditions to be domiciled in the United Kingdom for some inheritance tax purposes.<sup>12</sup> A person not domiciled in the United Kingdom at the relevant time is to be treated for the purposes of the Inheritance Tax Act 1984 as domiciled in the United Kingdom at the relevant time if:

- (1) he or she was domiciled in the United Kingdom within the three years preceding the time at which the domicile falls to be determined; or
- (2) he or she was resident in the United Kingdom in not less than 17 of the 20 years preceding the year when domicile falls to be determined.

### (iii) Capital Gains Tax

9.6 Capital gains tax is chargeable on gains on the disposal of assets. For this purpose, the disposal of an asset includes any occasion when the ownership of the asset is transferred, whether in whole or in part, from one person to another (except by death) by way of sale, exchange or gift, or when the owner of the asset derives a capital sum from it. Chargeable gains<sup>13</sup> are calculated, broadly speaking, by deducting the acquisition cost (or market value in the case of acquisition by gift or inheritance) from the net sale proceeds. Subject to certain exceptions,<sup>14</sup> gains accruing on the disposal of all forms of property are within the charge to capital gains tax. Broadly, liability falls on persons resident or ordinarily resident<sup>15</sup> in the United Kingdom to whom a chargeable gain accrues. However, by section 14 of the Capital Gains Tax Act 1979, where such a

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<sup>5</sup> Outright gifts between individuals face no immediate tax charge, but become chargeable if the transferor dies within seven years.

<sup>6</sup> The relevant legislation is the Capital Transfer Tax Act 1984 (now known as, and here referred to as, the Inheritance Tax Act 1984) and the Finance Act 1986.

<sup>7</sup> Excluded property is not to be taken into account when ascertaining the value of an estate as it stood immediately before the death of its owner: see Inheritance Tax Act 1984, s. 5(1). Beyond this, however, the precise effects of excluded property upon liability to inheritance tax are not entirely clear: see, for example, *Foster's Capital Taxes Encyclopaedia*, para. C2.26.

<sup>8</sup> Other categories include, under section 6(2), "exempt gilts" (that is, those authorised by the Treasury as being exempt from taxation) in the beneficial ownership of a person neither domiciled nor ordinarily resident in the United Kingdom, and under section 6(3), certain public bonds, certificates and savings, such as National Savings Bank deposits, premium savings bonds and war savings certificates, where the person beneficially entitled to the rights arising under them is domiciled in the Channel Islands or the Isle of Man.

<sup>9</sup> See Inheritance Tax Act 1984, s. 6(1).

<sup>10</sup> *Ibid.*, s. 48. Settlements are defined for this purpose in s. 43 and include strict settlements, trusts creating only contingency interests, trusts not creating an interest in possession and annuities for life. See, further, *Foster's Capital Tax Encyclopaedia*, paras. E1.101 et seq.

<sup>11</sup> Two further rules may apply if the settlement was made after 26 March 1974, unless it is subject to a qualifying interest in possession. Where the settlement in question was originally subject to an interest in possession for the settlor and his or her spouse, then the domicile condition must have been satisfied *both* by the settlor when the settlement was made *and* by the spouse when his or her interest terminated. Second, where the settled property has been moved from one settlement to another since 26 March 1974, the domicile requirement must be satisfied in relation to both settlements.

<sup>12</sup> See *Foster's Capital Tax Encyclopaedia*, section J2.06, pp. 4556-4561.

<sup>13</sup> Or allowable losses, that is, losses accruing on a disposal which may be set off against liability to tax.

<sup>14</sup> See *Simon's Taxes*, paras. C1.106 and C1.107 and references therein.

<sup>15</sup> The terms "resident" and "ordinarily resident" have the same meaning for capital gains tax purposes as in the Income and Corporation Taxes Act 1970.

person can establish a non-United Kingdom domicile, tax is chargeable on the disposal of foreign assets on a remittance basis; that is, on such amount, if any, of the gain as is received in the United Kingdom. Conversely, losses accruing to such people are not allowable losses.

9.7 Domicile is also of relevance in relation to capital gains tax in respect of non-resident trusts, that is, trusts where the trustees, or the majority of them, are not resident in the United Kingdom and the administration of the trust is carried out overseas. Where the trust is in the form of a settlement and the settlor was domiciled in the United Kingdom and was either resident or ordinarily resident here when the settlement was made, special rules apply. Gains accruing to non-resident trustees are cumulated as "trust gains", and are attributed to those beneficiaries who are domiciled and resident or ordinarily resident in the United Kingdom and to whom payments of capital are made, who then become liable to capital gains tax on the total trust gains.

*(iv) The application of certain Schedule E provisions relating to income tax*

9.8 For the purposes of income tax under Schedule E, Case III,<sup>16</sup> foreign emoluments are defined<sup>17</sup> as emoluments of a person not domiciled in the United Kingdom from a non-United Kingdom resident employer. Where they are for duties performed outside the United Kingdom the basis of liability depends on the residence status of the individual.<sup>18</sup> A second provision relating to liability under Schedule E which rests in part on domicile is section 37 of the Finance Act 1986, which provides statutory relief for reimbursed travel expenses home by non-United Kingdom domiciled employees during the first five years of their stay in the United Kingdom.

*(v) Offshore Income Gains*

9.9 The Finance Act 1984, sections 92–100 and Schedules 19 and 20, create special rules to counter the exploitation of offshore "roll-up" funds, that is, funds which, instead of distributing income accumulate it, thus avoiding a charge to income tax. Certain gains made from such funds are chargeable to income tax under Schedule D, Case VI. The principal consequence of proof of non-United Kingdom domicile would appear to be that gains accruing to persons with a non United Kingdom domicile are taxed on a remittance basis only.<sup>19</sup>

*(vi) Anti-avoidance provisions: Income and Corporation Taxes Act 1970, section 478 and Finance Act 1981, section 45*

9.10 The purpose of these provisions is to prevent the avoidance of United Kingdom tax by the transfer of assets to non-United Kingdom residents or domiciliaries. Section 478 of the 1970 Act allows the attribution to the transferor of assets transferred to a person resident or domiciled outside the United Kingdom where the transferor is an individual who retains a power to enjoy income or receives a capital sum. Further, where the individual is not domiciled outside the United Kingdom the income or the capital sum is taxed on a remittance basis. Section 45 of the 1981 Act operates in a similar way in respect of persons other than the transferor who receive a benefit from the transferred assets.<sup>20</sup>

*(vii) Double taxation agreements*

9.11 The United Kingdom has double taxation agreements with 82 separate countries, and the application of at least some of those treaties could turn in part on questions of the domicile of individuals. Where the concept of domicile is used in such treaties, it is almost always simply as one of several criteria by which the country of

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<sup>16</sup> Income and Corporation Taxes Act, s. 181.

<sup>17</sup> *Ibid.*

<sup>18</sup> If he is resident in the United Kingdom but not ordinarily resident, foreign emoluments for duties performed abroad are chargeable on the remittance basis. If he is both resident and ordinarily resident in the United Kingdom, foreign emoluments for duties performed wholly outside the United Kingdom are also chargeable on the remittance basis.

<sup>19</sup> See *Butterworths U.K. Tax Guide 1986–1987*, paras. 34.37–34.42.

<sup>20</sup> See *Butterworths U.K. Tax Guide 1986–1987*, paras. 34.23–34.36.

residence of a person is determined for the purposes of deciding whether or not the treaty applies.<sup>21</sup>

### *Impact of taxation legislation on domicile reform*

9.12 It will be apparent from the previous paragraphs that domicile is a relevant, but not a central, connecting factor for legislation on income tax, inheritance tax and capital gains tax. The question to be faced is what impact the part played by domicile in the field of taxation should have on proposals for the reform of domicile generally. In our Consultation Document we indicated that the provisional proposals there made would not, in our view, create any problems in the context of tax legislation. We did, however, invite comments on that issue and we expressed the provisional view that, if significant problems were identified, the right approach would be to seek to amend the tax legislation, rather than to refrain from making proposals for the general reform of the law of domicile which might be thought desirable in all other contexts.<sup>22</sup>

9.13 Some of the comments received on consultation expressed general concern about the effects of any change in the rules relating to domicile on the incidence of taxation; other comments revealed anxiety in this context over particular proposals; whilst most of those who commented were quite content with the fact that changes in the general law of domicile were bound to have some impact on the determination of an individual's domicile for a variety of purposes, including taxation. Domicile is a general concept in the law. Its meaning can change, and has done so, as the result of judicial decision. To this extent, judge-made changes in the law of domicile have changed the impact of taxation legislation where the legislation refers to domicile. This is an inevitable consequence of using such a general concept in that legislation. Similarly, we think that it would be quite wrong for necessary reform of the general concept to be frustrated simply because of its use in one, albeit significant, context. The right approach, in our view, is for the reforms of the general rules of domicile to be assessed on their merits. If they are thought broadly to be desirable, then consideration might need to be given by the Treasury and the Inland Revenue to the question whether domicile should continue to be relied on as a connecting factor in tax legislation.

9.14 It is right for us to point out that no clear case has been put to us for abandoning the use of domicile in the context of taxation. Indeed it has been argued that the concept should have the same general meaning there as elsewhere in the law. It would, of course, be possible for any legislation implementing our recommendations to be disappplied to taxation legislation, leaving the law of domicile there having its old unreformed meaning. Whilst such a course is possible, we believe it to be undesirable, not only because it would mean having concepts of domicile which varied with the context; but also because we are not convinced that the defects in the present law of law of domicile are any less significant in the taxation field than they are in other areas.

9.15 We do acknowledge that any prospect of change in the law of domicile causes anxieties in the context of taxation. It is for this reason, among others, that we have recommended<sup>23</sup> that the legislation to implement our proposals should come into effect, not two or three months after Royal Assent, but on an identified date which could be fixed at a date some months after Royal Assent in order to give tax payers and their advisers full opportunity to consider how changes in the law of domicile might affect their individual taxation circumstances. We are not persuaded that reforms relating to children and the mentally disordered are going to cause anxiety because of their taxation implications. The abolition of the domicile of origin could affect the domicile of adults in a case where that domicile would have revived, but again we do not believe that this can be portrayed as a significant issue in the field of taxation. We accept that some of the provisional recommendations in our Consultation Document relating to the acquisition of a domicile by adults caused concern to those interested in taxation matters—in particular the suggestion that intention be defined as an intention to make a home in a country 'indefinitely' and that this intention should be (rebuttably)

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<sup>21</sup> See *Butterworths U.K. Tax Guide 1986–1987*, Chapter 36: Sumption, *Taxation of Overseas Income and Gains*, 3rd ed., (1979) Chapter 5.

<sup>22</sup> Para. 1.4.

<sup>23</sup> Para. 8.8. above.

presumed from seven years habitual residence. It will be recalled<sup>24</sup> that, for other reasons, we have decided not to pursue further the idea of a presumption based on a period of habitual residence and no doubt this will be welcomed by those who were concerned that domicile in a part of the United Kingdom might too readily be acquired by those who come to work here. As to the nature of the intention necessary to acquire a domicile here, our recommendation that it should be an intention to settle here for an indefinite period<sup>25</sup> is also likely to reduce anxiety in the tax context, because this both confirms what seems to have become the present law, i.e. intention to live here indefinitely, and makes clear the substantial nature of the connection through the idea of 'settle'.

9.16 Our conclusion is, therefore, that the recommendations in this Report are unlikely to have a significant impact on the incidence of taxation. Nevertheless it may be advisable to delay implementation of any legislation for a period sufficient to enable due attention to be paid to the effects of our recommendations. We also believe that if, contrary to our views, justified anxieties can be shown to exist in relation to the consequences of our proposals in the field of taxation, this should lead to a reconsideration of the continued use of domicile as a connecting factor in tax legislation rather than to the rejection of law reform proposals which might generally be welcomed.

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<sup>24</sup> Para. 5.22, above.

<sup>25</sup> Para. 5.14, above.



## PART X

### SUMMARY OF RECOMMENDATIONS

10.1 We summarise here the conclusions and recommendations set out in the earlier Parts of this Report. Where appropriate, we identify the relevant provisions (the clauses or the rules in the Schedule) in the draft Domicile Bill (contained in Appendix A to this Report) to give effect to particular recommendations.

- (1) Domicile should continue to be available as a connecting factor in the law of England and Wales, Scotland and Northern Ireland.  
(Paragraph 3.12)
- (2) The domicile of a child, i.e. a person under the age of 16, should be determined as follows:
  - (a) the child should be domiciled in the country with which he is for the time being most closely connected;
  - (b) where the child's parents are domiciled in the same country and he has his home with either or both of them, it is to be presumed, unless the contrary is shown, that the child is most closely connected with that country;
  - (c) where the child's parents are not domiciled in the same country and he has his home with one of them, but not with the other, it is to be presumed, unless the contrary is shown, that the child is most closely connected with the country in which the parent with whom he has his home is domiciled.  
(Paragraphs 4.13, 4.15 and 4.16; rule 1)
- (3) The domicile of a child at birth should be determined in accordance with (2) above and, accordingly, the domicile of origin, as a separate type of domicile determined according to a separate set of rules, should disappear from the laws of the United Kingdom.  
(Paragraph 4.24)
- (4) No person or court should have power to abrogate or override the general rules governing the domicile of a person who is under 16.  
(Paragraph 4.25)
- (5) The age at which an independent domicile can be acquired should, in Scotland, be 16, in line with the rest of the United Kingdom.  
(Paragraph 4.28; rule 7)
- (6) No special provision is required for determining the domicile of a person who marries under the age of 16. (Paragraph 4.32)
- (7) The domicile of a person under the age of 16 should be determined by the general rules applying to such a person, irrespective of the fact that she or he is a parent. (Paragraph 4.33)
- (8) The normal civil standard of proof on a balance of probabilities should apply in all disputes about domicile. (Paragraph 5.6; rule 6)
- (9) A person who has reached the age of 16 should continue to be able to acquire a new domicile if he is present in the country in question with the requisite intention. (Paragraph 5.7; rule 2(2)(a))
- (10) No higher or different quality of intention should be required when the alleged change of domicile is from one acquired at birth than when it is from any other domicile. (Paragraph 5.9)
- (11) To establish the necessary intention for the acquisition of a new domicile by an adult, i.e. a person who has reached the age of 16, it should be sufficient to show that he intended to settle in the country in question for an indefinite period. (Paragraph 5.14; rule 2(2)(b))
- (12) The intention necessary for the acquisition of a new domicile should be determined without reference to any presumption.  
(Paragraph 5.22)

- (13) The doctrine of the revival of the domicile received at birth should be abolished and replaced by a rule to the effect that an adult's domicile should continue until he obtains another domicile.  
(Paragraph 5.25; rule 5)
- (14) A person who has reached the age of 16 but who lacks the mental capacity to acquire a domicile of choice should be domiciled in the country with which he is for the time being most closely connected.  
(Paragraph 6.6; rule 4(1))
- (15) An adult who lacked the capacity to acquire a domicile should, on restoration of that capacity, retain the domicile he had before his capacity was restored.  
(Paragraph 6.7; rule 4(2))
- (16) Whether a person has the mental capacity to acquire a domicile of choice should be a question of fact in each case. (Paragraph 6.9)
- (17) No special protective provisions are required to qualify our recommendation (14) that the domicile of a mentally incapable person should be in the country with which he has for the time being the closest connection.  
(Paragraph 6.12)
- (18) A person who is present in a federal or composite state with the intention to settle in that state for an indefinite period should, if he is not held under the general rules to be domiciled in any country within that state, be domiciled in the country therein with which he is for the time being most closely connected. (Paragraph 7.8; rule 3)
- (19) Amendments of the law of domicile should not have retrospective effect.  
(Paragraph 8.2; clause 1(2))
- (20) The new rules on domicile should apply to determine the domicile of a person as at any time after the legislation comes into force. Those rules should also apply to times before the legislation comes into force but only for the purpose of determining where, at a time after the legislation comes into force, a person is domiciled.  
(Paragraph 8.7; clause 1(2))
- (21) The transitional provisions recommended at (20) above should replace the provision in section 1(2) of the Domicile and Matrimonial Proceedings Act 1973 in relation to the domicile of a married woman for the purpose of determining such a woman's domicile at a time after the new rules come into force.  
(Paragraph 8.7; clauses 1(2) and 2(3))

*(Signed)* ROY BELDAM, *Chairman, Law Commission*  
TREVOR M. ALDRIDGE  
BRIAN DAVENPORT  
JULIAN FARRAND  
BRENDA HOGGETT

J. G. H. GASSON, *Secretary*

PETER MAXWELL, *Chairman, Scottish Law Commission*  
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PHILIP N. LOVE  
JOHN MURRAY  
GORDON NICHOLSON

R. EADIE, *Secretary*

31 July 1987

# Draft Domicile Bill

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## ARRANGEMENT OF CLAUSES

Clause

1. Rules for determining domicile.
2. Short title, interpretation, repeals, commencement and extent.  
SCHEDULE: Rules for determining domicile.

*Domicile*

DRAFT

OF A

# B I L L

INTITULED

An Act to make new provision for determining the domicile of individuals. A.D. 1987.

**B**E IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1.—(1) The rules in the Schedule to this Act apply for the purpose of determining where an individual is domiciled. Rules for determining domicile.

(2) Those rules apply to times before this Act comes into force but only for the purpose of determining where at a time after this Act comes into force an individual is domiciled.

(3) Where those rules apply, they do so in place of the corresponding rules of the common law and the enactments repealed by this Act; but nothing in this Act affects any other rules of the common law.

## EXPLANATORY NOTES

N.B.: References to “recommendations” are to the Summary of Recommendations in Part X of this Report.

### *General*

The draft Bill provides a statement of the main rules for determining the domicile of an individual but it does not seek to provide a fully comprehensive code. Examples of rules as to domicile which are not included in the Bill are that no person may be without a domicile, that no person may have more than one domicile, and that a person's domicile is to be determined by the law of the forum.

### *Clause 1*

#### *Clause 1(2)*

1. *Subsection (2)* gives effect to recommendations (19) and (20). A person's domicile at a time after the Act is in force will be determined by reference to the new rules (set out in the Schedule) and for the purpose of determining that domicile the new rules will apply to times before the Act is in force. But if, after the Act comes into force, the only issue is as to where a person was domiciled on a date before it came into force, that domicile will be determined by reference to the old law, including the statutory provisions (set out in clause 2(3)) that are repealed: for that purpose, those provisions will continue to apply: see Interpretation Act 1978, s. 16(1).

#### *Clause 1(3)*

2. *Subsection (3)* serves two functions. First, it makes clear that new domicile rules will replace their common law equivalents, but that other common law rules (such as those mentioned under “General” above) will remain. Second, it indicates that where the new rules apply to times before the legislation is in force, they displace the statutory provisions that, for times after the legislation comes into force, are repealed by the Act: see clause 2(3).

*Domicile*

2.—(1) This Act may be cited as the Domicile Act 1987.

Short title,  
interpretation,  
repeals,  
commence-  
ment  
and extent.

[(2) The references to parents in the Schedule to this Act are not to be read as referring only to persons who are or have been married to each other.]

(3) Sections 1, 3 and 4 of the Domicile and Matrimonial Proceedings Act 1973 (abolition of wife's dependent domicile, age at which independent domicile can be acquired and dependent domicile of child) and section 9(1)(a) of the Law Reform (Parent and Child) (Scotland) Act 1986 (domicile of child born out of wedlock) are repealed.

1973 c. 45.

1986 c. 9.

(4) This Act shall come into force on 1st January 19[ ].

(5) This Act extends to Northern Ireland.

## EXPLANATORY NOTES

### *Clause 2*

#### *Clause 2(2)*

1. *Subsection (2)* makes it clear that the references to parents in rule 1 of the Schedule include parents of children born out of wedlock. This subsection is unnecessary for Scotland in view of section 1 of the Law Reform (Parent and Child) (Scotland) Act 1986. However, at present it is needed for England and Wales, notwithstanding the enactment of the Family Law Reform Act 1987: section 1 of that Act is not yet in force and will apply only to enactments passed after it comes into force. Clause 2(2) is also necessary for Northern Ireland. It is expected to be next year before there is legislation for Northern Ireland corresponding to the Family Law Reform Act 1987. Clause 2(2) will not be needed if section 1 of the 1987 Act and the corresponding Northern Ireland legislation are in force before the Domicile Bill is enacted.

#### *Clause 2(4)*

2. *Subsection (4)* provides for the Act to come into force on 1 January of a year which, at this stage, is unspecified. The reasons for this form of commencement provision are set out in paragraph 8.8 of the Report.

*Domicile*

Section 1.

**SCHEDULE**

**RULES FOR DETERMINING DOMICILE**

*Domicile of children*

1. (1) A child is domiciled in the country with which he is for the time being most closely connected.

(2) Where the child's parents are domiciled in the same country and he has his home with either or both of them, it is to be presumed unless the contrary is shown that the child is most closely connected with that country.

(3) Where the child's parents are not domiciled in the same country and he has his home with one of them, but not with the other, it is to be presumed, unless the contrary is shown, that the child is most closely connected with the country in which the parent with whom he has his home is domiciled.

*Domicile of adults*

2. (1) On becoming an adult, a person retains (subject to paragraph (2) below) the domicile he had immediately before that time.

(2) An adult acquires a domicile in another country if—

(a) he is present there, and

(b) he intends to settle there for an indefinite period.

*Domicile in federal or composite State*

3. In any case where—

(a) an adult is present in a State comprising two or more countries and intends to settle in that State for an indefinite period, but

(b) the application to him of the other rules in this Schedule does not show that he is domiciled in any particular country within the State,

then (notwithstanding the other rules in this Schedule) he is to be treated until he next obtains a domicile in accordance with these rules as domiciled in the country within that State with which he is for the time being most closely connected.



## EXPLANATORY NOTES

### *Rule 1*

1. *Rule 1* applies to all children under 16 (see rule 7), irrespective of whether they are validly married or are parents themselves (see recommendations (6) and (7)).

### *Rule 1(1)*

2. *Rule 1(1)* implements recommendation (2)(a). The country of closest connection (for the purposes of this rule and the other rules—rules 3 and 4(1)—where the test of closest connection is used) will be determined in the light of all the circumstances of the case but, as explained in paragraph 4.18 of the Report, it is unnecessary to include an express provision to this effect in the Bill.

### *Rules 1(2) and (3)*

3. *Rules 1(2) and (3)* give effect to recommendation (2)(b) and (2)(c) respectively, by introducing two *rebuttable* presumptions to assist in the determination of the country of closest connection. As already explained, the references to 'parents' cover all parents, irrespective of whether they are or have ever been married to one another. Adoptive parents are included, without the need for express reference, by virtue of, for England and Wales, the Children Act 1975, Schedule 1, paragraph 3, and for Scotland, the Adoption (Scotland) Act 1978, section 39. No special provision is made for Northern Ireland because the draft Adoption (Northern Ireland) Order, published as a Proposal on 20 October 1986, is expected to be made by the end of the year and to be in force next year.

### *Rule 2*

#### *Rule 2(1)*

1. Under *rule 2(1)* a person will retain his last childhood domicile on becoming an adult, i.e. on reaching the age of 16 (rule 7) unless at that time he is present in another country with the intention of settling there for an indefinite period in which case he will (in accordance with rule 2(2)) acquire a new domicile in that country.

#### *Rule 2(2)*

2. *Rule 2(2)* sets out the two requirements for the acquisition of a new domicile by a person aged 16 or over. Paragraphs (a) and (b) implement recommendations (9) and (11) respectively. The policy underlying the latter recommendation is explained in paragraphs 5.13–5.14 of the Report.

### *Rule 3*

*Rule 3* makes special provision for the acquisition of a domicile in a federal or composite State, i.e. a State comprising two or more countries (as defined in rule 7). In accordance with recommendation (18), a person aged 16 or over who is present in such a State (e.g., the United Kingdom, Australia or Canada) and intends to settle somewhere in that State for an indefinite period, but has not formed an intention to settle in any particular country in that State, will be domiciled in whichever of the constituent countries (e.g., England and Wales, Scotland or Northern Ireland, in the case of the United Kingdom) with which he is most closely connected. *Rule 3* will cease to apply once the conditions for the acquisition of a new domicile under rule 2(2) are met. A person's domicile will then be determined under rule 2(2).

## *Domicile*

### *Domicile of adults under disability*

4. (1) An adult lacking the capacity to form the intention necessary for acquiring a domicile is domiciled in the country with which he is for the time being most closely connected.

(2) When that capacity is restored to an adult, he retains the domicile that he had immediately before it was restored.

## EXPLANATORY NOTES

### *Rule 4*

#### *Rule 4(1)*

1. *Rule 4(1)* implements recommendation (14).

#### *Rule 4(2)*

2. *Rule 4(2)* implements recommendation (15).

## *Domicile*

### *Continuity of adult domicile*

5. An adult's domicile under rule 2 or 4(2) continues until he obtains another domicile.

### *Standard of proof*

6. A person is to be taken for the purposes of these rules to have intended to settle in a country for an indefinite period if it is shown on a balance of probabilities that he had that intention.

### *Interpretation*

7. In these rules—

“child” means a person who has not attained the age of sixteen, and “adult” is to be interpreted accordingly, and

“country” includes territory and means, in relation to a person whose domicile at a particular time is in question, a country which has its own system of law at that time.

## EXPLANATORY NOTES

### *Rule 5*

*Rule 5* gives effect to recommendation (13). A domicile obtained under rule 2 or 4(2) will continue until another domicile is acquired under rule 2(2), 3 or 4(1). Rule 5 does not apply to a domicile obtained under the closest connection test in rules 3 and 4(1). The object of that test is to determine the country of closest connection for the time being, i.e. on the particular date as at which a person's domicile falls to be determined. The test, being a continuing one, does not require a further rule about continuity.

### *Rule 6*

*Rule 6* implements recommendation (8).

### *Rule 7*

1. The definition of "child" and "adult" is in accordance with recommendation (5).
2. The definition of "country" makes it clear that by that term is meant a geographical area governed by its own system of law. Thus, a composite State, such as the United Kingdom, or a federal State, such as Canada, contains a number of countries, e.g., England and Wales, Scotland and Northern Ireland in the United Kingdom, and Quebec and Ontario in Canada.

## APPENDIX B

### Membership of the Joint Working Party

Dr. P. M. North } Dr. E. M. Clive }	<i>Joint Chairmen</i>	Law Commission Scottish Law Commission
Professor A. E. Anton, CBE		Consultant, Scottish Law Commission
Mr. R. Bland		Scottish Courts Administration
Mr. J. Easton		Inland Revenue
Mr. P. G. Harris		Law Commission
Mr. P. M. Harris		Lord Chancellor's Department
Mr. J. Hill		Foreign and Commonwealth Office
Professor J. D. McClean		University of Sheffield
Mr. J. V. Ribbins		General Register Office
Miss J. C. Hern	<i>Secretary</i>	Law Commission

## APPENDIX C

### List of individuals and organisations who commented on Working Paper No. 88; Consultative Memorandum No. 63.

Aberdeen University (Working Party of the Faculty of Law)  
American Chamber of Commerce (United Kingdom)  
Arthur Young, Chartered Accountants, London  
Association of Independent Businesses  
Baltic Exchange  
Sir Wilfrid Bourne, K.C.B., Q.C.  
Mr. A. Briggs, St. Edmund Hall, Oxford  
British Bankers' Association  
Mr. B. I. Cawthra, European Patents Office, Munich  
Children's Legal Centre  
Citibank N.A.  
Dr. E. B. Crawford, University of Glasgow  
Department of Trade and Industry  
Family Law Bar Association  
Dr. J. J. Fawcett, University of Bristol  
Foreign and Commonwealth Office  
Mr. D. M. Gelber, London  
General Register Office  
Professor W. M. Gordon, University of Glasgow  
Professor R. H. Graveson, C.B.E., Q.C.  
Mr. P. Grose-Hodge, Solicitor, London  
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Institute of Chartered Accountants of Scotland  
Institute of Legal Executives  
Mr. A. J. E. Jaffey, University of Exeter  
Mr. L. Kelly, London  
Law Reform Commission of Manitoba  
Law Society  
Law Society of Scotland  
Dr. R. D. Leslie, University of Edinburgh  
Moore, Stephens and Co., Chartered Accountants, London  
Rt. Hon. Lord Murray  
Miss S. M. Nott, University of Liverpool  
Mr. M. L. Parry, University of Hull  
Mr. H. Patrick, Edinburgh  
Mr. S. F. R. Patrick, W.S., Edinburgh  
Dr. D. S. Pearl, Fitzwilliam College, University of Cambridge  
Mr. M. P. Pilkington, University of Leeds

Senate of the Inns of Court and Bar  
Mr. D. Sheridan, Halpern and Woolf, Chartered Accountants  
Sheriffs' Association  
Major J. Shove, O.B.E.  
Mr. R. Smith, University of Hull  
Mr. P. A. Stone, University of Exeter  
Mr. P. W. A. Walters, Jersey  
Mr. G. A. Watt, Edinburgh  
Professor P. R. H. Webb, University of Auckland  
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