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DOMICILE

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INTRODUCTION

The South African Law Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).

The members of the Commission are -

The Honourable Mr Justice G Viljoen (Chairman)
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PREFACE

This working paper has been prepared by the research staff of the Commission to serve as a basis for the Commission's deliberations. The points of view, conclusions and recommendations contained herein should not at this stage be regarded as the final points of view of the Commission. The working paper is being published in full to provide persons and bodies wishing to comment or to make suggestions for the development, improvement, modernisation or reform of this particular branch of the law with sufficient background information to enable them to place substantiated submissions before the Commission.

Any request to treat comments or parts of comments on the working paper as confidential will be respected. If no request for confidentiality or anonymity is made the Commission will assume that commentators agree to the Commission's quoting from or referring to comments and attributing comments to commentators.

Any person or body wishing to make oral representations to the Commission should submit a brief résumé of his or its proposed representations, together with a request to be heard by the Commission, to the Commission in writing.

It would be appreciated if written comments, representations or requests, could reach the Commission by 31 October 1988 at the address which appears on the previous page. Please communicate with the researcher if you are unable to submit your comments in time.

The researcher responsible for the investigation, who may be contacted for further information, is Mr H C Smuts. The project leader is the Honourable Mr Justice P J J Olivier.

HIERDIE STUK IS OOK IN AFRIKAANS BESKIKBAAR

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1. INTRODUCTION

ORIGIN OF THE INVESTIGATION

1.1 During 1986 Mr M J de Waal of the University of Stellenbosch referred a submission he had made to the January 1986 congress of the Association of University Lecturers to the South African Law Commission. The submission deals with various aspects of domicile and the question posed therein is whether this part of the South African law should be reformed.

1.2 Mr De Waal's submission was referred to various academics for comment and they were ad idem that this part of the law should be revised.

1.3 In the light of the volume of literature that has been written about domicile in which calls are made for law reform, and in view of the submission by Mr De Waal as supplemented by the comments of the academics, the Commission decided to include the present investigation in its programme.

STATEMENT OF PROBLEM

1.4 Mr De Waal made the following remark in his submission:

> Domisilie is dikwels deurslaggewend by die vasstelling van 'n hof se jurisdiksie en is 'n belangrike koppelingsfaktor in die internasionale privaatreg. Vir die personereg is domisilie egter van belang omdat dit opereer as 'n statusbepalende faktor ... Min onderafdelings van die personereg verskaf soveel probleme en word geteister deur soveel onbeantwoorde vrae as juis domisilie. Verder word die behandeling van domisilie van afhanklikheid in die Suid-Afrikaanse reg gekenmerk deur anomalieë, onpraktiese oplossings en onbillikhede.

1.5 Prof Ellison Kahn put it to the Commission as follows, inter alia:

> In my opinion there are grave defects in the rules of our law of domicile ... My past criticisms of our rules of domicile were muted. The time has come, in my view, for consideration to be given to a radical revision of the rules through an Act of Parliament.

1.6 Some of the existing problems of domicile are the determination of a person's domicile if he has lost a previous domicile without acquiring a

new domicile; the determination of a person's intention to reside permanently at a place (animus manendi) in the case of a domicile of choice; the domicile of dependency of a married woman; the domicile of children and the age at which an independent domicile is acquired; the domicile of a foundling; the domicile of public servants, soldiers, diplomatic officials, etc; and problems related to domicile - e g the recognition of foreign divorce orders.

THE RELEVANCE OF DOMICILE

1.7 As far as the private law is concerned, domicile influences various competencies of a person. The patrimonial consequences of a marriage are, for instance, determined by the law of the husband's matrimonial domicile. This principle is immutable and is not influenced by the husband's subsequent change of domicile.[1] An antenuptial contract is thus interpreted according to the law of the husband's domicile at the time of marriage and the law of the same domicile determines the extent of prospective spouses' capacity to decide by agreement before the marriage is contracted that, in respect of movable property, their matrimonial property regime will be governed by another system of law than that of the husband's domicile.[2]

1.8 A child's legitimacy or illegitimacy is also determined according to the father's domicile at the time of the child's birth.[3] Furthermore, the question whether an illegitimate child is legitimated by his parents' subsequent marriage is determined by his father's domicile at the time of marriage.

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1 Frankel's Estate v The Master 1950 1 SA 220 (A); Sperling v Sperling 1975 3 SA 707 (A); cf also Kahn in Husband and Wife at 631 and Van der Vyver & Joubert at 88-89.

2 Cf Kahn in Husband and wife at 635-636 and the authorities referred to therein.

3 Seedat's Executors v The Master 1917 AD 302; Hamid v Minister of the Interior 1954 4 SA 241 (T).

1.9 The law of intestate succession of the country in which the testator is domiciled at the time of his death determines, as far as the law of succession is concerned, how movable property should devolve.[4] In the same way the lex domicilii of the testator determines his capacity to dispose of his movable property by means of a will.[5] In short, domicile is also relevant in considering a person's capacity to inherit[6] and in considering the question of the requirements as regards the form and formalities of a legal will.[7]

1.10 Domicile is also relevant in determining the system of law according to which a will should be interpreted; if the testator has not indicated the proper system of law, the law of the place where the testator was domiciled when the will was made prevails.[8]

1.11 In the foregoing examples domicile was used as primary connecting factor which indicated the proper system of law when a choice of law is involved. Naturally domicile is also used in other contexts, e g as a factor which determines the jurisdiction of a provincial or local division of the Supreme Court, especially in divorce actions,[9] actions for the annulment of marriages and actions concerning inheritance. In a recent decision, Evelyn-Wright v Pierrepoint,[10] the very question before the court was whether that court had jurisdiction to order the rectification of a will. After consideration of the relevant authority it was held that only the court where the testator was domiciled at the time of his death is competent to

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4 Estate Baker v Estate Baker (1908) 25 SC 234; Kahn in Law of succession at 636.

5 Kahn in Law of succession at 637.

6 Van der Vyver & Joubert at 90.

7 Ibid at 90-92; Kahn in Law of succession at 641-648.

8 Van der Vyver & Joubert at 92; Kahn in Law of succession at 648-650.

9 Cf Ex parte Jones: In re Jones v Jones 1984 4 SA 725 (W).

10 1987 2 SA 111 (E).

order rectification and not the court where the testator was domiciled when the will was executed. Apart from the instances just mentioned, domicile is also a factor in determining the "international jurisdiction" of a foreign court in order to recognise and enforce an order of such a court.[11] For instance, the only court that has jurisdiction at common law to order a divorce and whose decision is to be recognised is the court of both parties' common domicile.

1.12 It can thus be stated that domicile plays an important role in various areas of the law and that this part of the law as well as its related rules should therefore be clear and certain and should comply with the needs of contemporary legal traffic.

THE CONCEPT OF DOMICILE

1.13 In Gunn v Gunn[12] it was mentioned that "... domicile only means home". This concise definition corresponds with the Latin word domicilium, which means "home" or "residence". In Codex 10 39 7 as well as in Voet 5 1 92 it is acknowledged that domicile is related to residence but that it is not ended by temporary absence.[13] A definition is found in Mason v Mason,[14] where the court put it as follows: "Domicile means the place or country which is considered by law to be a person's permanent home." This formulation is generally acknowledged as the most acceptable but definitely not as a very satisfying definition.[15] This definition sometimes results in a person being accorded a domicile in a very artificial manner without his ever physically having been there. Nor does the definition make it clear what content should be given to the requirement that a person should have the intention to reside permanently at a place, where the

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11 Cf Guggenheim v Rosenbaum (2) 1961 4 SA 21 (W).

12 1910 TS 423 at 427.

13 Cf Van der Vyver & Joubert at 87.

14 (1885) 4 EDC 330 at 337.

15 Boberg at 55-56; Kahn at 4; Van der Vyver & Joubert at 87.

acquisition of a domicile of choice is concerned. In this regard conflicting pronouncements are found regarding the acquisition of a domicile of choice by soldiers, public servants, prisoners and other persons without a free choice of residence.[16]

1.14 Be that as it may, it is at present accepted that domicile is the place where a person is de iure considered to reside permanently, even if he is de facto absent.[17]

1.15 It is futhermore accepted that the South African law of domicile rests on the following principles, viz -

- that nobody can be without a domicile; and
- that nobody can have more than one domicile at any time.[18]

1.16 In view of the fact that a person's status is determined by the law of the place where a person is domiciled, every person is accorded a domicile, be it by way of fact or by way of fiction. The domicile of persons having contractual capacity usually rests on a self-made choice, while the law accords a domicile to persons not having such a capacity.[19]

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16 Boberg at 74-77; Van der Vyver & Joubert at 106-110.

17 Cf Barnard et al at 35.

18 Although the question whether a person can have more than one domicile was left open in Eilon v Eilon 1965 1 SA 703 (A), it appears to be a well-established principle.

19 Barnard et al at 36.

2. DOMICILE BY OPERATION OF LAW

Married women

The South African law

2.1 On contracting a marriage a wife takes her husband's domicile and follows it as often as he changes it, irrespective of the question whether he is physically present at that place and irrespective of the question whether the wife has the intention to remain permanently at that place. If the marriage is dissolved by divorce or death, the wife retains the domicile she had on dissolution of the marriage until she acquires a domicile of her own choice or until she remarries, in which instance she again takes her husband's domicile.

2.2 Domicile of dependency is an immutable consequence of marriage and cannot be excluded by way of antenuptial contract - it operates whether the marriage is in community of property or out of community of property and was explicitly retained in section 13 of the Matrimonial Property Act 88 of 1984, notwithstanding the abolishment of the husband's marital power.[1]

2.3 Although there are obiter dicta which indicate that there are exceptions to the wife's domicile of dependency, e g where the husband is a vagabundus[2] or where the husband has abandoned his wife in circumstances which make it impossible for her to follow him,[3] this would appear not to be a correct reflection of the South African law.[4] The rule that a married

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1 Cf Kahn at 73.

2 Mason v Mason (1885) 4 EDC 330 at 353; Hudson v Hudson 1907 EDC 189 at 191-192; Ex parte Stevens 1912 EDL 443 at 446.

3 Mason v Mason (supra) at 354-355.

4 Van der Vyver & Joubert at 99.

woman follows her husband's domicile should be applied without any exception.[5]

2.4 In the case of an ab initio void marriage the wife does not take the husband's domicile.[6] As far as voidable marriages are concerned it appears that the wife takes the husband's domicile until the marriage is annulled.[7] There is some uncertainty whether or not annulment of the marriage cancels the wife's domicile of dependency retroactively. Kahn[8] is of the opinion that there is "some persuasive authority" that it will not, while Van der Vyver and Joubert[9] are of the opinion that no distinction should be made between an ab initio void marriage and a voidable marriage that has been annulled - in the latter instance the wife should not be taken to have followed the husband's domicile.

2.5 In view of the fact that a married woman acquires a domicile of dependency and that she cannot choose her own domicile, it may happen that such a woman is domiciled at a place where she is not residing at all, which may lead to certain problems. Kahn uses the following example:[10]

> A wife, who hails from and is a citizen of France, leaves her South African domiciled husband and returns to France where she settles. The religious convictions of both spouses forbid a divorce. Many years later she dies intestate leaving some movables in the Republic.

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5 Ibid. Cf also Shapiro v Shapiro 1914 WLD 38 at 40; Nunn v Nunn 1929 NLR 307 at 308.

6 Govu v Stuart (1903) 24 NLR 440; Kahn at 74; Pollak in 1934 SALJ at 30, fn 189a; Van der Vyver & Joubert at 99.

7 Forsyth at 121; Kahn at 75.

8 Kahn at 75.

9 Van der Vyver & Joubert at 100.

10 Kahn in 1986 TSAR at 13.

2.6 "To the layman" says Kahn,[11] "it seems ludicrous that succession ab intestato to her movables will be determined by South African law, being the law of her last domicile ... Even to lawyers it is a strange situation."

2.7 The possibility of injustice if a married woman cannot acquire a domicile of her own appears from a case such as Ex parte Jones: In re Jones v Jones.[12] In that case the applicant filed an application to sue her husband by way of edictal citation for a divorce on grounds of the irretrievable breakdown of the marriage. The parties were married in London during August 1980. A month thereafter the husband abandoned her and two years later she settled in South Africa. According to English law the applicant is domiciled in South Africa. The question before the court, therefore, is whether the applicant is indeed domiciled in South Africa and whether the court has jurisdiction to hear the matter.

2.8 Section 2(1) of the Divorce Act 70 of 1979 stipulates, inter alia, that a court shall have jurisdiction in a divorce action if the wife is the applicant and she is ordinarily resident in the area of jurisdiction of that court on the date on which the action is instituted and has been ordinarily resident in the Republic for a period of one year immediately prior to the said date and is domiciled in the Republic.

2.9 The court applied the rule that questions regarding domicile should be dealt with in accordance with the lex fori, in other words the South African law. In terms of South African law her husband is domiciled in England and therefore the wife too. Consequently the court does not have jurisdiction in the divorce action.

2.10 The decision cannot be criticised on legal grounds, but the unfairness that may result therefrom speaks for itself - thus, if Mrs Jones wants a divorce she would have to go to England and institute her action there.

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11 Ibid.

12 1984 4 SA 725 (W).

2.11 Finally mention should also be made of the question whether a woman to whom judicial separation has been granted retains her domicile of dependency and whether she may acquire a domicile of choice.[13] Kahn[14] points out that although there are a few common law writers who are of the opinion that such a woman may acquire an own domicile, several writers, amongst whom Johannes Voet, do not allow any exception from the rule that a wife follows her husband's domicile.[15] Although it was mentioned in Steytler v Steytler[16] that a wife may obtain a "jurisdictional domicile" for some purposes,[17] the court decided[18] that in matters relating to the marriage tie and to status the parties have only one domicile, viz that of the husband. In this regard Pollak[19] is of the opinion that a wife always follows the husband's domicile.[20]

The position abroad

. The United Kingdom

2.12 In answering a questionnaire compiled by the European Committee on Legal Co-operation regarding domicile the United Kingdom replied[21] that the principle that a wife follows her husband's domicile caused certain problems in practice: "For that reason, it is at present suggested to allow

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13 Although orders for restitution of conjugal rights and judicial separation were abolished in terms of section 14 of the Divorce Act 70 of 1979 it may be that there are still instances where such orders were made earlier which justify this discussion.

14 Kahn at 78.

15 Cf also Forsyth at 121.

16 1913 CPD 725.

17 Ibid at 730.

18 Ibid 730-731.

19 In 1934 SALJ at 27-30.

20 Cf also Van der Vyver & Joubert at 98.

21 European Committee at 70.

the wife in certain cases to have a different domicile from that of her husband."

2.13 Section 1(1) of the Domicile and Matrimonial Proceedings Act, 1973, however, brought about a radical change. In terms of this provision a married woman now acquires an own independent domicile for all purposes. This section provides that the domicile of a married woman -

> ... shall, instead of being the same as her husband's by virtue only of marriage, be ascertained by reference to the same factors as in the case of any other individual capable of having an independent domicile.

2.14 In terms of section 1(2) of the Act a married woman who had her husband's domicile immediately before section 1 came into force retains that domicile as a domicile of choice until it is changed by acquisition or revival of another domicile.

2.15 This provision extends to England, Wales, Scotland and Northern Ireland (section 1(3) of the Act).

. Ireland

2.16 In Ireland it has now been proposed that a married woman's domicile of dependency should be abolished.[22]

. New-Zealand

2.17 In terms of section 5(1) of the New-Zealand Domicile Act, 1976, every married person is enabled to acquire an own domicile and the woman's domicile of dependency is abolished.

. Australia

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22 Ireland Annual Report at 56-57.

2.18 Section 6 of the Australian Domicile Act, 1982, provides without further ado that "(t)he rule of law whereby a married woman has at all times the domicile of her husband is abolished".

. The United States of America

2.19 As a rule, a wife follows her husband's domicile. However, if there are "special"[23] or "appropriate"[24] circumstances present which make the existence of a single domicile unfair, the wife may establish an own domicile. In the same way, a wife that is living apart from her husband can establish an own domicile.

2.20 In the supplement to American Jurisprudence,[25] however, it is stated that according to Psaty v Psaty[26] a wife now has the same capacity to acquire a domicile of choice as does her husband, "and the common-law concept that a wife, by operation of law, automatically is assigned the domicile of her husband no longer applies".

. Provinces of Canada

British Columbia

2.21 The Charter of Rights Amendments Act, 1985, inter alia, specifically provided that a married woman has a right to acquire an own domicile independent from that of her husband. Regarding this reform the Law Reform Commission of that province remarks as follows:[27]

> This represents an improvement over the former law under which a married woman acquired and retained the domicile of her husband.

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23 Restatement par 21.

24 Am Jur 2d par 53.

25 Am Jur 2d Supp par 53.

26 (1978) 93 Misc 2d 454, 402 NYS2d 779.

27 British Columbia Report at 25.

This "domicile of dependency" subsisted even where husband and wife had separated and no longer lived in the same jurisdiction.

Manitoba

In the recent past reform in this area also took place in Manitoba. In its report on domicile the Law Commission of that province also recommended that the rule that a wife always follows her husband's domicile be abolished.[28] This recommendation is now embodied in the Domicile and Habitual Residence Act, which received Royal assent on 18 August 1983.[29]

Ontario and Saskatchewan

2.23 The Law Reform Act, 1978, of Ontario provides, inter alia, that the same rules that are applied to determine the domicile of a married man shall be applied to determine the domicile of a married woman.

2.24 In its report, Proposals for an Equality of Status of Married Persons Act, the Saskatchewan Law Reform Commission recommended that that province should follow the example of Ontario.[30]

. The European Continent

2.25 Switzerland: As from January 1988 several new provisions relating to marriage are being introduced. For example, the new section 161 of the Swiss Civil Code provides that the wife acquires the domicile of the husband without losing the domicile she had before her marriage. Section 162 provides that spouses shall determine their common place of residence jointly. As far as marriages are concerned which were entered into before the introduction of the new provisions, provision is made that the wife may exercise a choice to re-acquire her original domicile and to register that domicile with the authorities of her original place of domicile.

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28 Manitoba Report at 34.

29 Manitoba Annual Report at 23.

30 Saskatchewan Report at 12; Saskatchewan Annual Report at 11-12.

2.26 Austria and France: In a considerable number of European countries the wife follows her husband's domicile. However, there are some exceptions: "... when it is found to be unjust in individual cases" (Austria) or "... if the choice made by the husband results in serious inconveniences for the family" (France).[31]

2.27 Certain countries such as Belgium and West-Germany allow a wife to chose or terminate a domicile freely.[32]

2.28 In Denmark there is a presumption that the wife's domicile is the same as her husband's, but she is not precluded from acquiring an own domicile.[33]

2.29 In the Netherlands every natural person may acquire an domicile ("woonplaats") of his own choice, independently and on his own.[34] Domicile of dependency exists only with regard to minors and persons under curatorship.[35]

Conclusions and recommendations

2.30 The fact that a married woman is incapable of acquiring an own domicile during her marriage has drawn severe criticism over the years.

2.31 The fact that the wife continuously follows her husband's domicile, which has been described as "the last barbarous relic of the wife's servitude",[36] is not in step with legislation that has been adopted in South

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31 European Committee at 68-69.

32 Ibid.

33 Ibid at 68.

34 Burgerlijk Wetboek, Book 1 title 3, sect 10(1); Melis at 12.

35 Melis at 13.

36 Per Lord Denning in Gray v Formosa 1963 P 259 (CA) at 267. Cf also Forsyth at 120-122; Kahn at 72.

Africa during the past years. The telling example is the Matrimonial Property Act 88 of 1984, which has as its object the granting of equal status to husband and wife. For example, in terms of section 11 of the Act the husband's marital power has been abolished. In terms of section 12 of the Act the law relating to domicile, however, remains unchanged.

2.32 It was pointed out above that the wife's domicile of dependency has been abolished in most Western countries and that in some instances the wife is permitted to acquire an own domicile. While one guard against slavish imitation, this reform does, at the very least, raise the question whether South African law is not outdated in this regard and should be reformed.[37]

2.33 If one looks for the principle underlying the rule that a wife follows her husband's domicile, one finds, inter alia, that her domicile is "a consequence of the union between husband and wife brought about by the marriage".[38] "This", says Kahn[39], "is mere verbiage, however, and expresses no rationale."

2.34 In view of the present equal status of a married woman, her growing financial assistance to the household, and her active participation in the labour market, it appears that there is no longer any reason to ascribe to her a domicile because of her dependence on the husband. Indeed, in this regard the Law Reform Commission of Manitoba[40] remarked as follows:

> There is no reason to perpetuate the continuance of a married woman's dependent domicile. Indeed, her domicile of dependency should have been abolished long ago. We (therefore) recommend ... (t)hat the rule of law whereby a married woman has at all times the domicile of her husband be abolished.

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37 Cf section 4 of the South African Law Commission Act 19 of 1973.

38 Per Lord Cave in Lord Advocate v Jaffrey (1921) 1 AC 146 (HL (Sc)) at 158.

39 Kahn at 75.

40 Manitoba Report at 12.

2.35 The Commission therefore wishes to recommend provisionally that the domicile of a married woman should be determined in the same way as that of any other person capable of acquiring an own domicile.

Children

The South African law

2.36 At birth a child is assigned a domicile (of origin). This domicile has a specific meaning and is established not merely by birth occurring in a specific country but with reference to the domicile of the father or mother.[41]

2.37 The domicile of origin of a legitimate child is that of his father's at the time of the child's birth. The child retains his father's domicile even if the marriage of the child's parents has been dissolved prior to birth.[42] However, if sole guardianship has been awarded to the mother or a third party it is suggested[43] that the child's domicile will be that of his mother or the third party.

2.38 If the child is born after his father's death, he acquires the domicile his mother has when he is born.[44]

2.39 Both Kahn[45] and Spiro[46] are of the opinion that a child legitimated per matrimonium subsequens acquires the domicile his father had at the time of the child's birth.

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41 Kahn at 17; Pollak in 1934 SALJ at 13.

42 Ibid; Spiro at 132.

43 Kahn at 17; Spiro at 132.

44 Pollak in 1934 SALJ at 12.

45 Kahn at 18.

46 Spiro at 133.

2.40 As far an adopted child is concerned, it appears that he acquires a domicile of dependency from his adoptive parents, but that his domicile of origin remains that of his natural father if he is legitimate, or that of his natural mother if he is illegitimate.[47]

2.41 A child's domicile of origin continues until it is changed (during his minority) by another person who is legally competent to do so.[48] In the case of a minor legitimate child he acquires a domicile of dependency from his father, which domicile changes as frequently as his father's and irrespective of whether or not the child lives with his father.

2.42 In Hull v McMaster[49] it was mentioned that the rule that a child follows his father's domicile does not apply if it prejudice the child. According to Van der Vyver and Joubert[50] this exception should seriously be doubted,[51] while Kahn[52] is of the opinion that there is much to be said in favour of this reservation[53]. Be that as it may, the position appears to be that, if the father has the required intention to settle permanently at a certain place, and if he actually resides there, the child will follow his domicile. If any of the elements are not present, the father, and consequently the child, does not acquire a new domicile.[54]

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47 Kahn at 18-19; Spiro at 75 and 133. Although a child shall, in terms of section 20(2) of the Child Care Act 74 of 1983, "for all purposes whatever be deemed in law to be the legitimate child of the adoptive parent, as if he was born of that parent during the existence of a lawful marriage", it is doubted whether this provision has any effect on the adopted child's domicile of origin.

48 Pollak in 1934 SALJ at 24.

49 (1866) 5 Searle 220 at 225-226.

50 Van der Vyver & Joubert at 96.

51 Cf Pollak in 1934 SALJ at 25: "(I)t is doubtful whether there is really any such qualification of the general rule..."

52 Kahn at 85.

53 Cf also Spiro at 135-136.

54 Cf Spiro at 136.

2.43 If a minor is illegitimate, if his father is deceased, or if sole guardianship over the child has been conferred on the mother on divorce, the child acquires his mother's domicile.

2.44 In the latter instance a distinction should be made between guardianship on the one hand and custody on the other. This distinction is of importance because in most divorce cases the courts consider it in the best interests of the children to entrust them to the care of the mother - custody is then conferred on the mother, while the father retains guardianship over the children.

2.45 Where the father has guardianship without the element of custody over a child, the question arises whether the child still follows his domicile. Academics differ on this point.[55] Spiro[56] has maintained since 1950 that the child's domicile is dependent on that of the father. Van der Vyver and Joubert[57] also state without further ado that, as far as domicile is concerned, "hierdie faset van 'n kind se status met voogdy gepaard gaan en nie met beheer en toesig nie". Writers like Pollak,[58] Kahn,[59] Forsyth,[60] Boberg[61] and possibly Barnard et al,[62] on the other hand, are of the opinion that it would be fairer, more correct and in line with the factual circumstances if domicile should follow custody.

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55 Cf Boberg at 64; Forsyth at 124.

56 Cf Kahn at 91; Spiro at 297.

57 Van der Vyver & Joubert at 97.

58 Pollak in 1934 SALJ at 26 and 26, fn 170.

59 Kahn at 90-93.

60 Forsyth at 124.

61 Boberg at 64.

62 Barnard et al at 40.

2.46 This matter has been raised only obiter in two decisions, viz Landman v Mienie[63] and Favard v Favard.[64] In these cases the court remarked that the minor child always follows the father's domicile, in other words the domicile of the guardian. At the very least, therefore, it appears as if there is no absolute clarity as far as this matter is concerned.

2.47 It was mentioned above that an illegitimate child, as well as a child whose father is deceased, follows the domicile of his mother. If the widow remarries or if the mother of the illegitimate child marries a third person she again acquires a domicile of dependency, viz that of the husband. As far as the domicile of the child is concerned it is uncertain whether or not he follows the domicile of his stepfather. In this regard Kahn[65] mentions that the "topic ... bristles with a bewildering variety of possible situations". Van der Vyver and Joubert[66] on the one hand state that one would expect the child to acquire his stepfather's domicile, while Forsyth,[67] on the other hand, is of the opinion that "(i)t seems awkward and artificial that (the children) should, through their mother, become dependent upon the domicile of their stepfather". Kahn[68] is of the opinion that the child should acquire the mother's domicile of choice, should she be competent to acquire an own domicile during her new marriage, and if she cannot acquire an own domicile then the child's domicile should be the same as the mother's hypothetical domicile of choice. In most instances this would correspond to that of the stepfather, but if the parents live apart then the child should acquire the hypothetical domicile.

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63 1944 OPD 59 at 65.

64 1953 3 SA 656 (SR) at 657G.

65 Kahn at 93.

66 Van der Vyver & Joubert at 97.

67 Forsyth at 124.

68 Kahn at 95.

2.48 Boberg[69] criticises this point of view of Kahn's and mentions that this could result in a child being domiciled at a place where neither his mother nor his stepfather is domiciled. It would also be difficult to determine the mother's intention. Boberg prefers the child to follow the mother's domicile in all circumstances. This would ensure unity of domicile in the family. If the parents are living apart, the child would probably live with his mother and would also share her domicile.

2.49 Be that as it may, there are various views concerning this aspect[70] and it is generally doubted whether Pothier's point of view,[71] namely that the children do not follow their mother's domicile but retain the domicile they had when she married (again), is still correct today.

2.50 A further aspect of a minor's domicile is the question whether a tacitly emancipated child can acquire an own domicile of choice.[72] Although Voet 5 1 100 is clear[73] authority for the point of view that a child who is tacitly emancipated may acquire an own domicile,[74] the question was left open in Ochberg v Ochberg's Estate.[75]

2.51 Kahn is of the opinion that a child may be emancipated to such a degree that he may also acquire an own domicile.[76] Spiro, on the other

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69 Boberg at 66 fn 49.

70 Cf also Boberg at 66-67.

71 Pothier I 19.

72 In terms of section 7 of the Age of Majority Act 57 of 1972 a person to whom majority has been granted by the court "shall for all purposes be deemed to have attained the age of majority". Such a person naturally acquires an own domicile. Cf Spiro at 248.

73 Cf Kahn at 84.

74 Cf also Pothier 1 16.

75 1941 CPD 15 at 37.

76 Kahn at 84. Kahn is supported by, inter alia, Barnard et al at 41 and Forsyth at 123.

hand, points out[77] that tacit emancipation does not terminate parental power and that if this is the case then an emancipated minor is not capable of changing his domicile by his own act. Again it is evident that our law does not offer a clear answer to the question.

The position abroad

. The United Kingdom

2.52 Section 3(1) of the Domicile and Matrimonial Proceedings Act, 1973, provides at present that any person is capable of having an independent domicile when he attains the age of sixteen or marries under that age.

2.53 A child whose parents are living apart has in terms of section 4(1) and (2) his mother's domicile[78] "if he ... has his home with her". A child whose mother is dead retains the domicile his mother last had before she died (section 4(3)).

2.54 During 1985 the English and Scottish Law Commissions[79] tentatively recommended that the domicile of any person under the age of 16 be determined as follows:[80]

> If the child has his home with his parents his domicile is the same as -
>
> (i) that of his parents if their domiciles are the same; and
>
> (ii) that of his mother if the parents' domiciles are different.
>
> Where the child has his home with a single parent his domicile is the same as that of that parent.

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77 Spiro at 134; Cf also Boberg at 64 fn 35 and at 384.

78 In terms of section 1(1) of the Domicile and Matrimonial Proceedings Act, 1973 a married woman's domicile is ascertained in the same way as that of any other individual capable of having an independent domicile - cf paragraph 2.13 above.

79 England Working Paper.

80 Ibid at 79-80.

In any other case the child is domiciled in the country with which he is for the time being most closely connected.

2.55 In their final report,[81] however, the Commissions acknowledge that it can hardly be justified in principle that a child who has his home with both parents, they having different domiciles, should follow his mother's domicile. The Commissions mention that this choice was adopted initially because of the complexity and uncertainty which would have been brought about by alternatives such as habitual residence and closest connection.

2.56 Because of the comment the Commissions received, they re-examined the matter of domicile of dependency. The Commissions admitted that dependency has the advantage of certainty.[82] However, in order to avoid the necessity of a "tie-breaking" rule in cases where the parents' domiciles differ, and in order to retain the advantage of legal certainty the Commissions have now recommended that the fixed dependency rule be abandoned, that a new rule be introduced and that certain presumptions be introduced.

2.57 The test decided on by the Commissions is that of the country of closest connection.[83] This test has the advantage that it can be determined objectively with reference to the circumstances of each particular case. It further protects a child, who does not live with a parent, against a third party attempting to manipulate the child's domicile to his own advantage.

2.58 The Commissions were furthermore of the opinion that the underlying principle that if one knows the domicile of the relevant parent, then it is possible to determine the domicile of the child, should continue to be applied.[84] The appropriate approach in cases such as this is to combine

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81 England Report at 15.

82 Ibid.

83 Ibid at 16-17.

84 Ibid at 17.

the basic rule of closest connection with a rebuttable presumption with regard to the child's domicile. The Commissions consequently recommended 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.

2.59 Where the child has his home with a single parent and the parents are not domiciled in the same country the Commissions recommended that it 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.

2.60 In the "difficult case"[85] of the child who has his home with both parents, they having different domiciles, the Commissions were of the opinion that there is no real reason why a choice in favour of one parent or the other should be made in order to determine the child's domicile. The Commissions consequently recommended that the basic test of closest connection should be applied without any presumption in cases such as this.

2.61 Furthermore, as far as closest connection is concerned, the Commissions decided against[86] giving specific guidance as to how it should be determined - courts should be capable of assessing all the circumstances of the child in order to determine the country most closely connected to the child.

2.62 As far as "home" as a distinguishing factor is concerned, the Commissions mentioned that this concept clearly causes no problems in practice.[87] Nor is it expected that it would be a problem to indicate that a child has his home with his parents although there may be temporary

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85 Ibid.

86 Ibid at 18.

87 As it appears from the application of the Domicile and Matrimonial Proceedings Act, 1973.

separations even on a regular basis, e g where the child attends a boarding school, or where the parents are abroad in the course of their work.

2.63 With these amendments the English and Scottish Law Commissions attempted to obviate any problems[88] with regard to the domicile of an illegitimate child, a legitimate child whose father is dead, a child who has his home with his mother after his parents have separated and a foundling.[89] These proposals also do not discriminate against any of these children.

. New Zealand

2.64 Section 6 of the Domicile Act, 1976, which has taken effect "in place of all rules of law relating to the domicile of children"[90] provides that a child (i e an unmarried person under the age of 16 years) whose parents are living together has the domicile of his father.[91] If his parents are not living together and he has his home with his father he has his father's domicile and if he ceases to have his home with his father or if his father dies then he continues to have that domicile until he has his home with his mother.[92]

2.65 Subject to the provisions of section 6(4) a child whose parents are not living together follows the domicile of his mother or, if she dies, the domicile she had at her death.[93]

2.66 Just as is the case with the present proposals in the United Kingdom, one notices that the Domicile Act, 1976, does not distinguish

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88 Problems similar to those in the present South African law.

89 Cf England Working Paper at 36.

90 Section 6(1) of the Act.

91 Section 6(3) of the Act.

92 Section 6(4) of the Act.

93 Section 6(5) of the Act.

between legitimate and illegitimate children. As far as foundlings are concerned, section 6(6) of the Act provides that such a child's parents shall be deemed to be domiciled in the country in which he was found.

. Australia

2.67 Section 8 of the Domicile Act, 1982, provides that a person is capable of having an independent domicile if he has attained the age of 18 years or if he marries.

2.68 Section 9 of the Act, which makes provision for the determination of certain children's domicile, provides that where a child (i e an unmarried person who has not attained the age of 18 years) has his principal home with one of his parents and his parents are living separately or the other parent has died, the domicile of that child is that of the parent with whom he has his principal home or, if that parent dies, the domicile that that parent has at the time of death (section 9(1)).

2.69 In the case of an adopted child who has two adoptive parents his domicile is the domicile he would have if he had been born in wedlock to those parents. In the case of an adopted child with one adoptive parent the child's domicile is that of the parent and if the parent dies he retains that domicile (section 9(2)).

2.70 A child's domicile by virtue of section 9(1) ceases if the child has his principal home with his other parent, or if his parents resume or commence living together (section 9(3)).

2.71 In terms of section 9(4) a child who has his domicile by virtue of section 9(1) or 9(2) retains that domicile until he acquires an own domicile of choice.

2.72 In terms of section 4(2) of the Act parents of a child also includes unmarried parents. The above-mentioned provisions are therefore equally applicable to illegitimate children.

. The United States of America

2.73 As a rule a child follows his father's domicile. If the parents are divorced the child follows the domicile of that parent who has legal guardianship over him and if guardianship has not been instituted by law, he follows the domicile of the parent with whom he lives.[94]

2.74 An emancipated child can acquire an own domicile. Some of the states require the court's intervention in this regard, but most of the states merely require that a child, "having attained the years of discretion", should lead a life independent from that of his parents with their consent.[95]

2.75 As a rule an illegitimate child follows his mother's domicile. The child retains his mother's domicile if she marries someone other than the child's father.

2.76 As far as adopted children are concerned their domicile is determined in the same way as that of a natural child.[96]

. Provinces of Canada

2.77 British Columbia, Ontario and Manitoba and Saskatchewan: The Charter of Rights Amendments Act, 1985, of British Columbia has, inter alia, the result that no distinction is made between illegitimate and legitimate children. Because of the possibility that those provisions can create a domicile of dependency on the part of a child in relation to a father of whom the child has no knowledge and with whom he has no contact the Law Reform Commission of British Columbia recommended that provisions similar to those in section 69 of the Family Law Act, 1985, of Ontario also be adopted by British Columbia.[97] Section 69 provides as follows:

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94 Restatement at 88-89.

95 Ibid at 90.

96 Ibid at 91.

97 British Columbia Report at 25-26.

The domicile of a person who is a minor is,

(a) if the minor habitually resides with both parents and the parents have a common domicile, that domicile;

(b) if the minor habitually resides with one parent only, the parent's domicile;

(c) if the minor resides with another person who has lawful custody of him or her, that person's domicile; or

(d) if the minor's domicile cannot be determined under clause (a), (b), or (c), the jurisdiction with which the minor has the closest connection.

2.78 In 1982 the Law Reform Commission of Manitoba recommended that the domicile of a minor, i e a person under the age of 18, should be determined as follows:[98]

A minor's domicile -

(a) is that of his parents[99] where both parents have a common domicile;

(b) is that of the parent with whom he habitually resides;

(c) is that of the father where the domicile of the minor cannot be determined under (a) or (b); or

(d) is that of the mother where the domicile of the minor cannot be determined under (c).

2.79 The last-mentioned proposals are similar to those that were also recommended during 1982 by the Law Reform Commission of Saskatchewan.[1]

. The European Continent

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98 Manitoba Report at 14-15. In the Manitoba Annual Report at 23 it is indicated that the proposal has been embodied in legislation, i e the Domicile and Habitual Residence Act, 1983. It could, however, not be ascertained to what extent precisely the proposal has been followed.

99 "Parents" includes adoptive parents as well as parents who are not married to each other - Manitoba Report at 15.

1 Saskatchewan Report at 16.

2.80 As far as the European Continent is concerned a child as a rule follows the domicile of his parents if their domicile is the same, and that of his father if his parents have different domiciles. If his parents live apart he follows the domicile of the parent who has guardianship over him[2] or, as in the Netherlands, who has authority over him.[3]

2.81 It is, however, interesting to note that in West Germany parents who have separate domiciles may choose the child's domicile by agreement.[4] In Sweden on the other hand each person's domicile is determined independently, irrespective of his age.[5]

2.82 As far as illegitimate children are concerned, quite a number of European countries do not distinguish between the position of legitimate and illegitimate children[6] or confer upon the children the domicile of the person who exercises parental authority over them.

Conclusions and recommendations

2.83 It thus appears from the foregoing survey that problems in connection with the domicile of a child are to a large extent universal and that countries abroad have taken definite steps to eliminate these problems. These problems include the domicile of a child whose parents are divorced, the domicile of an illegitimate child, of a foundling, etc. As far as the comparative situation in South Africa is concerned, it is clear that our law is still of the old school.

2.84 In order to eliminate the current problems one should move away from the stereotyped domicile of dependency of a child and, in the light of

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2 European Committee at 71-73.

3 Melis at 13.

4 European Committee at 72.

5 Ibid at 73.

6 E g Germany, Norway, Sweden - European Committee at 74-76; the Netherlands - Melis at 13.

the underlying principle of this working paper, a domicile which relates to the actual place of residence should rather be ascribed to the child. This approach should eliminate the present "bewildering variety of possible situations"[7] to a large extent.

2.85 The Commission appreciates the fact that the present domicile of dependency has the advantage that a child's domicile can in most instances be ascertained with ease and certainty. This, however, also contains a disadvantage: If the parents are divorced and the mother has custody over the child could it still be said that the child has a domicile of dependency in relation to his father? Furthermore, should such a child's domicile change as frequently as does his father's?

2.86 The Commission is of the opinion that the English and Scottish Law Commissions, while moving away from the principle of dependency, have gone a long way towards establishing a functional alternative which would still have the result of clarity and legal certainty. Although at first glance the recommendations of the Commissions appear to be most liberal (not in the pejorative sense), their effect would not bring about any radical changes.

2.87 The advantage, however, is that if similar proposals are adopted here a child's domicile is far more likely to correspond to his actual place of residence than in the present situation; that the problem would be solved where the parents are divorced but the mother has custody of the child; that there would be more clarity about the domicile of a foundling and that, for purposes of domicile, a distinction would no longer be made because of a child's legitimate or illegitimate status.

2.88 It has been proposed above that a wife should be capable of acquiring a domicile of her own. The present recommendations with regard to children are of such a nature that even the (highly improbable) instance where parents live together but have different domiciles would be provided

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7 Kahn at 93; cf par 2.47 above.

for - the recommendations prevent a choice having to be made between the domiciles of the parents in such a case.

2.89 Although, in terms of section 20(2) of the Child Care Act 74 of 1983, an adopted child is for all purposes deemed in law to be the legitimate child of the adoptive parent, "as if he was born of that parent during the existence of a lawful marriage", the Commission is of the opinion that its recommendations will likewise remove any doubt that may exist about such a child's domicile.

2.90 With its recommendations the Commission wants to prevent a child born out of an extramarital relationship from obtaining his mother's domicile via the stigma of illegitimacy. The Commissions' recommendations do not discriminate between children on the grounds of their parents' marital status.

2.91 The fact that the object of the Commissions' proposal is that a child's domicile should be determined independently - without reference to another person - also has the advantage that the thorny question which arises in the case of surrogate motherhood is prevented. In other words, it would no longer be necessary to ask who or where the child's parent is; it would be possible to determine merely on the grounds of the surrounding circumstances which place or country the child is most closely connected with.

2.92 The Commission is similarly of the opinion that our courts in the (again, exceptional) case where a child's domicile is to be determined would easily make this finding of fact and that, apart from the proposed presumption, it would not be necessary to set particular guide-lines. Guide-lines would only tend to hamper the courts' capability to make a proper finding of fact.

2.93 The question of an emancipated child's domicile and the age at which a domicile of choice can be acquired is dealt with in the next chapter under the heading: The choice of a domicile.

2.94 In summing up the Commission wishes to recommend -

(i) that a child be domiciled at the place or in the country with which he is most closely connected;

(ii) that if a child has in the ordinary course of events his home with his parents or with one of them it be presumed, unless the contrary is shown, that that child's parental home is his domicile;

(iii) that, in order to establish certainty and to have the presumption operate as advantageously as possible, a reference to "parents" should also include adoptive parents and parents who are not married to each other.

Mentally ill persons

The South African law

2.95 As far as the domicile of mentally ill persons is concerned the courts apparently prefer to take the view that a mentally ill person retains the last domicile he had before he became incapacitated.[8] Another point of view on the other hand is that such a person should, because of reasons of expediency, rather follow the domicile of his guardian or curator[9] and if he does not have a guardian or curator, he should retain the domicile he had when he became mentally incapacitated.[10]

2.96 As regards the case of a minor there does not exactly appear to be authority. Textbook writers[11] are, however, of the opinion that a mentally ill minor should continue to follow the domicile of his father, his mother or his guardian, as the case may be. If a child reaches the age of

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8 Henning's Executor v The Master (1885) 3 SC 235; Ex parte Fletcher 1930 WLD 231 (obiter); Rifkin v Rifkin 1936 WLD 69.

9 Barnard et al at 41.

10 Boberg at 68; Van der Vyver & Joubert at 101.

11 Cf Forsyth at 125; Kahn at 98-99; Van der Vyver & Joubert at 101.

majority, Van der Vyver and Joubert[12] are of the opinion that the child retains the domicile he had at that stage. Forsyth[13] and Kahn[14] are, however, of the opinion that the child still follows the domicile of his natural guardian. It thus appears that there is not complete clarity about this matter either.

The position abroad

. The United Kingdom

2.97 The position here is that a mentally incapable major retains the domicile he had when he became incapacitated or, in the case of Scotland, the domicile he had when he reached the age of majority. In England, Wales and Northern Ireland a mentally incapable minor retains his domicile of dependency until he recovers from his incapacity.[15]

2.98 In their recent report[16] the English and Scottish Law Commissions pointed out the discrepancy that might arise if a child's domicile is determined according to the country with which he is most closely connected, and the present law with regard to mentally incapable persons: The domicile of a mentally disordered child will change as his connection with different countries changes, but as soon as he reaches the age on which he would normally be able to acquire a domicile by himself, his domicile would either become immutable as long as his incapacity lasts or he would, according to present law, acquire a domicile of dependency from his parents.

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12 Van der Vyver & Joubert at 101.

13 Forsyth at 125.

14 Kahn at 98.

15 England Working Paper at 63.

16 England Report at 30.

2.99 The Commissions on the other hand pointed out the similarities[17] between the situation of a child and that of a mentally incapable adult - both cannot for instance acquire an independent domicile and in certain instances there is not such a close relationship with a parent that it would be appropriate to determine their domiciles according to the domiciles of the parent. In both instances freezing the domiciles irrespective of changes in personal circumstances would be likely to lead to artificialities.

2.100 The Commissions consequently held[18] that the domicile of a mentally incapable person should be determined in the same way as that of a child, to wit with reference to the country with which he is most closely connected. In the result the domicile of a mentally incapable child would be determined according to the "closest connection rule" (subject to certain presumptions) and, as soon as he reaches the age on which he would normally be able to acquire an independent domicile, the same criterion of the country with which he is most closely connected would apply to him.

2.101 Regarding the case where a mentally incapable major recovers from his condition the Commissions recommended[19] that such a person should retain the domicile he had before his capacity was restored. (Thereafter he obviously can chose his own domicile.)

2.102 The Commissions also pointed out[20] the degree of built-in protection provided by the "closest connection rule" for a mentally incapable person against a third who seeks to manipulate such a person's domicile to his advantage. In such cases the courts would have little trouble in finding that a change of residence was brought about for ulterior purposes and that the change of residence did not sever the connection between the mentally incapable person and his erstwhile domicile.

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17 Ibid at 31.

18 Ibid.

19 Ibid.

20 Ibid at 32.

2.103 Interesting to note is the fact that in the draft legislation[21] of the Commissions they do not refer to a mentally ill person, but to "(a)n adult lacking the capacity to form the intention necessary for acquiring a domicile ...". The Commissions thus provided for cases where, for instance, a person is in an unconscious state for a long period of time.

. The United States of America

2.104 As a general rule a mentally ill person retains the domicile he had when he became incapacitated.[22] This domicile, however, can in certain instances be changed by another person, for example by the husband if his wife becomes mentally ill while they are still living together.[23]

2.105 If it is in the interests of the mentally ill person, his guardian may change his domicile with the permission of the court.

. Canada

2.106 The Law Reform Commission of Manitoba[24] has in its report on domicile merely codified the law regarding the domicile of a mentally incompetent person, to wit that a person born mentally ill retains the domicile of a dependent child and that a person who becomes mentally ill retains the domicile he had before his incapacity. The Commission, however, recommended that such a person's "committee"[25] should be able to change his domicile with the permission of the Supreme Court.[26]

Conclusions and recommendations

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21 Ibid at 52.

22 Am Jur 2d par 77.

23 Ibid par 80.

24 Manitoba Report at 35-36.

25 Similar to our curator.

26 Manitoba Report at 15-16 and 35-36.

2.107 The possibilities that a mentally ill person either retains the domicile he had when he became incapacitated or that he follows his guardian or curator's domicile were mentioned above.

2.108 Both possibilities have advantages as well as disadvantages. For example, "freezing" a mentally ill person's domicile prevents him from being prejudiced by a change of domicile by the guardian or curator. This possibility, however, has the result that the domicile of the propositus and his actual place of residence do not correspond. Forsyth[27] on the other hand is of the opinion that if the propositus follows the domicile of his guardian or curator it would be "harsh"[28] towards his dependants if they were to continue to follow the domicile of the father.

2.109 A further possibility is that the domicile of a mentally ill person should be determined according to the place with which he is most closely connected - the possibility now recommended by the English and Scottish Law Commissions.

2.110 The Commission is also of the opinion that the position of a mentally ill person is comparable to that of a child. Both are dependent on others for their care. Dependency, however, is not always a suitable criterion for determining domicile. For example, the mentally ill person and the person on which he is legally dependent might reside at the different places and might de facto have different domiciles. The domicile that is then legally ascribed to the mentally ill person would in this case be artificial and would not correspond to the reality.

2.111 In the same way it could lead to artificialities if the mentally ill person's domicile is frozen at the stage when he becomes incapacitated - his domicile and actual place of residence might not correspond at all.

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27 Forsyth at 125.

28 Ibid.

2.112 The Commission is of the opinion that in the present case it should also move away from the traditional viewpoint regarding the domicile of mentally ill persons and also wishes to follow the English and Scottish Law Reform Commissions in this regard. For the present it would appear that in this case too the "closest connection rule" would be a practical alternative for the domicile of a mentally ill person. It presents the possibility that such a domicile can be determined objectively, with reference to all the circumstances surrounding the mentally ill person. Furthermore, it is doubted whether this recommendation would really bring about radical changes to the present domicile of mentally ill persons. The advantage, however, is that to a large extent one would succeed in having the actual place of residence and domicile correspond continually. The Commission therefore tentatively recommends that the domicile of a mentally ill person be determined with reference to the place or country with which he is most closely connected.

2.113 It is not only mentally ill persons who are not capable of acquiring an own domicile, but also, for instance, persons who are in a protracted comatose state, and the present recommendation ought to cater for such cases too.

2.114 In the case where the propositus recovers from his condition the Commission is of the opinion that it would be no more than realistic for such a person to retain the domicile he had when he recovered.

Domicile of origin

The South African law

2.115 The importance of the domicile of origin is, according to Barnard et al[29] founded in the fact that a person's domicile of origin revives if he has abandoned his domicile of choice without acquiring a new domicile.

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29 Barnard et al at 37.

Boberg[30] also mentions that a domicile of origin serves a dual purpose: First it ensures that every person starts life with a domicile, which domicile continues until it is replaced by a domicile of dependency or choice, and, secondly, it fills the gap that arises if a person has abandoned his domicile without acquiring a new domicile of choice or dependency.

2.116 The English law doctrine of "revival of domicile of origin" was applied in this country in Ex parte Donelly[31] after the court considered it expedient not to deviate from the existing law of the British Empire. This was also endorsed by the Appellate Division in Hutchison's Executor v The Master.[32]

2.117 The doctrine of revival of domicile of origin presupposes that a person who has abandoned his domicile of choice is more closely attached to his country of origin than to his last domicile.[33] Forsyth[34] points out that this doctrine was established in the heyday of British imperialism when a need existed "to maintain all those far-flung Englishmen within the blanket of the common law". Kahn[35] mentions that the reason for the existence of the doctrine, namely not to be out of step with the rest of the British empire, does not exist any more. Consequently there is no reason why the principle should continue to be applied. Forsyth[36] concurs with this point of view and expresses the hope that the Appellate Division will settle the matter. Spiro[37] on the other hand is of the opinion that the doctrine does

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30 Boberg at 63.

31 1915 WLD 29.

32 1919 AD 71 at 74.

33 Cf Manitoba Report at 8.

34 Forsyth at 115. Cf also Kahn at 20.

35 Kahn at 21 and 22. See also Spiro in Conflict of laws at 64-77.

36 Forsyth at 117.

37 Spiro in Conflict of laws at 75.

not really form part of the South African law because of the lack of sufficient convincing authority in this regard.

2.118 Be that as it may, the doctrine is severely criticised[38] and unanimity exists between textbook writers that if the doctrine forms part of our law it should be abolished.

2.119 For the present, however, it appears that the courts prefer the doctrine;[39] as a matter of fact, not so long ago the Supreme Court[40] accepted for purposes of a finding that the doctrine forms part of our law.

The position abroad

. The United Kingdom

2.120 In their investigation the English and Scottish Law Commissions also pointed out the problems surrounding the doctrine of the revival of domicile of origin. The Commissions are of the opinion that it leads to artificialities and that a "continuance rule" - namely that a person's last domicile continues until he acquires a new domicile - should rather be used.[41]

2.121 According to the Commissions the latter rule facilitates the determination of a person's domicile, it is at present widely accepted, it ensures that a person is at least domiciled in a country in which he has at

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38 Cf also Van der Vyver & Joubert at 111-113.

39 Ibid at 112; cf the dicta in Mason v Mason (1885) 4 EDC 330 at 337 and 347; Lauchlin v Lauchlin (1903) 24 NLR 230 at 239; Forster v Forster & Wheeling (1905) 26 NLR 124 at 125; Gunn v Gunn (1910) TS 423 at 427; Ex parte Sandberg (1912) TPD 805 at 809 and Hutchison's Executor v The Master, Natal (1919) AD 71 at 74.

40 Massey v Massey (1968) 2 SA 199 at 204D.

41 England Working Paper at 81; England Report at 29.

one time lived and it is simply a less complex concept than is the doctrine of revival of domicile.[42]

. New Zealand

2.122 The doctrine of revival of domicile of origin is specifically abolished in section 11 of the Domicile Act, 1976. This section furthermore provides that a person's last domicile continues until a new domicile is acquired.

. Australia

2.123 The Australian Domicile Act, 1982, has provisions[43] similar to those in the New Zealand Domicile Act, 1976.

. The United States of America

2.124 In Restatement of the Law[44] it is mentioned that the doctrine of revival of domicile does not form part of the American law. Consequently a person retains his last domicile until he acquires a new domicile of choice.[45]

. Manitoba

2.125 It has been similarly recommended that a domicile should continue until a new one has been acquired and that the doctrine of revival of domicile of origin be abolished.[46]

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42 England Working Paper at 60.

43 Sections 7 and 12 of the Domicile Act, 1982.

44 Restatement par 19.

45 Ibid. Am Jur 2d par 35.

46 Manitoba Report at 34.

Conclusions and recommendations

2.126 It was pointed out above that the foundation for the existence of the doctrine of revival of domicile of origin does not exist any more. Although the doctrine naturally had as its purpose legal certainty, viz to ensure that every person has a domicile, it has the result that a person may be saddled with a domicile at a place that he has never even visited.

2.127 The requirement of certainty can be satisfied if it is provided that a person's domicile continues until it is replaced by another domicile. This recommendation at least takes account of some place of residence of the person concerned, in contrast with what may sometimes happen in the case of the doctrine in question.

2.128 In view of the above the Commission recommends that -

- notwithstanding provisions to the contrary in any other law or the common law, no person's domicile of origin should revive;

- no person should lose his domicile unless he has acquired another domicile by choice or by operation of law.

3. VOLUNTARILY CHOSEN DOMICILE

The choice of a domicile

The South African law

3.1 Domicile of choice can be established by any person except a minor,[1] a married woman or a mentally ill person.[2] A person acquires his domicile of choice upon his actual and lawful settling in a place (the factum requirement) with the intention of residing there permanently[3] or for the foreseeable future[4] (the animus requirement). Both requirements must be present at the same time in order to establish a domicile of choice, but need not arise simultaneously.[5]

3.2 With regard to the factum requirement no minimum period of residence is required; a person acquires a domicile of choice as long as he is physically and lawfully[6] present in that place with the necessary intention of settling there.

3.3 The animus requirement has often been criticized by jurists because of the different contents ascribed to it.

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1 An emancipated minor, according to certain authors, may in principle establish a domicile: cf Kahn at 84; Barnard et al at 41. Contra: Spiro at 134.

2 Cf Van der Vyver & Joubert at 101 and the authority quoted therein.

3 Barnard et al at 37.

4 Van der Vyver & Joubert at 101.

5 Ley v Ley's Executors 1951 3 SA 186 (A).

6 Kahn at 39.

3.4 Pollak stated in 1933[7] that animus manendi may bear one of the following interpretations:

(i) An intention to reside in the country for a definite period ...

(ii) An intention to reside in the country until a definite purpose is achieved ...

(iii) An intention to reside in the country for an indefinite period ...

(iv) An intention to reside forever.

3.5 In Johnson v Johnson[8] the Appellate Division referred[9] with approval to the author Westlake, where the latter states that "... the intention necessary for acquiring a domicile of choice excludes all contemplation of any event on the occurence of which the residence would cease". The test, however, was too strict - so much so that its consistent application would eliminate the establishment of a domicile of choice.[10] In Ley v Ley's Executors[11] the Appellate Division again considered the test and, regarding the words "excludes all contemplation", held as follows:[12]

> As I understand the expression, it means that if the state of mind of the de cujus is something like this, "I may settle here permanently, and anyhow I'll stay for a time; but perhaps I'll move to another country" the intention required to establish a domicile is not present. But if his state of mind is like this, "I shall settle here", that is enough, even though it is not proved that if he had been asked, "Will you never move elsewhere?" he might not have said something like, "Well, never is a long day. Who knows? I might move if I change my mind or if circumstances were to change". Any doubt actually present to his mind as to whether he will move or not will according to Westlake's statement exclude the intention to settle permanently, but the possibility that, if the idea of a move in the future had been suggested to him, he might not at once have scouted it does not amount to contemplation of an event on which the residence would

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7 Pollak in 1933 SALJ at 465.

8 1931 AD 391.

9 Ibid at 398.

10 Barnard et al at 38.

11 1951 3 SA 186A.

12 Ibid at 195A-D.

cease. It is only the former that has to be disproved by the person alleging a change of domicile.

3.6 According to the judgment uncertainty as to whether a person wishes to settle somewhere will exclude the required animus. Should a person, however, have the intention of settling permanently, but not exclude the possibility that he may change his mind or that circumstances may compel him to move, the animus requirement is none the less complied with.[13] Through this test an attempt was made to escape from the inflexible approach in the Johnson decision.

3.7 The present question reappeared before the Appellate Division in Eilon v Eilon.[14] In the majority judgment, acting judge of appeal Potgieter held that a person dismissed the onus of proving the existence of domicile of choice as soon as physical presence in the place concerned has been proved and further, if it has been proved that the person concerned "had ... a fixed and deliberate intention to abandon his previous domicile, and to settle permanently in the country of choice".[15] The court further held as follows:[16]

> A contemplation of any certain or foreseeable future event on the occurrence of which residence in that country would cease, excludes such an intention. If he entertains any doubt as to whether he will remain or not, intention to settle permanently is likewise excluded.

3.8 In a minority judgment judge of appeal Williamson states, among others, that the question ought to be whether the appellant (the propositus) has shown, on a preponderance of probabilities, that his then present intention was to reside permanently in the country concerned (South Africa) in the sense that he had no intention of restricting the duration of his residence:[17]

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13 Barnard et al at 39.

14 1965 1 SA 703 (A).

15 Ibid at 721A.

16 Ibid.

17 Ibid at 709B-C.

> The inquiry does not involve, in my view, a scrupulous and solicitous investigation as to whether perhaps in the future he might not in certain circumstances decide to remove his permanent home to Israel.

3.9 According to Forsyth[18] the above-mentioned dictum in the majority decision does not yet give complete clarity in respect of the acquisition of domicile of choice and it is "either exceptionally strong authority for the strong test or perhaps it is simply perplex".

3.10 However that may be, it appears as if the animus requirement at present has the following contents: The propositus must have the intention of settling at a place, either permanently or for the foreseeable future, and not temporarily. If his realization is dependant upon unforeseen circumstances which may cause him to move, his animus is not excluded, but if the circumstance is certain or foreseeable, the person does not have the necessary intention.[19]

3.11 The question whether a person has acquired a domicile of choice goes hand in hand with the question whether the propositus has abandoned his previous domicile.

3.12 In this regard Forsyth[20] and Kahn[21] particularly refer to what is called the "tenacity of a domicile of origin". The authors indicate that, notwithstanding the fact that the criterion of proof in civil cases is that of a preponderance of probabilities,[22] it appears as if a higher requirement is

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18 Forsyth at 106.

19 Barnard et al at 39; Kahn at 49-51; Van der Vyver & Joubert at 104.

20 Forsyth at 117-119.

21 Kahn at 26-35.

22 Cf in this regard Ley v Ley's Executors 1951 3 SA 186 (A).

set in order to prove the abandonment of a domicile of origin than is the case with a domicile of choice.[23]

3.13 Forsyth[24] is of the opinion that the reason for the tenacity of this domicile is similar to that which applies to the doctrine of revival of a domicile of origin: "(F)ar-flung Englishmen in different parts expected the blanket of the common law to be flung around them, notwithstanding their long residence away from home."

3.14 In Ley v Ley's Executors[25] it was decided that if a higher requirement were to be set in respect of the proof that a domicile of choice was acquired, this would be wrong. Kahn[26] opined in 1951 that, although this decision concerned the criterion of proof in respect of domicile of choice, "the decision must equally be applied to the more usual issue whether it had been proved that a domicile of origin had been abandoned". F J de Jager[27] repeated this point of view in 1973.

3.15 In 1972 Kahn[28] opined that the impression that the South African courts shared the view of the English and Scottish courts in respect of the above-mentioned tenacity of the loss of a domicile of origin, still existed. As regards the loss of a "well settled domicile of choice", Kahn [29] likewise states that "... there is a similar reluctance to find abandonment is

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23 Boberg (at 94) states explicitly that "a domicile of origin is more tenacious: in other words, it is more difficult to prove that a person has abandoned his domicile of origin than to prove that he has abondened a domicile of choice".

24 Forsyth at 118.

25 1951 3 SA 186 (A).

26 Kahn in 1951 SALJ at 360.

27 De Jager at 44.

28 Kahn at 27.

29 Kahn at 30-31 and 36. Cf Eilon v Eilon 1965 1 SA 703 (A).

shown". Forsyth[30] indicates that the social circumstances which gave rise to the "doctrine of tenaciousness of the domicile of origin" have long since passed and that there is almost no merit in retaining it. He expresses the wish that the Appellate Division will place the domicile on equal footing with domicile of dependency and of choice. This wish has not yet been fulfilled.

The position abroad

3.16 Problems experienced with domicile all over the world, and especially in the common law countries, have led, during the past decades, to drastic reform. Law commissions and legislators recognized the existence of problems, particularly in relation to the subjective element of the establishment of a domicile. A tendency is consequently found whereby an attempt is made, on the one hand, to emphasize objective facts which indicate[31] a "substantial and durable connection between a person and a given country", and on the other hand to, among other things, create presumptions which will largely countermine problems in respect of the proof of the required intention.

. The United Kingdom

3.17 The fundamental principles relating to domicile[32] in England, Scotland, Ireland and Wales are basically the same as in South Africa. Therefore, problems appearing in South Africa likewise appear in the United Kingdom.

3.18 As point of departure it can be mentioned that section 3 of the Domicile and Matrimonial Proceedings Act, 1973, determines that any person who has reached the age of 16 years may establish a domicile himself. This provision applies to England, Wales and Northern Ireland. The English and

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30 Forsyth at 119.

31 IECL at 111.

32 Inter alia, the definition of domicile of choice, the doctrine of revival of domicile of origin.

Scottish Law Commissions have now recommended[33] that this age should also apply to Scotland.[34]

3.19 As regards the establishment of a domicile of choice, the English and Scottish Law Commissions judged that the requirement that a person should have the intention to settle permanently in a country is too strict.[35] Likewise, the smallest grain of doubt that may exist in a person's mind is excluded by the requirement that such a person should have "a fixed and settled purpose" - "a determination" - "a final and deliberate intention,"[36] where the abandonment of a domicile of origin and the establishment of a domicile of choice is concerned. The Commissions accordingly recommend that a person, apart from a factual presence,[37] should have "an intention to settle in a country for an indefinite period".[38]

3.20 In their initial Consultation Document the Commissions proposed that the intention requirement should be one "to make a home in a country indefinitely" and that the proof of this should be supplemented by a rebuttable presumption that "a person should be presumed to intend to make his home indefinitely in a country in which he has been habitually resident for a continuous period of seven years or more since reaching the age of 16".[39]

3.21 The idea was that the presumption should be an aid to, amongst others, the courts and legal advisers in determining a person's domicile.

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33 England Report at 20-21.

34 Previously, the age was 12 years in respect of girls and 14 years in respect of boys.

35 England Working Paper at 52; England Report at 25.

36 Winans v Attorney-General (1904) AC 287, 291-2 as quoted in England Working Paper at 49.

37 England Report at 24.

38 Ibid at 26.

39 England Working Paper at 84; England Report at 26-27.

Such a presumption would exclude the necessity of each time undertaking an investigation into a person's past in order to determine his intention at a specific moment.[40] This proposition, however, triggered severe criticism. Some commentators judged that, in principle, it is wrong to determine a person's domicile by using a presumption, as the onus should always rest on the person who alleges a change of domicile.[41] Others voiced the fear that the proposed presumption may lead to a "negative presumption", namely that a new domicile is not established if the residence of the person concerned was less than seven years. More important, however, was the criticism that the presumption could lead to a wrong result, in other words a different result to what the case would be in the absence of a presumption. On the basis of the above-mentioned points of criticism, as well as other objections that were raised, the Commissions have now decided to abandon the presumption.

3.22 Mention was made above, in respect of the South African law, of the tenacity of a domicile of origin and of the fact that it appears as if a higher criterion of proof is required in order to indicate that this domicile has been abandoned in favour of another. This aspect has its roots in the English law and the Law Commissions have now also given attention to it. In this regard the Commissions remarked as follows:[42]

> It is said that the the necessary intention in such a case must be shown with "perfect clearness and satisfaction" to the court, or "beyond a mere balance of probabilities", 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.

3.23 The Commissions could find no grounds for the existence of the requirement and have now recommended that the normal civil criterion of

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40 England Report at 27.

41 Ibid.

42 England Report at 23 and the authority quoted therein.

proof, on a preponderance of probabilities, should apply to all disputes concerning domicile.[43]

. New Zealand

3.24 Section 7 of the New Zealand Domicile Act, 1976, provides that any sane person may establish an independent domicile upon attaining the age of 16 years or as soon as he marries.

3.25 Regarding the establishment of a new domicile of choice, section 9 of the Act provides that a person acquires the domicile of that country if he finds himself in the country[44] and he has the intention of residing there indefinitely.

3.26 The Act also provides that a person who ordinarily resides in a union and who has the intention of residing there indefinitely, but does not yet have the intention of residing in a specific country of that union, is deemed to have the intention of indefinitely residing in a country of the union if he ordinarily resides there (section 10(a)).

3.27 As regards the criterion of proof that is applicable when it is alleged that a domicile of origin has been abandoned and that a domicile of choice has been established, section 12 of the Act determines that the same criterion that applies to the proof of abandonment of a domicile of choice and the acquisition of a domicile of choice is sufficient for the proof of a new domicile of choice.

. Australia

3.28 Section 8 of the Domicile Act, 1982, determines that any sane person may independently establish a domicile when he is 18 years old or married.

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43 Ibid at 24 and 54.

44 "... if ... he is in that country".

3.29 As in the case of New Zealand the Act determines that the intention that a person should have in order to establish a domicile of choice is the intention to make his home indefinitely in that country.

. The United States

3.30 The establishment of a domicile of choice in the USA is characterized by the employment of a flexible intention requirement. Simply stated, a person should have the intention of residing permanently or indefinitely.[45] In American Jurisprudence[46] it is put as follows:

> But it need not be an intention to remain for all time; it is sufficient if the intention is to remain for an indefinite period. There must be a present intention to make a home unless or until an unforeseen or uncertain future event occurs which will induce one to seek a domicil elsewhere. In other words there must be an absence of an intent to reside in some other place.

In fact, even if a person should have the intention of returning at some indefinite future time to his previous place of domicile, this does not prevent the establishment or retention of a domicile.[47]

. Canada: Manitoba

3.31 In its draft Domicile Act the Law Reform Commission of Manitoba proposed that any person who has reached the age of 18 years should acquire a domicile in a country if his principal home is in that country and he has the intention of indefinitely residing there.[48]

3.32 In order to eliminate problems of proof with the intention requirement, the Commission also recommended that a presumption be

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45 In Restatement par 18 the requirement is given that a person should have the intention to make that place his home for the time being.

46 Am Jur 2d par 25.

47 So called "floating intention" Am Jur 2d par 27.

48 Manitoba Report at 34.

created that a person has the intention to indefinitely reside in a country where his principal home is situated.[49]

. The Continent of Europe

3.33 In Europe, much more objective factors are employed in order to determine where a person is ordinarily resident, or where he has his domicile or his home.

3.34 In West Germany it was done by replacing the test of domicile by that of a person's registered habitual residence.[50]

3.35 In Denmark an objective approach is likewise followed. Instead of enquiring what a person's intention is, the question "... as to what may normally be expected of persons in the same position as the person in question" is asked.[51]

3.36 In Belgium a person's intention to settle somewhere may in theory be proved by an express declaration in this regard to the local authority of the place where the person concerned settles himself.[52] A person's intention is nevertheless also deduced from the particular circumstances.

3.37 In Belgium a resident acquires various domiciles for various purposes. A person's public law domicile, for example for purposes of the franchise, is there where he has his "gewone verblijfplaats" or "résidence habituelle" for six months.[53] In respect of civil domicile, section 102 of the Civil Code determines that a Belgian citizen's domicile, for purposes of exercising his civil rights is there where he has his "hoofdverblijf" or

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49 Ibid 11 and 34.

50 IECL at 111.

51 Gammeltoft-Hansen et al at 337.

52 European Committee at 54.

53 Ibid.

"établissement principal". A person's principal residence is there where he has his home and the centre of his interests and affections and generally corresponds with his habitual residence.

3.38 A person may change his public law domicile, and specifically his electoral domicile, by transferring his habitual residence to another place at least six months prior to the revision of the voters' list. As far as his civil domicile is concerned, section 103 of the Civil Code determines that a person changes that domicile by having his actual residence at another place, "combined with the intention to set up his establishment there".[54]

3.39 In the Swiss law, too, the requirements of domicile have an objective character: Domicile is that place where a person has his interests and the focal point of his life, and his intention is confirmed by the facts.[55]

3.40 As far as the Italian law is concerned, domicile is, as soon as a choice in respect thereof has been made, an objective situation which is represented by the place where a person has the centre of his business affairs and interests.

3.41 In the Dutch law a person's domicile ("woonplaats") is there where he has his home ("woonstede") and if a woonstede is absent, his woonplaats is there where he has his actual residence.[56]

3.42 In terms of section 11(2) of the Dutch Civil Code, Book 1, Title 3, a person is presumed to have transferred his woonstede when he notifies the local authority thereof in the prescribed form.[57]

Conclusions and recommendations

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54 Ibid at 55.

55 Dessemontet & Ansay at 55.

56 Melis at 12.

57 Ibid.

3.43 It appears from the above that our law engages the factum requirement in respect of domicile of choice without problems. Residence does not have the technical meaning ascribed thereto in other branches of the law:[58] "Residence here simply means lawful physical presence."[59] It could therefore be of short duration and one could say that mere presence is sufficient to comply with the factum requirement.[60] The position with the animus requirement is different, however, since there is no complete clarity in respect of the contents that should be ascribed to this requirement.

3.44 The Commission believes that the third meaning which Pollak ascribes to the requirement,[61] namely the intention to reside in a country for an indefinite period, is sufficient to comply with the animus requirement. This meaning clothes the animus requirement with flexibility and makes it clear that less than an intention to settle permanently in a country, is required.

3.45 It was mentioned above that the English and Scottish Law Commissions likewise recommended that animus manendi should bear the meaning of residence for an indefinite period and that it is already prescribed as such in, for example, New Zealand and Australian legislation.

. The proof of domicile

3.46 The Commission realises that the above-mentioned proposals, if accepted, would not yet completely alleviate the onus where a change of a well-established domicile is concerned.[62] It would, for example, still be possible for long and expensive litigation to be conducted in order to reach

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58 Kahn at 39.

59 Forsyth at 102.

60 Cf England Report at 24.

61 Pollak in 1933 SALJ at 465; see par 3.4 above.

62 Cf also England Working Paper at 53-57.

a conclusion in respect of the deceased's intentions before his estate can be finalized.

3.47 The Commission does not, however, feel that it would be appropriate in this case to ascribe a domicile to a person by means of a presumption - the objections to this, which were mentioned above in the case of the United Kingdom, speak for themselves.

3.48 It seems, however, that a higher requirement is set as far as proof of abandonment of a domicile of origin and the abandonment of a well-established domicile of choice are concerned. If there is, in fact, any question of a higher standard of proof, it is not clear why it should be required in such a case. In order to clarify the position, the Commission wishes to propose that an explicit provision be established that a person's domicile should be determined on a balance of probabilities. The Commission realises that such a provision may possibly be interpreted as having been inserted as a result of excessive carefulness, and that such a provision does not in reality alter the present law. The Commission nevertheless feels that the possibility exists that so much evidential material may be required where, say, a well-established domicile of choice is concerned, that the criterion of proof required may in the end almost be one of beyond reasonable doubt. Comment specifically as regards the desirability of the statutory regulation of this matter will be welcomed.

- The age at which a domicile of choice may be established

3.49 Earlier in this working paper reference was made to the age at which persons may establish a domicile of choice. In England, the age at which a person may establish an independent domicile was reduced from the age of majority, 18, to 16; in New Zealand from the age of majority, 20, to 16; and in Australia from the age of majority, 21, to 18 years.[63]

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63 This information was obtained from comment submitted by Prof Ellison Kahn to the Commission; cf sec 3 of the Domicile and Matrimonial Proceedings Act, 1973 (England); sec 7 of the Domicile Act, 1976 (New Zealand); and sec 8 of the Domicile Act, 1982 (Australia).

3.50 In the Commission's investigation regarding the advancement of the age of majority,[64] the Commission decided against the advancement of the age of majority of 21 years. An aspect which was not addressed in particular, however, was the establishment of domicile by a minor.

3.51 Without detracting from the previous decision of the Commission, the Commission none the less believes that it would be expedient to enable a minor to establish an independent domicile at a certain age. Many minors complete their school education round about their eighteenth year and leave their homes in order to take up employment; to undergo further studies; to do national service; to marry; to establish a home etc. For this very reason the law should ascribe that domicile to a person which, as far as possible, corresponds to his actual home, the place to which he is the most closely connected.

3.52 Earlier in this working paper it was also mentioned that the question whether a minor who is tacitly emancipated may establish a domicile of his choice still remains unanswered.[65] As far as a person is concerned who has already reached the age of 18 years, the Supreme Court may, in terms of section 2 of the Age of Majority Act 57 of 1972, declare such a person to be a major, and in terms of section 7 of the Act he is deemed, for all purposes, to have attained the age of majority. Such a person will therefore naturally be able to establish an independent domicile and the question is consequently not applicable in this case.[66]

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64 Law Commission Report: Age of Majority.

65 Paragraphs 2.50 and 2.51 above. This question could possibly also be asked in the case of a person to whom venia aetatis has been granted and in the case where "complete discharge from parental authority" has been allowed. It appears, however, as if venia aetatis has already fallen into desuetude, otherwise the operation of section 2 of the Age of Majority Act 57 of 1972, should have the result. Regarding discharge from guardianship, the question whether it has fallen into desuetude or whether it has been repealed by the referred to Act is left open in Grand Prix Motors v Swart 1976 3 SA 221 (C); 225 D-E. Van der Vyver & Joubert at 138 are of the opinion that both methods have been repealed by the referred to Act. Cf also Law Commission Report: Age of Majority at 31-33.

66 Spiro at 248.

3.53 In order to harmonize reality and the law and in order to establish the necessary legal certainty, the Commission wishes to recommend tentatively that any mentally competent person over the age of 18 years should be competent to establish a domicile of his choice, provided of course that the requirements of residence and intention have been complied with.

DOMICILE OF CHOICE OF PERSONS WHOSE CHOICE IS LIMITED[67]

3.54 The following remark was made in Ex parte Quintrell:[68]

> In order to create a new domicile you must not only have residence but you must have intention to remain permanently and indefinitely and you must also have the power to carry out that intention. (Own emphasis)

3.55 In the case of prisoners, members of armed forces, diplomatic officials and other persons who are employed at a particular place by order of their employers, prohibited immigrants, deportees and persons who are illegally in the country of their choice, the question arises whether they are in fact capable of exercising a free choice of domicile.[69]

. Prisoners

3.56 The traditional point of view is that prisoners cannot exercise a free choice of domicile and that they therefore retain the domicile they had immediately before their imprisonment.[70] On the other hand it has been accepted on occasion that a person who is imprisoned for life - and probably also a person who serves a long term of imprisonment - neces-

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67 Cf Kahn at 52 et seq.

68 1922 TPD 14 at 15.

69 Cf Barnard et al at 41-42; Forsyth at 107-113; Kahn at 52-72; Van der Vyver & Joubert at 106-110.

70 Kahn at 53; Pollak in 1934 SALJ at 17.

sarily acquires the domicile of the place where the prison is situated.[71] This decision is, however, criticized on grounds of principle:[72] the fact that a person serves a long term of imprisonment does not prevent him from deciding to settle permanently at that place. Thus, as soon as he has made the decision to settle legally and permanently at that place after he has been set free, he acquires a domicile of that place.[73]

. Soldiers

3.57 In view of the fact that soldiers are by order stationed at certain places and are therefore not in a position to choose their residence voluntarily it was initially said that a soldier cannot acquire a domicile of choice while he remains a member of the armed forces and that he retains the domicile he had when he joined the armed forces.[74]

3.58 In Baker v Baker[75] the Appellate Division, however, decided that a soldier can in fact acquire a domicile of choice in a country where he is not stationed: "During his period of leave he was a free agent entitled to select and establish his home wherever in the world he pleased, outside the limits of enemy territory."[76]

3.59 There is however not consensus about the question whether a soldier can acquire a domicile at the place where he is in fact stationed,[77]

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71 Nefler v Nefler 1906 ORC 7.

72 Cf Forsyth at 108; Kahn at 53-54; Van der Vyver & Joubert at 106.

73 Ibid fn 71 supra.

74 Pollak in 1934 SALJ at 17.

75 1945 AD 708.

76 Ibid at 715.

77 Affirmative: Inter alia Paterson v Paterson 1946 EDL 67, Nicol v Nicol 1948 2 SA 613 (C), Ex parte Glass & uxor 1948 4 SA 379 (W), Ex parte Readings 1958 4 SA 432 (C). Negative: Inter alia Ex parte Quintrell 1922 TPD 14, Frankenberg v Frankenberg 1943 EDL 147, McMillan v McMillan 1943 TPD 345.

but there are dicta in the Baker case[78] which indicate that if the Appellate Division were to consider the issue the court might come to the conclusion that a soldier can acquire a domicile in the country in which he is stationed.[79]

. Diplomats and officials

3.60 In a few decisions the difference which purportedly exists between soldiers and diplomats, viz that diplomats are less subjected to being transferred than soldiers[80] and that diplomats can therefore acquire a domicile of choice, was pointed out. In Naville v Naville[81] the court accordingly ruled that a diplomat can acquire a domicile of choice at the place where he is stationed.

3.61 By analogy with diplomats, other public servants and employees who are subject to being transferred should also be capable of acquiring a domicile of choice.[82] There are differences of opinion about this too.[83] Textbook writers are, however, ad idem that decisions which purport that an employee who is subject to being transferred cannot acquire a voluntarily chosen domicile at the place to which he has been transferred should be regarded as obsolete[84] and even "manifestly wrong".[85]

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78 1945 AD 708 at 712-715.

79 Kahn at 55.

80 Ex parte Quintrell 1922 TPD 14; Fozard v Fozard 1924 CPD 62; McMillan v McMillan 1943 TPD 345.

81 1957 1 SA 280 (C).

82 Forsyth at 110; Kahn at 62; Van der Vyver & Joubert at 109.

83 In favour: Ex parte Quintrell 1922 TPD 14 at 16, Fozard v Fozard 1924 CPD 62 at 63, McMillan v McMillan 1943 TPD 345 at 349-350. Against: Bothma v Bothma 1940 1 PH B9 (O), Carvalho v Carvalho 1936 SR 219.

84 Van der Vyver & Joubert at 109.

85 Kahn at 62.

. Deportees and persons who find themselves illegally in the country of their choice

3.62 Animus manendi or animus revertendi should be of such a nature that it could be carried out legally. In order to acquire a domicile of choice the residence of a propositus must therefore be lawful.[86]

3.63 Although there is authority to the contrary,[87] the following appears to be the position: If a person is deported while having the intention to return, or if he finds himself illegally in a country with the intention to remain permanently, he cannot lawfully acquire a domicile of choice in that particular country.[88]

Conclusion

3.64 It appears as if a person, whose capacity to choose a domicile is restricted should nevertheless be able to exercise a choice within the limitations of his capacity. For example, nothing should prevent a long term prisoner, while being imprisoned at a particular place, from forming the intention to remain indefinitely in that town, district or country. The same applies to a soldier, diplomat or other person who is not present at a particular place of his own choice. It is obvious that settlement and residence at a particular place should be legal in order to acquire a domicile at that place.

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86 Pollak in 1934 SALJ at 20.

87 Olwage v Buntman 1910 WLD 44; Hitchcox v Hitchcox 1930 2 PH B33 (C); Taylor v Taylor 1931 CPD 98.

88 Ex parte MacLeod 1946 CPD 312; Smith v Smith 1962 3 SA 930 (FC); Drakensbergpers v Sharpe 1963 4 SA 615 (N); Kahn at 62-70.

4. TRANSITIONAL PROVISIONS

. Retrospectivity

4.1 In matters pertaining to domicile the moment at which a person had a specific domicile may be of major importance. That moment could possibly be before the commencement of the proposed provisions. For instance, in the case of the validity of a will, the validity of that will is, inter alia, tested against the testator's lex domicilii at the time of the execution of the will.[1] Should the proposed provisions now have retrospective effect, with the result that the domicile of the propositus will be determined according to the "new" provisions?

4.2 The Commission is of the opinion that the proposed provisions should not have retrospective effect, since many practical problems could result from retrospective effect. The English and Scottish Law Commissions put it as follows:[2]

> Were (the new rules) to do so they might re-open past transactions in areas such as succession, marriage, divorce, legitimacy ... It could, for example, render invalid marriages valid at the time they were contracted under the unamended law.

* The Commission thus wishes to recommend that no provision of the proposed Bill should affect any right or capacity which has been acquired or any legal act which has been performed or any liability which has been incurred on account of the domicile which someone had immediately before the commencement of the Bill.

* The Commission further recommends that any proceedings which, at the commencement of the proposed Bill, are pending in a court of law should be finalised as if the Bill has not been passed.

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1 Cf section 3bis (1)(a)(ii) of the Wills Act 7 of 1953.

2 England Working Paper at 74.

. Renvoi

4.3 The renvoi doctrine can for instance be raised[3] where the law of the forum and the lex causae[4] not only differ as far as the substantive law is concerned but in particular have different connecting factors which determine the choice of law in a particular case.[5] The problem can be illustrated as follows:[6]

> A, a South African citizen, acquires a domicile in West Germany where he dies intestate. A's estate consists of a number of movables and it must now be determined how the property should devolve. According to South African law movables devolve according to the law of the place where the testator was domiciled at the time of his death, in other words, West Germany. German law, however, provides that the property should devolve according to the law of the place where the person was nationalised, in other words, South Africa.

4.4 In the case of renvoi the question is whether the South African court, when it found that the German law was applicable, meant only the West German internal law to the exclusion of the choice of law rules, which rules bring about renvoi, and whether the South African court meant the whole of the West German law, including the choice of law rules.[7]

4.5 If South African law has in view only the internal law to the exclusion of the choice of law rules, the question of renvoi does not arise. In its working paper on the review of the formalities of a will[8] the Commission has already indicated that it would be desirable if renvoi were

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3 Cf Kahn in Law of succession at 624 et seq for instances where renvoi can be raised.

4 The system of law governing the particular problem.

5 Manitoba Report at 32.

6 Cf Forsyth at 64.

7 The matter could be taken further: Does the remittal happen with reference to the internal South African law or with reference to the internal law and choice of law rules? Cf, inter alia, Kahn in Law of succession at 625 for a discussion of the so-called "partial" and "total" renvoi.

8 Law Commission Working Paper: Formalities of a will at 123.

excluded with regard to wills. In the present case the Commission also deems it desirable.

* The Commission thus provisionally recommends that if a court, in the application of the choice of law rules, finds that a question before the court should be determined according to the law of a foreign country because of someone's domicile in that country, the court should then decide that question according to the relevant law of that country, even if a court of that country in the application of the choice of law rules would have found the South African law to be applicable.

5. ALTERNATIVE CONNECTING FACTORS

INTRODUCTION

5.1 A question which may also be aptly dealt with in this working paper is whether there is another connecting factor other than domicile that might be used in order to eliminate any defects that domicile exhibits at present. In other words, is there not an alternative to domicile? In what follows, concepts such as "nationality" and "habitual residence" will be looked into in more detail as possible alternatives.

. Nationality

5.2 During the previous century nationality, in the sense that it indicates the lex patriae of a citizen, replaced domicile to a large extent as a connecting factor in certain European countries. While domicile indicates a person's civil status and the law with regard to the exercise of his rights and the performance of his duties, nationality, on the other hand, represents a person's political status in a certain country by virtue of which he owes a certain allegiance to the country.[1]

5.3 The following are put forward as some of the advantages of nationality as a connecting factor:

(i) Since in most instances there is a close connection between the propositus and the private law order of a state of which he is a citizen, nationality is the best indicating factor of the legal order which applies to him.[2]

(ii) Nationality is more suitable for universal acceptance in the international private law because it does not have as many

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1 Cheshire & North at 183.

2 De Jager at 207.

shades as domicile and is not as susceptible to subjective interpretation.[3]

(iii) Nationality is a simpler concept and is more easily understood than domicile.[4]

(iv) Nationality is more easily ascertained and proved than domicile.[5]

(v) In the case of nationality, it usually involves consent on the part of the state and the prospective citizen, with the result that the connection created and its concomitant consequences are less susceptible to criticism than in the case of domicile.[6]

5.4 Notwithstanding the advantages that are put forward, nationality exhibits certain serious disadvantages:

(i) Nationality as a connecting factor may jeopardize legal certainty, since its consistant application may result in a national who settles in another country being able in that country to rely on a foreign lex patriae.[7] A considerable number of exceptions would therefore have to be allowed with regard to nationality as a connecting factor.

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3 Ibid at 213. Although De Jager uses the word "burgerskap" instead of "nasionaliteit" these concepts bear the same meaning in the present context, viz that of staatsangehörigkeit; cf Wiechers in 1972 THRHR at 1.

4 England Working Paper at 13.

5 Ibid.

6 Ibid at 14.

7 De Jager at 211.

(ii) In the case of persons who are citizens of more than one state as well as in the case of stateless persons particular exceptions would also have to be made.[8]

(iii) Nationality increases the possiblity of a person being connected with the legal order of a country he has long since left.

(iv) If a person is a national of a state with more than one territorial legal order it is not always possible to determine, on the basis of nationality, which legal order is applicable to that person.[9]

5.5 Experience obtained by the legal systems of the European continent has, on the one hand, led to a movement away from nationality as a connecting factor and, on the other hand, to other concepts being used in order to eliminate shortcomings of the nationality principle. For example, the new sections 14 and 15 of the West German Einführungsgesetz zum Bürgerlichen Gesetzbuch, as amended by leglislation of 25 July 1986, "providing for a new private international law", provide that the law governing the personal and matrimonial property relations of spouses is determined by reference to the law of the nationality both parties have or had or, in the absence of a common nationality, the laws of the state in which both spouses had their last common place of "habitual residence" or, in its absence, the laws of the state with which both spouses are most closely connected.[10]

5.6 A number of European countries and some South American countries also followed the above-mentioned approach in order to reconcile

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8 De Jager at 215-216; England Working Paper at 14.

9 Cheshire & North at 184 and 185; England Working Paper at 14; De Jager at 218.

10 This information was obtained from comment submitted by Prof A E A M Thomashausen of the Institute for Foreign and Comparative Law, University of South Africa.

domicile and nationality, and it would appear as if "habitual residence" now achieves this reconciliation.

HABITUAL RESIDENCE

5.7 It was mentioned above that the concept "habitual residence" is increasingly being applied in order to reconcile domicile with the nationality principle and also to eliminate certain faults connected with these standing concepts. This trend is also supported by various Hague conventions on private international law. This concept is also applied more and more often in British legislation.[11]

5.8 De Jager[12] distinguishes between ordinary ("gewone") and habitual ("gebruiklike") residence as follows:

> Gewone verblyf is die feitelike aanwesigheid op 'n bepaalde plek sonder dat dit gewil is. Gebruiklike verblyf daarenteen is van 'n meer duursame aard. By die vasstelling van die vraag of verblyf as gebruiklik beskou word, word ook op die bedoeling van die persoon gelet.

5.9 In the English case of Cruse v Chittum[13] it was submitted on behalf of the applicant that habitual residence has an element of intention: "an intention to reside in that country".[14] It was furthermore submitted that "habitual" points to the quality of residence rather than to the duration of residence. "Habitual residence", it was submitted, "denotes a regular physical presence which must endure for some time."[15] The

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11 Cheshire & North at 186; cf the Wills Act, 1963, the Adoption Act, 1986, the Immigration Act, 1971, the Recognition of Divorces and Legal Separations Act, 1971 and the Domicile and Matrimonial Proceedings Act, 1973.

12 De Jager at 218. Cf, however, Kahn in Law of succession at 645.

13 (1974) 2 All ER 940 at 943.

14 Ibid at 942g.

15 Ibid at 943a.

distinction between ordinary residence and habitual residence was explained as follows:[16]

> (O)rdinary residence is different from habitual residence in that the latter is something more than the former and is similar to the residence normally required as part of domicile, although in habitual residence there is no need for the element of animus which is necessary in domicile.

The court accepted the above submission.

5.10 With the Cruse case in mind Cheshire and North[17] mention that the difference between habitual residence and domicile is that the element of animus required is weaker: "Indeed, it ought to be a requirement of present intention to reside unlike the intention required in domicile which is concerned with whether there is a future intention to live elsewhere."

5.11 According to them no more than a present intention to reside is necessary and this ought to be assumed from the fact of continuous residence. The writers furthermore mention that domicile is a legal concept whereas habitual residence is rather a question of fact and lacks the artificialities of domicile.

5.12 In its report recommending that habitual residence be substituted for domicile as a connecting factor the Irish Law Reform Commission pointed out the advantages attached to habitual residence:[18]

(i) It is simpler to establish where a person has his habitual residence than his domicile, since less emphasis is placed on the propositus's intention.

(ii) The concept of habitual residence is more easily understood than domicile.

(iii) In the case of habitual residence a concept similar to domicile of dependency is not used to connect a person with a specific

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16 Ibid at 943b.

17 Cheshire & North at 187.

18 Ireland Report at 7.

legal order. Problems surrounding the domicile of dependency of a married woman therefore do not arise.

5.13 Some of the drawbacks of habitual residence as a connecting factor are as follows:[19]

(i) If a person does not have a fixed residence, e g because he travels constantly for business purposes, it may be difficult to determine where he has his habitual residence.

(ii) If domicile is replaced by habitual residence as a connecting factor it might be uncertain what role, if any, a person's intention should play in this regard. In the case of domicile of choice there is at least some degree of consensus that a person should have the intention to reside permanently or for the foreseeable future at a particular place.

(iii) In its report the Irish Law Reform Commission also pointed out that in some cases doubt might arise as to how long a person should reside at a place in order to describe his residence as "habitual" - in the case of domicile a person acquires the domicile of a particular country immediately he arrives in that country animo manendi.

5.14 More important, however, is the fact that habitual residence as a connecting factor between a person and a country might possibly not be sufficiently strong to justify the person's status, the patrimonial consequences of a marriage and matters relating to succession etc being determined according to that law.[20]

5.15 Problems might arise if domicile is replaced by habitual residence as a connecting factor; one of these problems may be illustrated as follows:

A, a South African steel engineer, is employed in the Republic of China in terms of a long term contract. If he has his habitual residence there and if he should die intestate, his movable property would devolve in terms of the Taiwanese law. If domicile remains the connecting factor his property would naturally devolve according to South African law.

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19 Ireland Report at 7-8.

20 England Working Paper at 10.

5.16 A further problem which might arise if habitual residence is substituted for domicile is that it might lead to "forum shopping": since habitual residence is possibly more easily established than domicile, a person might frequently change his forum in order to suit his particular problem.[21]

5.17 This problem is apparently countered in countries using habitual residence as a connecting factor by requiring a person to register with the relevant local authority.

CONCLUSION

5.18 It is self-evident that replacing a standing connecting factor such as domicile with one such as habitual residence is a drastic reform measure. If the law were to be a amended in this way, one would find oneself in unfamiliar territory and one might find that this reform presents more problems than solutions.

5.19 This problem probably led to the decision by the Ministry of Justice of Quebec not to accept the recommendation by the Office de Revision du Code Civil of that province, viz that the provisions in the Code Civil pertaining to domicile be repealed and replaced by the concept of habitual residence.[22]

5.20 During 1983 the Irish Law Commission made a similar recommendation to their Prime Minister,[23] but on 10 December 1985 the Minister of Justice of that country told the Chamber of Deputies (the "Dáil") that the question whether habitual residence should be substituted for domicile as a connecting factor "was being left for another day".[24]

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21 E g to obtain a divorce easily, to estract the maximum financial gain from a divorce, etc.

22 Manitoba Report at 21.

23 Ireland Report.

24 Ireland Annual Report at 56.

5.21 If one considers legislation or law reform abroad it is noticed that the common law countries retain domicile as a connecting factor, but employ elements of habitual residence to improve the content and meaning of the concept of domicile; in a sense it is endeavoured to achieve a synthesis between the juridical concept of domicile and factual residence. This has the result that a person's domicile corresponds legally and factually to a greater extent to his place of residence than was previously the case.

5.22 The Commission is therefore of the opinion that it would not be expedient to effect radical reform in the sense that a new concept is even introduced as a connecting factor.

5.23 The drawbacks exhibited by the concept of nationality were pointed out above. Experience abroad has for that very reason led to a movement away from the standing principle of nationality.

5.24 A concept such as "residence", being the centre of a person's household and affairs, would also have to be qualified in order to eliminate things like "forum shopping". This might be achieved by attaching the word "habitual" to it. Although it was attempted in paragraph 5.8 above to explain the meaning of the concept, "habitual residence" or "habitually resides" is in a sense unfamiliar to our law.[25] What is certain, however, is that the concept implies more than the familiar concept of ordinary residence (gewone verblyf). It therefore remains an open question whether actual law reform, in the sense of improvement of the law, would be achieved if a completely new concept were to be introduced in our law.

5.25 The concept of "residence" could possibly also be amplified by requiring a system of compulsory registration of residence with a competent local authority. In this regard the address which appears on the central population register could serve as proof of residence.

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25 A judge in England even went as far as to say that "the adjective adds nothing to the noun": Hopkins v Hopkins (1951) P 116 at 121-122 as referred to in Cheshire & North at 187.

5.26 The Commission sees the merits of a proposal such as the above. It remains a real possibility, however, that the registered addresses of many people would not always correspond to their places of residence - one need only think of students, national servicemen, domestic workers who live with their employers, etc.

5.27 The Commission is of the opinion that it should aim at a solution which would alter the existing law as little as possible but which would as far as possible eliminate the above problems as well as drawbacks displayed by our existing law of domicile.

5.28 Where Graveson believes that habitual residence "appears to be the most appropriate ... concept to meet the demands of a fluid, modern society",[26] the Commission, for the present, wishes to follow the English and Scottish Law Commissions which, inter alia, remarked as follows:[27]

> We remain of the view that the greater fluidity of modern society ... calls not so much for a concept which allows (men) 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.

5.29 The Commission therefore believes that domicile should be retained as the connecting factor, but that the concept should be adapted as indicated in the previous chapters.

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26 Graveson at 194.

27 England Report at 10.

6. INCIDENTAL MATTERS

INTRODUCTION

6.1 Although this working paper might possibly not be the most suitable way or place to deal with the substantive amendment of other areas of the law as part of the present investigation, there are certain rules and provisions which are so intimately related to the concept of domicile that a change to the principles of domicile might also affect those other areas of the law. It is therefore deemed necessary to discuss those aspects too.

PATRIMONIAL CONSEQUENCES OF MARRIAGE

6.2 One of the most important consequences of marriage is the fact that the patrimonial consequences of marriage, e g the question whether a marriage was contracted in or out of community of property, are determined by the law of the place where the man was domiciled at the time of the marriage.[1]

6.3 In view of the recommendations that are made in this working paper the question may be posed whether or not this common law rule should also be changed, particularly if one envisages a case where the parties were married in a particular country, settled in another country and remained there for a considerable number of years. Should the law of the husband's domicile at the time of the marriage still determine the patrimonial consequences of the marriage? A further question might be why preference should be given to the husband's domicile.

6.4 An advantage of the immutability of marital domicile is that a wife is protected against arbitrary changes of domicile by the husband who in-

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1 Frankel's Estate v The Master 1950 1 SA 220 (A); Sperling v Sperling 1975 3 SA 707 (A); cf also Kahn in Husband and wife at 631; Van der Vyver & Joubert at 88-89.

tends to enlarge his proprietary rights.[2] It could also be said that a husband should not benefit from acts not requiring his wife's consent.

6.5 It could be argued that the Matrimonial Property Act 88 of 1984 has improved a wife's legal position to such an extent that the need no longer exists for the continuance of the standing rule.[3]

6.6 The fact of the matter is that such a rule is necessary for reasons of legal certainty and that some cut-off rule or other has to be used in order to determine which law regulates the patrimonial consequences of the marriage.

6.7 The Commission is therefore of the opinion that the rule that the patrimonial consequences of the marriage are governed by the law of the place where the husband was domiciled at the time of the marriage is reconcilable with the Commission's current suggestions. It is therefore recommended that the law in this respect be left as it is.

JURISDICTION IN DIVORCE ACTIONS[4]

6.8 Section 2(1) of the Divorce Act 70 of 1979 stipulates that a court will have jurisdiction in a divorce action if -

(a) the parties to the action are domiciled in the area of jurisdiction of the court on the date on which the action is instituted; or

(b) the wife is the plaintiff or applicant and she is ordinarily resident in the area of jurisdiction of that court on the date on which the action is instituted and has been ordinarily resident in the

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2 Kahn in Husband and wife at 631.

3 Cf e g sections 15, 29 and 31 of that Act.

4 Background and recommendations in this and the next part are mostly derived from Kahn in 1986 TSAR.

Republic for a period of one year immediately prior to the said date and -

(i) is domiciled in the Republic; or

(ii) was domiciled in the Republic immediately before cohabition between her and her husband ceased; or

(iii) was a South African citizen or was domiciled in the Republic immediately prior to her marriage.

6.9 Sub-section 2(1)(a) stipulates that the parties should be domiciled in the area of jurisdiction of the court before the court will have jurisdiction. In practice this at present means the court where the man is domiciled, since the wife follows her husband's domicile.[5]

6.10 If it is now recommended that a wife should be able to establish an independent domicile, this will mean that both parties should at the same time have their separate domiciles in the area of jurisdiction of the court concerned before the court will have jurisdiction in the action in terms of section 2(1)(a). The effect of this section may therefore be frustrated or, put differently, a plaintiff could be prevented from instituting a divorce action if the defendant establishes his domicile in a different place prior to the institution of the action.[6]

6.11 In order to counter this problem, it would be advisable that section 2(1)(a) be amended in such a way that a court will have jurisdiction if a party is domiciled in its area of jurisdiction.[7] This

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5 Kahn in 1986 TSAR at 12.

6 England Family Law Report at 11.

7 If the action can be heard in a different court more conveniently or more fitly, the court will still be able to transfer the action to a different division on application in terms of section 9 of the Supreme Court Act 59 of 1959.

amendment corresponds to the current analogous provision of the English legislator.[8]

6.12 Concerning section 2(1)(b), this section has its origin in, inter alia, section 1(1) of the Matrimonial Causes Jurisdiction Act 22 of 1939. Although section 2(1)(b) at present applies only to the wife, it largely embodies the principle that a person can establish jurisdiction through ordinary residence.

6.13 If the section is left as it is at present it could be argued that the section is, as Kahn[9] puts it, "anti-male". There is also much to be said in favour of the argument that ordinary residence should be retained as a ground for jurisdiction in divorce actions. There may be those who have resided in a certain area of jurisdiction inside the Republic for a number of years, yet who do not intend to remain there indefinitely - persons who are therefore not domiciled there.[10] In this case a person should also be able to obtain a divorce order from the court concerned. "Ordinary residence" is a flexible concept and will contribute to the fact that a Mrs Jones, as in the case of Ex parte Jones,[11] should be able to put her application to the court if she has not yet established a domicile, but does have her ordinary residence in the area of jurisdiction of that court.

6.14 The objections pertaining to "forum shopping" may be raised against this proposal.[12] The Commission believes, however, that this possiblity will be largely eliminated if the current requirements for residence, viz ordinary residence in the area of jurisdiction of the court and one year's ordinary residence in the Republic, are retained. It is doubtful whether a foreigner will still be prepared to go to the trouble and

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8 See par 6.15 below.

9 Kahn in 1986 TSAR at 13.

10 England Family Law Report at 10.

11 Ex parte Jones: In re Jones v Jones 1984 4 SA 725 (W); cf paragraphs 2.7 - 2.10 above.

12 Cf England Family Law Report at 4.

expense of obtaining a divorce in the Republic. "Though the rich will never be deterred",[13] the Commission believes that this risk should not stand in the way of its proposals. In fact, to a large extent, the possibility already exists under the present legislation. No problems have, however, been experienced.

6.15 If one takes into account the legislation in England, Australia and New Zealand, one notices that the laws of those countries already have provisions that are analogous to the above recommendations. Section 5(2) of the English Domicile and Matrimonial Proceedings Act, 1973, for example, provides as follows:

> (2) The (High court and a divorce county court) shall have jurisdiction to entertain proceedings for divorce and judicial separation if (and only if) either the parties to the marriage -
>
> (a) is domiciled in England and Wales on the date when the proceedings are begun; or
>
> (b) was habitually resident in England and Wales throughout the period of one year ending with that date.

6.16 As far as Australian legislation is concerned, section 39(3) of the Family Law Act 53 of 1973 provides as follows:

> (3) Proceedings for a decree of dissolution of marriage may be instituted under this Act by a party to the marriage if, at the date on which the application for the decree is filed in a (Family Court or Supreme Court of a State or a Territory), either party to the marriage -
>
> (a) is an Australian citizen;
>
> (b) is domiciled in Australia; or
>
> (c) is ordinarily resident in Australia and has been so resident for one year immediately preceding that date.

6.17 The fact that it is recommended that the grounds for jurisdiction in divorce matters be broadened, also has important consequences for the

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13 The words of the English and Scottish Law Commissions, ibid.

recognition of foreign decrees of divorce, which will be dealt with at a later stage.

6.18 To summarize, the Commission recommends that section 2(1) of the Divorce Act 70 of 1979 should be replaced by a provision to the effect that a provincial or local division of the Supreme Court has jurisdiction in a divorce action if the parties to the action or either of them is domiciled in the area of jurisdiction of the court at the date on which the action is instituted, or if either of the parties is ordinarily resident in the area of jurisdiction of that court on the date on which the action is instituted and has been ordinarily resident in the Republic for a period of one year immediately prior to that date.

THE RECOGNITION OF FOREIGN DECREES OF DIVORCE

6.19 Another matter which may possibly be fittingly dealt with in this working paper and which links up with the previous recommendation is the recognition of foreign divorce orders.

6.20 Put briefly, this matter deals with the problem that arises when parties are divorced according to one system of law, but are still married in the eyes of another legal system - the case of the so-called "limping marriages", "the scandal which arises when a man and a woman are held to be man and wife in one country and strangers in another".[14]

6.21 The fundamental principle of the recognition of divorce orders is that the only court which, according to the common law, has international jurisdiction in divorce matters, is that court in whose area of jurisdiction the parties were domiciled at the time when the action was instituted:[15] Provided that an order by another court will also be recognised if the law of the parties' common domicile at the time of the divorce would have

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14 Wilson v Wilson (1873) LR 2 P & D 435.

15 Kahn in 1986 TSAR at 5; cf Sauber v Sauber 1949 2 SA 769 SWA.

recognised the divorce.[16] These principles reflect the current position as far as the South African judicature is concerned.

6.22 In terms of section 13 of the Divorce Act 70 of 1979, the validity of a divorce order granted in a place where the spouse was not domiciled at the time of the granting of the order will be recognised by a court in the Republic if that place is designated by the State President by means of a proclamation in the Government Gazette for the purposes of the recognition of such an order. No such proclamation has been issued as yet.

6.23 This section has its origin in section 6bis of the Matrimonial Affairs Act 37 of 1953, which provided, inter alia, that a decree of divorce by a foreign court will be recognised if it is declared by means of a proclamation that the law of that specific country substantially corresponds to the South African provisions.

6.24 In other common law countries, and specifically in England, the basic principles have undergone a certain amount of development. In Travers v Holley[17] the court decided in essence, apart from the principle of reciprocity, that if a foreign court accepts jurisdiction in a divorce action in circumstances under which the English court would have had jurisdiction, the order of the foreign court should be recognised.[18] This decision was confirmed in Indyka v Indyka[19] and it was decided that it is sufficient if there is a "real and substantial connexion"[20] such as nationality or ordinary residence between the plaintiff (or possibly the defendant)[21] and the foreign country.

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16 Guggenheim v Rosenbaum (2) 1961 4 SA 21 (W); cf Petersen in 1974 Responsa Meridiana at 30.

17 (1953) P 246 (CA), (1953) 2 All ER 794.

18 Cf Kahn in 1986 TSAR at 10.

19 (1969) 1 AC 33 (HL), (1967) 2 All ER 689.

20 (1967) 2 All ER at 731I.

21 Kahn in 1986 TSAR at 10.

6.25 After the Hague Convention of 1970 on divorces and judicial separations[22] had been ratified by England, the Recognition of Divorces and Legal Separations Act, 1971, was placed on the statute book. Since the "real and substantial connection" rule from the Indyka case was somewhat nebulous and led to uncertainties,[23] the English legislator provided in section 3 of the said Act, inter alia, that the validity of an overseas divorce or judicial separation shall be recognised if any of the parties at the time of the institution of judicial[24] proceedings in that country was habitually resident in that country, was a citizen of that country, or was domiciled in that country in accordance with the meaning which is there attached to the word.[25] In terms of section 6 of the Act, the common law rules pertaining to the recognition of divorces are retained.

6.26 Because of the fact that overseas systems of law have broadened the grounds upon which the courts accept jurisdiction in divorce orders - which is now also recommended with regard to section 2(1) of the Divorce Act 70 of 1979[26] - it may possibly happen that the courts will decide a question pertaining to the recognition of a foreign divorce on the basis of the "real and substantial connection" rule, should the Commission's proposals materialise in legislation.

6.27 In order to counteract the possibility of "limping marriages" and to promote legal certainty as to the cases in which foreign divorce orders will be recognised, the Commission is of the opinion that the legislator should lead the way and that section 13 of the Divorce Act should be appropriately amended.

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22 See England Hague Convention Report and Kahn in 1986 TSAR at 10.

23 Cf England Hague Convention Report at 11.

24 Cf section 2(a) of the Act.

25 Cf also e g sec 104(3) of the Australian Family Law Act 53 of 1975.

26 See par 6.18 above.

* The Commission therefore recommends that section 13 of the Divorce Act 70 of 1979 should be replaced by a provision to the effect that the validity of a foreign divorce order is recognised if either spouse at the time the order was granted[27] was -

- domiciled in the country concerned in accordance with the meaning attributed to the concept in that country;[28] or
- ordinarily resident in that country; or
- a citizen of that country.

ADMISSION OF PERSONS TO THE REPUBLIC REGULATION ACT 59 OF 1972

6.28 For the purposes of the above-mentioned Act domicile is to a certain extent codified in the Act. The Act, however, relates to a specific subject,[29] viz -

> To consolidate the laws relating to prohibited persons; the regulation of the admission of persons to the Republic or any province; the removal from the Republic or any province of undesirable and certain other persons; persons travelling through the Republic; and matters incidental thereto.

6.29 In view of the fact that this Act was certainly adopted on considerations of policy, and because this working paper only codifies some of the general principles of domicile, the Commission does not wish to amend the said Act in any way via this working paper.

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27 The date on which the order was granted is used because of practical considerations: That date is more easily ascertained than e g the date upon which judicial proceedings were instituted in the other country - the date on which the order was granted will also in all probability differ very little from the date on which the judicial proceedings were instituted.

28 The content of the concept "domicile" may differ from territory to territory, hence this definition.

29 See the long title of the Act.

6.30 The following solitary amendment is, however, necessary. In terms of section 1(4) of that Act, a woman whose marriage is dissolved during her absence from the Republic in a manner other than by the death of her husband, loses her domicile in the Republic.

6.31 Since it is recommended in this working paper that a married woman should be able to establish a domicile of her own, it would be unfair if she should lose her domicile merely because of a divorce during her absence (which may be temporary) from the Republic. The Commission therefore recommends that this provision should be repealed.

SUMMARY OF RECOMMENDATIONS WHICH NECESSITATE LEGISLATION

1. The domicile of a married woman should be determined in the same way as that of any other person who is able to establish a domicile of his own.

(Paragraphs 2.30 - 2.35)

2. The domicile of children under the age of 18 years should be determined as follows:

(a) A child is domiciled at the place or in the country with which he is most closely connected.

(b) If a child has, in the ordinary course of events, his home with his parents or with one of them, it is to be presumed, unless the contrary is shown, that that child's parental home is his domicile.

(Paragraphs 2.83 - 2.94; 3.53)

(c) A reference to "parents" in the above-mentioned context should also include adoptive parents and parents who are not married to each other.

(Paragraphs 2.89 - 2.90; 2.94)

3. An adult person who is mentally incapable of establishing a domicile should be domiciled at the place or in the country with which he is most closely connected.

(Paragraphs 2.107 - 2.113)

4. If an adult who is mentally incapable of establishing a domicile should recover from his condition he should retain the domicile he had when he recovered.

(Paragraph 2.114)

5. A reference to mentally ill persons in the Bill should also refer to persons who are mentally disabled, as well as persons who are unable to exercise a rational choice.

(Paragraph 2.113)

6. Notwithstanding provisions to the contrary in any other law or in the common law, no person's domicile of origin should revive except by operation of law or by choice.

(Paragraphs 2.126 - 2.128)

7. A person's domicile should continue until it is replaced by another domicile.

(Paragraphs 2.126 - 2.128)

8. Lawful presence at a place or in a country should be sufficient to comply with the factum requirement for a domicile of choice.

(Paragraphs 3.43 - 3.64)

9. The intention to reside at a place or in a country for an indefinite period should be sufficient to comply with the animus requirement for a domicile of choice.

(Paragraph 3.44)

10. Loss or the acquisition of a domicile should be determined on a balance of probabilities.

(Paragraphs 3.46 - 3.48)

11. Any mentally competent person over the age of 18 years should be capable of establishing a domicile of his own, provided that the requirements of residence and intention for a domicile of choice have been complied with.

(Paragraph 3.49 - 3.53)

12. The Bill should not have retrospective effect. In consequence, no provision of the proposed Bill should affect any right or capacity which has been acquired, or any legal act which has been performed, or any

liability which has been incurred on account of the domicile which a person had immediately prior to the commencement of the Bill.

(Paragraphs 4.1 - 4.2)

13. Legal proceedings which are pending at the time of the commencement of the proposed Bill should be finalised as if the Bill has not been passed.

(Paragraph 4.1 - 4.2)

14. When it is found in legal proceedings that the law of a certain country is applicable because a person is domiciled in that country, the law of that country should apply with the exclusion of the choice of law rules of that country.

(Paragraphs 4.3 - 4.5)

15. Section 2(1) of the Divorce Act 70 of 1979 should be replaced by a provision to the effect that a court has jurisdiction in an action for divorce if the parties or either of them is domiciled in the area of jurisdiction of the court, or if a spouse is ordinarily resident in the area of jurisdiction of the court and has been ordinarily resident in the Republic for a period of one year immediately prior to the institution of the action.

(Paragraphs 6.8 - 6.18)

16. Section 13 of the Divorce Act 70 of 1979 should be replaced by a provision to the effect that, subject to the provisions of any law or the common law, a foreign decree of divorce is recognised if either spouse, at the time of the granting of the order, was -

(a) domiciled in the country concerned in accordance with the meaning attributed to the concept in that country; or

(b) ordinarily resident in that country; or

(c) a citizen of that country.

(Paragraphs 6.19 - 6.27 and paragraph 6.27, footnotes 27 and 28)

17. Domicile of choice should be established subject to the provisions of the Admission of Persons to the Republic Regulation Act 59 of 1972.

Paragraphs 6.28 - 6.29)

18. The provision in the latter Act, to the effect that a woman loses her domicile if she is absent from the Republic and her marriage is dissolved in a manner other than by death (section 1(4)), should be repealed.

(Paragraphs 6.30 - 6.31)

BILL

[ ] Words in square brackets denote deletions in existing legislation.

Words underlined with an unbroken line denote insertions into existing legislation.

To amend the law of domicile and to provide for matters incidental thereto.

Introduced by the Minister of Justice

BE IT ENACTED by the State President and the Parliament of the Republic of South Africa as follows:-

Domicile of choice.

1.(1) Every person above the age of eighteen years and every person under the age of eighteen years who by law has the status of a major, excluding someone who because of mental illness or mental disability does not have the capability of making a rational choice, shall be competent to acquire a domicile of choice not= withstanding such a person's sex or marital status.

EXPLANATORY NOTES

Clause 1

Subclause (1) gives effect to recommendations 1, 5 and 11. A married woman's domicile should now be determined just like that of any other person capable of acquiring a domicile. Furthermore, it is believed that the wording of the subclause would make provision for cases where, for instance, persons are in a protracted state of unconsciousness. It is furthermore clearly stated that any person above the age of 18 years is capable of acquiring a domicile independently. At that age children usually leave home to start working, to do national service, to study etc.

(2) Save for the provisions of the Admission of Persons to the Republic Regulation Act, 1972 (Act No. 59 of 1972), a domicile of choice shall be acquired if any person is lawfully present at a particular place and he has the intention to settle there for an indefinite period.

Subclause (2) embodies recommendations 8, 9 and 17. It is endeavoured with this clause, especially with regard to the animus requirement in the case of the domicile of choice, to clarify the content of that requirement. As far as the proviso is concerned the Commission believes that the Act concerned was adopted because of particular policy considerations. In this regard the Commission would not like to recommend any amendments to that Act.

Domicile of any person not able to acquire a domicile of choice.

2.(1) Any person not capable of acquiring a domicile of choice as contemplated in section 1 shall be domiciled at the place with which he is most closely connected.

(2) If a child has in the normal course of events his home with his parents or with one of them, it shall be presumed, unless the contrary is shown, that the child's parental home is his domicile.

(3) For purposes of this section -

"child" means any person who has not yet attained the age of eighteen years, ex= cluding any such person who by law has the status of a major; and

"parent" includes an adoptive parent of a child and parents of a child who are not married to each other.

Clause 2

This clause gives effect to recommendations 2, 3 and 11. Clause 2(1) comprehends children as well as persons who do not have the mental capabilities to acquire a domicile of choice. As far as children are concerned, emphasis is removed from the standing domicile of dependency and problems connected with it (cf for instance paragraphs 2.45 - 2.49) should consequently be eliminated by the present provision. The clause also has the benefit that a child's domicile is no longer conferred upon him via the parents' marital status but that his domicile is determined objectively, with reference to all the surrounding circumstances.

As far as the presumption is concerned, the benefit of legal certainty connected with the domicile of dependency is to a certain extent retained. Furthermore it is explicitly stated that the presumption also applies in the case of an adoptive parent and parents who are not married to each other.

As far as persons are concerned who do not have the mental capability to acquire a domicile independently, it is endeavoured with clause 2(1) to have their actual place of residence and domicile correspond as far as possible.

Succession of domicile.

3.(1) No person shall lose his domicile until another domicile has been acquired by choice or by operation of the law.

(2) Notwithstanding contrary provisions in any Act or the common law no person's domicile of origin shall revive except as contemplated in section 1 or 2.

Clause 3

In order to prevent a "vacuum" from arising when someone has lost his domicile without acquiring a new domicile, clause 3(1) now provides that such a person shall not lose his domicile unless he has acquired a further domicile by choice or by operation of the law.

Although clause 3(1) already in effect eliminates the operation of the so-called "doctrine of revival of domicile of origin" it is deemed advisable to state it categorically that no person's domicile of origin shall revive except in terms of clause 1 or 2 - see clause 3(2).

Clause 3 refers to any person, including someone who does not have the mental capacities to acquire a domicile of choice independently. Thus, if such a person recovers from his condition he would retain his last domicile until he acquires another domicile by operation of law (the place with which he is most closely connected if he is under the age of 18 years) or by choice (if he is over the age of 18 years).

Clause 3 gives effect to recommendations 4, 6 and 7.

Application of choice of law rules.

4. If a court in the application of the choice of law rules finds that the question before it should be decided in terms of the law of a foreign country because of someone's domicile in that country, the court shall decide that question in terms of the relevant law of that country, even though a court of that country, in the application of the choice of law rules, would have indicated the South African law as appropriate to the question concerned.

Clause 4

This clause excludes the renvoi doctrine. Thus, if it is found that a particular question should be decided in terms of foreign law since the propositus is domiciled in the foreign country concerned, only the law of that country, excluding any rule which remits the matter to the South African law, is considered (Recommendation 14).

Standard of proof.

5. The loss or acquisition of a person's domicile shall be determined by a court on a balance of probabilities.

Clause 5

As mentioned in paragraph 3.48, this provision does not in essence amend the existing law and at first glance it might appear to be inserted ex abundanti cautela.

With this provision it is, however, endeavoured to make clear the intention that the same standard of proof should apply in actions concerning domicile and that there should be no question of a higher standard of proof when the loss of a domicile of origin or a well-established domicile of choice is concerned (Recommendation 10).

Amendment of section 2 of Act 70 of 1979.

6. Section 2 of the Divorce Act, 1979 is hereby amended -

(a) by the substitution for sub-section (1) of the following sub-section:

"(1) A court shall have jurisdiction in a divorce action if either or both the parties are domiciled in the area of jurisdiction of the court on the date on which the action is instituted or if either of them is ordinarily resident in the area of jurisdiction of the court on the said date and has been ordinarily resident in the Repu= blic for a period of one year imme= diately prior to the said date.";

Clause 6

This clause is a result of the recommendation that a married woman should be capable of acquiring a domicile independently (paragraphs 2.34 and 2.35 of the working paper). In order to retain the benefit of the more liberal ground of jurisdiction of ordinary residence, which applied in the case of a wife, this is now extended to either party. Bearing the possibility of "forum shopping" (paragraph 6.14 of the working paper) in mind, the requirement of one year's ordinary residence in the Republic is set over and above ordinary residence in the area of jurisdiction of the court.

This clause gives effect to recommendation 15.

(b) by the substitution for subsection (3) of the following sub-section:

"(3) A court which has jurisdiction in terms of this section in a case where /the parties are/ a party is not domiciled in the Republic shall deter= mine any issue in accordance with the law which would have been applicable had the parties been domiciled in the area of jurisdiction of the court concerned on the date on which the divorce action was instituted.".

Substitution of section 13 of Act 70 of 1979.

7. The following section is hereby substituted for section 13 of the Divorce Act, 1979:

"Recognition of certain foreign divorce orders.

13. The validity of a divorce order granted in a foreign court shall be recognised by a court in the Republic if, on the date on which the order was granted, either party to the marriage -

(a) was domiciled in the country concerned within the meaning borne by the concept "domicile" in that country; or

(b) was ordinarily resident in that country; or

(c) was a national of that country.".

Clause 7

The purpose of this clause, which gives effect to recommendation 16, is to eliminate the possibility of non-recognition of a divorce which was granted in a foreign country (the so-called "limping marriages") as far as possible. This possibility exists at present since the decisions of our courts do not yet display the overseas developments in this regard (cf paragraph 6.24 of the working paper) and since no country has yet been designated by proclamation in terms of section 13 of the Divorce Act 70 of 1979, the divorce orders of which shall be recognised by the South African law.

The wording of paragraph (a) flows from the fact that different countries attach different meanings to the concept of domicile, which do not necessarily correspond to the meaning that the concept has in South Africa.

Amendment of section 1 of Act 59 of 1972.

8. Section 1 of the Admission of Persons to the Republic Regulation Act, 1972, is hereby amended by the deletion of sub-section (4).

Clause 8

Deleting section 1(4) of the Admission of Persons to the Republic Regulation Act 59 of 1972 will prevent a wife (who in terms of the proposed Bill would be capable of acquiring an independent domicile) from losing her domicile in the Republic if her marriage has been dissolved otherwise than by the death of her husband during her absence from the Republic (Recommendation 18).

Application.

9.(1) This Act shall not affect any right or capacity which has been acquired or any legal act which has been performed, or any liability which has been incurred on account of the domicile which a person had immediately prior to the commencement of this Act.

(2) Any proceedings which are pending in a court at the time of the commencement of this Act shall be finalised as if this Act has not been passed.

Clause 9

The purpose of clause 9(1), which gives effect to recommendation 12, is to give this Bill future effect only.

Clause 9(2) is a necessary transitional provision which speaks for itself.

Short title and commencement.

10. This Act shall be called the Domicile Act, 19..., and shall come into operation on a date to be fixed by the State President by pro= clamation in the Gazette.

Clause 10

In line with the recommendations of the English and Scottish Law Commissions,[1] this procedure is adopted for the commencement of the Act in order to give persons who might be affected by the legislation the chance, if necessary, suitably to alter such of their circumstances as might have an effect on their domicile.

1 England Report at 36-37.