THE TENACITY OF A DOMICILE OF ORIGIN

Keith M Gordon[1]

In order to continue treating an individual as domiciled outside any of the jurisdictions that make up the United Kingdom[2], advisers often tell their clients to maintain good links with their home country and possibly retain a burial plot there. Whilst this is, no doubt, sound advice, it is nevertheless important to consider what factors would be applied by the Courts when determining whether an individual has acquired a new domicile.
This article:

- seeks to ascertain whether any clear guidelines can be deduced from the decided authorities regarding the factors that would indicate whether or not an individual has changed his or her domicile; and

- considers the burden and standard of proof required before a Court can reach such a conclusion.

The article concludes by considering whether long-term residents in the UK can rely upon their club memberships and preferred burial plots when maintaining their claim to be domiciled overseas.

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2 For convenience, except where the actual jurisdiction is relevant, I shall refer to such individuals as domiciled in the UK.

Reason for a rule of domicile

According to Dicey and Morris: The Conflict of Laws[3], "the object of determining a person's domicile is to connect him for the purpose of a particular inquiry with some system or rule of law". Although most readers will associate the concept of domicile with the different tax rules applying to non-UK domiciliaries, the concept is equally important in the context of family law and probate matters. It should be noted, however, that, notwithstanding the apparent purpose of the domicile concept, the rule which determines whether proceedings may be served on an individual outside the UK without the permission of the Court uses a purely statutory definition of domicile[4].

Meaning of domicile

Domicile of choice

Before considering the factors that determine whether or not someone's domicile has changed, it is important to consider the actual meaning of the term "domicile". It has long been established for the purposes of English law that the heart of the definition is an individual's "permanent home"[5]. However, the meaning of domicile differs marginally (but significantly) from simply the jurisdiction of a person's permanent home. In particular, if an individual is to acquire a new domicile, that individual must:

1. reside in a particular jurisdiction; and

2. intend to reside there permanently or indefinitely.

Such a domicile would be a domicile of choice. If either of those factors is missing, the individual will not be able to acquire a domicile of choice in that jurisdiction. See example 1.

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3 Thirteenth edition (2000), page 109

4 Civil Procedure Rules r. 6.19 and Civil Jurisdiction and Judgments Act 1982, section 41

5 See, for example. Earl of Halsbury LC in *Winans v Attorney-General* [1904] AC 287 at 288.

Example 1

> Boris sells his London home with the intention of permanently setting up home in Sydney. Tragically, Boris dies during the flight. As he has not yet resided in Australia, he cannot have acquired a domicile there[6].
>
> On the other hand, had Boris reached Sydney, he could have immediately acquired a domicile of choice in New South Wales[7].

Residence in the jurisdiction, for these purposes, is defined as "physical presence in that [jurisdiction] as an inhabitant of it"[8].

Domicile of origin

A person who has not acquired a domicile of choice will have a domicile of origin. English law provides that every person receives a domicile of origin at birth. Children born in wedlock acquire as their domicile of origin, the domicile of their father at the time of their birth. Other children acquire as their domicile of origin, the domicile of their mother at the time of their birth. A domicile of origin may change only by a child's adoption.[9]

Domicile of dependency

If the relevant parent[10] acquires a different domicile during the child's infancy (defined as the period up to, but excluding, the child's 16th birthday or marriage,

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6 *Bell v Kennedy* (1868) LR 1 Sc & Div 307 at 319 per Lord Chelmsford: "A new domicile is not acquired until there is not only a fixed intention of establishing a permanent residence in some other country, but also until this intention has been carried out by actual residence there."

7 *Ibid*.

8 *Inland Revenue Commissioners v Duchess of Portland* [1982] 1 Ch 314 at 318-9

9 Adoption and Children Act 2002, section 67(1). This Act makes it explicit that adoption orders can be made on the application of a same sex couple (whether or not registered as a civil partnership) (see section 144(4)). It remains unclear how one ascertains the revised domicile of origin of a child adopted by a same-sex couple when the members of the couple have different domiciles.

10 or other person on whom the child is legally dependent

if earlier[11]), the child will acquire a domicile of dependency.[12]

Losing a domicile of choice

Although a domicile of choice can be acquired only by a combination of ***both*** residence ***and*** the intention to remain there permanently or indefinitely, the subsequent change of only one of these factors will not amount to a loss of a domicile of choice[13]. See Example 2.

Example 2

> Suppose Peter, an Englishman, moves to Provence with the intention of residing there permanently, thereby acquiring a French domicile of choice. After a year, Peter decides that he can no longer tolerate the French lifestyle and starts to plan a further move.
>
> Until Peter ceases to reside in France, his French domicile of choice will endure.
>
> Alternatively, if Peter had temporarily left France (say, to reside in Tuscany for a year but with the intention of returning to Provence) his domicile of choice would remain as France would still be his permanent (or at least indefinite) home.[14]

If a domicile of choice is abandoned, the rule that everyone must have one (and one single) domicile[15] comes into play. If the individual acquires a new domicile of choice, this is straightforward.

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11 Domicile and Matrimonial Proceedings Act 1973, section 3.

12 If a married woman had acquired a domicile of dependency from her husband other than her domicile of origin (applicable only to pre-1974 marriages), then from 1 January 1974 that domicile of dependency would have become a domicile of choice and would have endured until another domicile is acquired or revived (Domicile and Matrimonial Proceedings Act 1973, section 1(2)).

13 *Udny v Udny* (1868) LR 1 Sc & Div 441 at 450.

14 To put it another way, Peter has not acquired another domicile of choice in accordance with the rule in *Udny*. Furthermore, it would be inappropriate for Peter's domicile of origin to be revived in these circumstances.

15 *Udny v Udny* (1868) LR 1 Sc & Div 441 at 448.

If, however, the domicile of choice is abandoned but no new permanent residence is established[16], a new domicile of choice cannot be established.[17] It is now firmly established that a domicile of origin revives in such circumstances in the absence of any alternative.[18]

What amounts to a change of domicile?

Subject to any statutory reforms in this area, the above rules are now firmly established. And, in most cases, an individual's residence will not usually be in dispute.[19] Nevertheless, even this area of law is evolving. For example, in 2005, the House of Lords ruled that illegal presence in England and Wales did not preclude an individual from acquiring an English domicile of choice.[20]

This article will, instead, focus on the issue of identifying what constitutes a permanent or indefinite intention to reside in a particular jurisdiction.

Nature of the intention

An individual is not required to make any formal assessment of his or her domicile. It is sufficient that there is a factual intention to remain in a place of residence permanently or indefinitely.[21] On the other hand, in *Huntly v Gaskell*[22],

16 This could arise if an individual keeps his or her options open before deciding where to settle. In more extreme circumstances, this would be the situation if an individual packs up his or her belongings in the first domicile of choice and is in transit towards another domicile of choice. In either case, the individual has not become resident in a new country or has not become so resident with the intention of remaining there permanently or indefinitely.

17 It is for this reason that it makes good sense for that a domicile of choice is abandoned only if both the residence and the intention requirements cease to be met.

18 *Udny v Udny* (1868) LR 1 Sc & Div 441 at 450, 452.

19 For some of the issues surrounding residence, the reader is referred to the discussion at paragraphs 6.034-6.038 of *Dicey and Morris*.

20 *Mark v Mark* [2006] 1 AC 98. It should be noted that the legality of the presence is not completely irrelevant. In particular, it can affect the question as to whether an individual has acquired the required intention to remain permanently or indefinitely (per Baroness Hale at 147B and Lord Hope at 106B with whom the other Lords agreed).

21 *IRC v Bullock* [1976] 1 WLR 1178 at 1183B-C. In a 1942 treatise, Professor W W Cook takes the alternative view – based upon US authorities.

22 [1906] AC 56

Lord Halsbury refers to the legal consequences of an individual abandoning a domicile of origin with the implication that no-one would take this step lightly. Furthermore, the facts of the case show that the individual was actually conscious of his own domicile status and actively sought advice to confirm that he had not acquired a Scottish domicile of choice. It is my view that the *Huntly* case does not displace the rule that an individual's domicile status does not depend on any legal analysis by the individual concerned. Instead, the individual's concern for his domicile status is simply one of the factors that ought to be considered by a court. See Example 3.

Example 3

> Chuck has a domicile of origin in Massachusetts. He is an Anglophile and, at the age of 20, he moves to England with the intention of living there permanently. However, he is conscious of the tax advantages of retaining an overseas domicile. Consequently, as in *Huntly*, Chuck seeks advice to confirm that his domicile of origin has not been displaced by an English domicile of choice.
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> In my opinion, the Court should consider Chuck's clear intention to live in England permanently as determinative of the issue. His desire to remain "non-domiciled" from a UK perspective is merely a factor which is outweighed by the other facts.[23]

Furthermore, it appears that it is unnecessary for an individual to make any conscious decision to remain resident in a country permanently or indefinitely. In *AG v Kent*[24], Wilde B expressed the test in the negative – "there was a long continuous residence in England without any declaration of an intention to leave it". However, this rule must be considered in the light of the rule that puts the burden of proof on the party wishing to argue that a domicile has changed. For example, in *Ramsay v Liverpool Royal Infirmary*[25], their Lordships accepted that "a long continued residence may in certain circumstances show that the domicil is changed, though such intention did not originally exist". However, "an intention to change a domicil of origin is not to be inferred from an attitude of indifference or a disinclination to move increasing with increasing years".

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23 In *AG v Kent* (1862) 1 H & C 12, a testator's declaration of overseas affiliation was not sufficient to displace an English domicile of choice.

24 (1862) 1 H & C 12

25 [1930] AC 588

Permanence of the residence

A person is defined as residing in a country permanently or indefinitely if he has set up "his home with the intentions of establishing himself and his family there and ending his days in that country"[26].

It has, however, long been recognised that very few individuals will move to a particular country in the certain knowledge that they will remain there until their death. Consequently, a domicile of choice will be obtained if an individual "has settled in some other territory ... with the intention of remaining there for an indefinite time". Furthermore, a "floating intention ... to return to the country of origin at some future period is not sufficient for the retention of the domicile of origin".[27]

The authorities examine this by considering what constitutes a realistic intention to return home and what is considered too remote to prevent a domicile of choice from being acquired.

In the former category are desires to return home on:

- the termination of an employment
- the death of a spouse and
- the change in a tax regime.

Contingencies held to be too vague and indefinite have included:

- making a fortune and
- an ill-defined deterioration in health.

These distinctions can, at first sight, appear to be rather fine. For example, a change in a tax regime might appear as vague and as indefinite as someone making their fortune and the earlier death of one's spouse might be no less likely than a deterioration of one's health. However, these are good examples of why it is important not to base domicile rulings on the application of superficial rules.

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26 See, for example, Lord Macnaghten in *Winans v Attorney-General* [1904] AC 287 at 291.

27 *Henderson v Henderson* [1967] P 77 per Sir Jocelyn Simon P at 80

IRC v Bullock[28] concerned a case of a Canadian who lived in England with his English wife who was not keen to live in Canada. Mr Bullock maintained that he would return to Canada in the event of his wife dying before him. In that case, Buckley LJ explained that the contingency which would make an individual return to his/her own country must not be indefinite[29] – in that it cannot be properly and objectively measured. Furthermore, as Buckley LJ continued[30], a further hurdle must be overcome in that there must be "a sufficiently substantial possibility of the contingency happening to justify regarding the intention to return as a real determination to do so upon the contingency occurring rather than a vague hope or aspiration". In the case of Mr Bullock, Mrs Bullock was three or four years younger than her husband and in good health. Therefore, at most, there was an even chance that she would pre-decease him enabling him to return to Canada. However, the possibility was "not unreal ... [there was] a real likelihood".[31] Similarly, in *Jopp v Wood*[32] (a case referred to in *Bullock*), a long and indefinite residence in India for the purpose of business was not sufficient to displace a Scottish domicile of origin when the individual had always had the firm intention to return to Scotland.

To contrast, in *Re Furse*[33], the suggestion was that Mr Furse would return to New York only when he was no longer able to live an active life on his farm in England. Fox J held that this contingency was "altogether indefinite ... [it had] no precision at all"[34]. As the judge commented later "the contingency which he expressed was vague and permitted of almost infinite adjustment to meet his own wishes". It seems that Mr Furse had a "Plan B" option to return to New York should his health deteriorate in such a way that his active life on the farm could not be continued. However, from the facts expressed in the judgment, it would seem

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28 [1976] 1 WLR 1178

29 at 1186B

30 at 1186H-1187A

31 Buckley LJ referred (at 1186G) to the Privy Council's decision in case of *Anderson v Laneuville* (1854) 9 Moo PCC 325. In that case, it was held that "it can never be said that residing in a country until the death of an individual is a residence merely for a temporary purpose". Buckley LJ suggested that this is not a proper formulation of the law and that the case should be considered in light of the facts. In particular, it should be noted that the testator's desire to return to England on the death of Mme Laneuville was not an uncontested fact.

32 (1865) 4 DJ & S 616

33 [1980] 3 All ER 838

34 at 846f

that Mr Furse's principal objective was to remain active on the English farm until his dying day. In the circumstances, it therefore appears that Mr Furse's intention was to reside in England permanently or indefinitely.

Similarly, in *CM v TM*[35], the Court distinguished between "[on the one hand] setting up home for an indefinite period in a particular place and [on the other] setting up a permanent home". In that case, a couple – both with English domiciles of origin had moved first to the United States and then to Ireland in order to escape the high levels of UK taxation in the 1970s. It was held that their presence in Ireland was only for so long as until the UK taxation rates returned to more manageable levels. This contingency[36] meant, according to Barr J, that the couple's presence in Ireland did not have "the element of permanency as so defined which is an essential indicator of a change in domicile".

It is submitted that the *CM v TM* case possibly marks the boundary between what constitutes a realistic possibility and what is thought to be too vague to be taken into consideration. Furthermore, the test had to be considered in the factual context. Until the creation of "New Labour" in the 1990s, many people commented (particularly at the time of the 1992 General Election) that the return of a Labour Government and the anticipated subsequent introduction of tax rises would lead to their departure from the UK. It is submitted that, in many cases, such sentiments would not have been sufficient for individuals who had settled in the UK from overseas to retain an overseas domicile. This would be the case especially in respect of individuals whose arrival in the UK was not motivated particularly by the tax consequences. On the other hand, where individuals are present in the UK specifically because of the tax advantages it affords them and where their activities could be easily transferred to another jurisdiction if the fiscal climate changes, it is my submission that they can rely upon the decision in *CM v TM* and that they retain their non-UK domicile.

Burden of proof

In many cases, a mere analysis of the facts is not sufficient to determine whether a person's domicile has changed. This is because the burden of proving a change of

35 [1990] 2 IR 52

36 noting, one suspects, that the couple moved to Ireland in early 1979 i.e. in the last days of the then Labour Government. The judge did suggest that "although the British tax regime in 1979 may have been crippling for the husband, he would have anticipated that that situation was not necessarily a permanent one and that there could be a radical improvement in the fiscal and economic climate in the UK in the medium term".

domicile lies on those who assert it.[37] This was most clearly demonstrated in the recent Court of Appeal decision in *Cyganik v Agulian*.[38] In that case, the death of a member of the London Greek-Cypriot community led to a claim under the Inheritance (Provision for Family and Dependants) Act 1975 by his fiancée. The facts as reported (which included the fact that the deceased had spent most of his life in London) suggested an indefinite intention to remain in England. However, this evidence was not sufficiently "clear cogent and compelling" for the Court to reach the conclusion that the deceased had acquired an English domicile of choice. In particular, Mummery LJ makes it clear that the parties were agreed that for much of the deceased's life, he had not acquired a domicile of choice in England. Therefore, the case concerned the question as to whether, in the last seven years, the facts were such that the Court could readily infer that his intentions had changed. In the absence of sufficient proof of such a change, the Court was bound to find that the Cypriot domicile of origin had endured.[39]

Therefore, in the typical tax disputes relating to domicile, it will be:

- for Her Majesty's Commissioners for Revenue and Customs ("HMRC") to show that an individual has acquired an UK domicile of choice (or revived a UK domicile of origin); or

- for the taxpayer to show that an overseas domicile has been acquired (or revived).

Factors determining a person's domicile of choice

It is notably difficult to assess an individual's intentions.

As suggested above, many advisers tell their clients to arrange for overseas burial plots and membership of overseas clubs in order to secure non-UK domiciled status. However, it is important for practitioners to realise that these measures are not a panacea and that the cases which have referred to burial plots and club

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37 See, for example, Earl of Halsbury LC in *Winans v Attorney-General* [1904] AC 287 at 298.

38 [2006] EWCA Civ 129; [2006] 1 FCR 406; [2006] WTLR 565; (2005-06) 8 ITELR 762

39 The Court of Appeal also highlighted an apparent error made by the judge at first instance who had found that there had been a change of domicile. The judge had ruled that before such a change in intentions, the deceased "might well eventually … have decided to sell up and go and live permanently in Cyprus". However, as the Court of Appeal subsequently confirmed, that was not the correct test. Instead, the question that should have been asked was whether the deceased had positively decided to remain in England.

memberships did not turn specifically on these factors but on the overall picture of the life of the individual whose domicile status was under review.[40]

Indeed, the Courts have ruled that "there is no act, no circumstance in a man's life, however trivial it may be in itself, which ought to be left out of consideration in trying the question whether there was an intention to change the domicile"[41]. *Dicey & Morris* cites[42] seventeen very different factors that have been considered with the note that the list is not exhaustive.

Cultural factors

It is further asserted in *Dicey & Morris*[43] that "there is a presumption against the acquisition of a domicile of choice by a person in a country whose religion, manners and customs differ widely from those of his own country". That statement was described by Sir Jocelyn Simon P in *Qureshi v Qureshi*[44] "not so much as a proposition of law as an expression of common experience". On this basis, he held in 1970 that a man, born in India who had then acquired a Pakistani domicile of choice in 1957, had retained that domicile despite having come to England in 1958. Whilst I would not suggest that that case was wrongly decided and I would agree with Sir Jocelyn's affirmation of the statement in *Dicey & Morris*, I would submit that times have changed in the past 36 years. In particular, Britain has become far more culturally diverse (both in respect of Government policy and on the ground). Consequently, I would argue that the cultural clash a visitor to this country might experience is less stark than would have been the case in the past and that, therefore, cultural differences should now, at least in certain

40 Furthermore, in *Ramsay v Liverpool Royal Infirmary* [1930] AC 588, the deceased, a Glaswegian, had spent the last 25 years of his life in Liverpool and was buried there in a family plot but the House of Lords held that he had retained his Scottish domicile of origin.

41 *Drevon v Drevon* (1864) 34 LJ Ch 129 at 133

42 at 6-049

43 at 6-050

44 [1972] Fam 173 at 193D

situations, be less of an obstacle than might previously have been the case.[45] It should also be commented that the Courts will accept a change in domicile between constituent parts of the United Kingdom more readily than between wholly independent states.[46]

Declarations of domicile status

As noted above[47], the Courts are not usually impressed by self-declarations of domicile. In one case, such a statement was described as "the lowest species of evidence"[48]. In *Ross v Ross*[49], the House of Lords ruled that

> *"declarations as to intention are rightly regarded in determining the question of a change of domicil, but they must be examined by considering the person to whom, the purposes for which, and the circumstances in which thy are made, and they must further be fortified and carried into effect by conduct and action consistent with the declared [intention]".*

HMRC will naturally treat declarations of non-UK domicile with suspicion. However, they will often treat statements by an individual that they have a UK domicile as determinative of the issue. As the Courts have held, such statements must be considered when looking at an individual's domicile status; however, there is a risk of attributing too much weight to them.

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45 Sir Jocelyn took into consideration "certain racial tensions and intolerances in this country and their possible repercussion on domiciliary intention". Although, the evil of racial hatred is ever-present, I would submit that the current sociological factors are different from those that existed in the 1960s and 1970s. I would, however, further submit that Sir Jocelyn's views on the possible repercussions on domiciliary intention merit further clarification. It has been established that a person, who is liable to be deported, might lack the required intention to remain in the jurisdiction; however, a precarious residence can nevertheless be the basis for an intention to remain (*Boldrini v Boldrini* [1932] P 9). Consequently, I would submit that what Sir Jocelyn meant was that a family subjected to racial abuse might not wish to remain resident in such an intolerant society for longer than is necessary. However, it is suggested that, if the family were intending to weather the abuse then that should be an indication of the family members' intention to remain resident within the jurisdiction and therefore to acquire a domicile of choice.

46 *Curling v Thornton* (1823) 2 Add 6 at 17

47 See footnote 23.

48 *Crookenden v Fuller* (1859) 1 Sw & Tr 441 at 450

49 [1930] AC 1 at 6-7

In non-Revenue cases, agreements with HMRC concerning an individual's status have not bound the Court[50] and nor should they. It remains to be seen whether HMRC will be bound by earlier agreements made concerning an individual's domicile in cases where the Commissioners are a party.

Residence for health reasons

In some cases, an individual's reason for staying in a particular country is not for any love of the place but simply for health reasons. This is clearly seen in *Winans v Attorney-General*[51], where Mr Winans, an American, had lived in England for many years on his doctor's advice until his death but despised the country. In that case, the Lord Chancellor, Earl of Halsbury, held[52]:

> "*If I were satisfied that he intended to make England his permanent home I do not think it would make any difference that he had arrived at the determination to make it so by reason of the state of his health.*"

Therefore, it would appear that a conscious decision to spend one's final days in a particular canton of Switzerland, say, would amount to a change of domicile as soon as residence is taken up there. And that this analysis would not change if the decision was made entirely for health reasons.

However, in *Winans*, there was not sufficient evidence to show that Mr Winans had indeed formed the intention to remain in England. Consequently, the House of Lords held that a domicile of choice in England had not been shown to have been established.[53]

Standard of proof

Dicey & Morris highlights that different judges have expressed different views regarding the standard of proof required to show a change of domicile. In particular, it cites two of the relatively recent leading cases on domicile. In *Re*

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50 See, for example, *Agulian v Cyganik* [2006] WTLR 565 at 567G.

51 [1904] AC 287

52 at 288

53 A similar decision appears to have been reached in the case of *Anderson (Anderson's Executor) v Inland Revenue Commissioners* [1998] STC (SCD) 43

Fuld (No. 3)[54], Scarman J commented[55]:

> "*There remains the question of standard of proof. It is beyond doubt that the burden of proving the abandonment of a domicile of origin and the acquisition of a domicile of choice is upon the party asserting the change. But it is not so clear what is the standard of proof: is it to be proved beyond reasonable doubt or upon a balance of probabilities, or does the standard vary according to whether one seeks to establish abandonment of a domicile of origin or merely a switch from one domicile of choice to another? Or is there some other standard?*
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> *"In Moorhouse v. Lord, Lord Chelmsford said that the necessary intention must be clearly and unequivocally proved. In Winans v. Att.-Gen., Lord Macnaghten said that the character of a domicile of origin "is more enduring, its hold stronger and less easily shaken off." In Ramsay v. Liverpool Royal Infirmary, the House of Lords seemed to have regarded the continuance of a domicile of origin as almost an irrebuttable presumption. Danger lies in wait for those who would deduce legal principle from descriptive language. The powerful phrases of the cases are, in my opinion, a warning against reaching too facile a conclusion upon a too superficial investigation or assessment of the facts of a particular case. They emphasise as much the nature and quality of the intention that has to be proved as the standard of proof required. What has to be proved is no mere inclination arising from a passing fancy or thrust upon a man by an external but temporary pressure, but an intention freely formed to reside in a certain territory indefinitely. All the elements of the intention must be shown to exist if the change is to be established: if any one element is not proved, the case for a change fails. The court must be satisfied as to the proof of the whole; but I see no reason to infer from these salutary warnings the necessity for formulating in a probate case a standard of proof in language appropriate to criminal proceedings.*
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> *"The formula of proof beyond reasonable doubt is not frequently used in probate cases, and I do not propose to give it currency. It is enough that the authorities emphasise that the conscience of the court (to borrow a phrase from a different context, the judgment of Parke B. in Barry v. Butlin must be satisfied by the evidence. The weight to be attached to evidence, the inferences to be drawn, the facts justifying the exclusion of doubt and the expression of satisfaction, will vary according to the nature of the case. Two things are clear – first, that unless the judicial conscience*

54 [1968] P 675

55 at 685D-686D

> *is satisfied by evidence of change, the domicile of origin persists: and secondly, that the acquisition of a domicile of choice is a serious matter not to be lightly inferred from slight indications or casual words.*"

However, these comments stand in contrast with those made by Sir Jocelyn Simon P a year earlier in *Henderson v Henderson*[56]:

> "*First, clear evidence is required to establish a change of domicile. In particular, to displace the domicile of origin in favour of the domicile of choice, the standard of proof goes beyond a mere balance of probabilities.*"

Dicey & Morris refer to an Australian judgment in which it is suggested, perhaps slightly tongue-in-cheek, that "the change of a domicile of origin must be proved beyond reasonable doubt while the change of a domicile of choice may be proved on the balance of probabilities".[57]

This Australian "rule" can be said to reflect some of the authorities to which the learned judge had earlier referred. However, it gives no guidance regarding domiciles of dependency. Perhaps, this is because a domicile of dependency might have different levels of adhesiveness – depending on the circumstances. See Examples 4 and 5.

Example 4

> Suppose Jason and Kylie are brother and sister born in 1979 and 1981 respectively. Suppose that their parents were English and living in London when Jason was born. However, suppose further that the family emigrated to Sydney, Australia when Jason was a few months old with the intention of residing there permanently.[58]
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> Jason would therefore have an English domicile of origin but a New South Wales domicile of dependency once the family reached Sydney.
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> Kylie would have a New South Wales domicile of origin.

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56 [1967] P 77 at 80

57 *Re Cartier* [1952] SASR 280 at 291

58 For the purposes of this example, it is assumed that Jason's parents acquire a domicile of choice upon their arrival in Sydney. The validity of this assumption depends on the facts of the case. In some situations, the parents will not be able to make any informed choice about their long-term plans until after a period of time in the new country.

Example 5

> Suppose Freda, a Californian, and Robert met in the United States whilst Robert was posted there by his UK employer. In 1973 they married when Robert had the intention of returning to England upon his retirement.
>
> Robert would have retained his English domicile of origin and Freda would have acquired an English domicile of dependency which would have become a domicile of choice with effect from 1st January 1974.

In Example 4, Jason and Kylie would probably have similar affiliation to New South Wales despite Jason having an English domicile of origin. On the other hand, Freda's connection with England is likely to be less strong than Jason's connection with New South Wales.

It was due to these issues that in 1987 the Law Commission proposed[59]:

- the abolition of the concept of a domicile of origin and
- that the standard of proof be stated to be the normal civil standard – i.e. the balance of probabilities. The Law Commission proposed the retention of the rule that any change in a person's domicile must be proven by the person asserting the change.

Pending statutory intervention, the concept of a domicile of origin will remain because of the rule that when a domicile of choice is abandoned and no new domicile of choice is acquired, then the domicile of origin is revived.[60] However, it is submitted that it is at least arguable that the other aspects of the Law Commission's proposals are already valid statements of the current law.

In particular, it is submitted that there should be no other distinction between the different kinds of domicile. As shown in Examples 4 and 5 above, a person's domicile can often be based on fluke rather than any attachment to a particular jurisdiction. This can be seen further if one considers the facts of Example 5 but assume that the marriage had in fact taken place in 1974. In that case, subject to where the couple were living at the time (etc), Freda would probably have retained her Californian domicile.

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59 *Private International Law: The Law of Domicile*, Law Com 168 Cm 200, paras 5.6, 5.9.

60 See footnote 18.

Without doubt, the concept of a tenacious domicile of origin stems from a time when global travel (or even intra-national) travel was less common. Consequently, adherences to one's country of origin were stronger than they might be nowadays. However, the test of domicile is not Norman Tebbit's "cricket test"[61]; instead, a person's domicile is where that person intends to reside permanently or indefinitely. Once someone's domicile has changed, that can be only because of a combination of that person's residence and intentions. Should their intentions and residence change at some future date, it is proper that the person's domicile status may once again be revised. However, there is no logical reason nor, in my opinion, any consistent line of authority, that suggests that the facts should be analysed any differently when one is abandoning a domicile of choice for another domicile of choice or when is claiming to have acquired a domicile of choice for the first time.

This is not to say that one's domicile of origin is completely irrelevant; on the contrary: as Kindersley VC said in *Drevon v Drevon*[62], every fact about a person's life must be considered. A person's domicile of origin might indeed have tenacious qualities. However, as seen in Example 4, Kylie's likely attachment to New South Wales is likely to be no stronger than her brother's. By virtue of his birthplace, Jason might have an iota more attachment to England than his sister but this is unlikely, in the absence of further facts, to have any real bearing on their respective domicile situations. Furthermore, suppose instead that Kylie were born in Perth where the family was temporarily living before settling in Sydney. In that case, Kylie would have an English domicile of origin despite her parents having no intention of returning to Britain at the time of her birth.

At the end of the day, one must consider fully an individual's life and circumstances; that includes considering a person's domicile of origin and the family background. If a person's background or life history shows an attachment to a particular country, that fact must be weighed up by the Courts when making a ruling as to the individual's domicile. However, in my view, if a person can be shown to have become resident somewhere with the intention of remaining resident there permanently or indefinitely – bearing in mind the person's history – then the issue for the Court will have been proven.

In my view, the only unique quality attaching to a domicile of origin is that it revives in cases where the person has no other domicile. This rule is illogical and the Law Commission proposed to reform it (as has happened in Australia and New

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61 as expressed in an interview in the Los Angeles Times and which suggested that immigration be excluded to those whose sporting loyalties might remain with their countries of origin.

62 See footnote 41.

Zealand[63]). However, in the absence of any statutory intervention, it would be wrong for the Courts to overturn this rule which is now firmly established in the Common Law.

What is harder to establish is the standard of proof currently applied by the Courts in domicile decisions. In my view, the Courts should look at all the facts critically, weighing each bit of evidence as seems appropriate for the particular case as per Scarman J in *Re Fuld (No. 3)*. Therefore, where a person is likely to have strong links with a particular jurisdiction, any long-term residence in another jurisdiction must be considered in that light. Similarly, if an individual has acquired a domicile of choice in one jurisdiction (say, one of the American states) and, a few years later, moves to another American state with no firm intention of leaving that state, it seems right that a new domicile of choice might be more easily acquired than if the person had previously lived only in the country where the person has a domicile of origin.

Conversely, now that global travel is so much easier and more commonplace, it follows that an individual's residence in another country is more likely to be less permanent than was previously the case. Therefore, a Court might be less willing to find that a person has acquired a domicile of choice in a particular country if there is the increased likelihood of that person moving again.

However, in my view, these factors are simply matters of weighting, rather than determining the standard of proof. Clear, cogent and compelling evidence is required. But, in my view, evidence that falls short of these standards should be treated as less persuasive than evidence that meets the standard. Once a Court has given the factual evidence the appropriate weighting, the ultimate decision should then, in my view, be determined on the balance of probabilities.

Long-term residents

That brings me to the final part of this article: whether long-term visitors can rely upon their overseas origins and the reservation of an overseas burial plot in order to justify their claim to a non-UK domicile status. In my view, such measures are far from sufficient. Without doubt, the retention of links with one's "home" country is useful evidence of an intention to return. However, this evidence must be considered alongside every other factor concerning the individual's life. In particular, any evidence to suggest that the club membership and overseas burial plot are acquired for the purposes of "window-dressing" would make the evidence itself less persuasive and its weighting would therefore be reduced considerably.

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63 See, respectively, Domicile Act 1982, section 7 and Domicile Act 1976, section 11

These measures, on their own, would amount to little more than a self-declaration of one's domicile status, which, as stated above needs to be backed up by consistent conduct.

On the other hand, there are a significant number of UK residents originally from overseas who do not have the firm intention of remaining in the UK forever. For them, their domicile situation can be more borderline. If there is a firm intention to leave at some time in the future, then *Jopp v Wood* suggests that a domicile of choice should not have been acquired. However, in that case, the individual's presence in India was for business reasons and the evidence suggested that he intended to return to Scotland in due course. Furthermore, it is now established that a floating or vague intention to return is not sufficient to displace the fact that a domicile of choice might have been acquired.[64] A definite intention to return means an intention to return on the happening of a measurable contingency which has a realistic likelihood of arising – even if the probability of it occurring is less than 50%.[65] Staying until one is simply fed up will suggest that a UK domicile of choice has been acquired.[66]

A visit to the UK which did not originally have the intention of becoming permanent can, over the course of time, acquire that intention. Consequently, a person can acquire a domicile of choice in the UK many years after they first became resident in the country.[67] What is less clear-cut is whether inertia, after a number of years, amounts to a change of intention. In *Ramsay,* it was held that an intention to remain cannot be inferred "from an attitude of indifference or a disinclination to move increasing with increasing years". However, in *Re Furse*, a stated intention to leave England was not considered persuasive when the individual, in the Court's opinion, had delayed his return to New York "for too long".

Ultimately, it is up to the Court to decide the domicile status on the basis of all the facts of the case. The one thing that is in the favour of a long-term resident, in the context of tax liabilities, is that any assertion that they have become UK domiciled is for HMRC to prove. Unless they can do so, the Court is bound to hold that the individual's overseas domicile of origin remains.

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64 See *Henderson v Henderson* [1967] P 77 per Sir Jocelyn Simon P at 80.

65 *IRC v Bullock* [1976] 1 WLR 1178

66 See Buckley LJ in *Bullock* at 1186B.

67 *Ramsay v Liverpool Royal Infirmary* [1930] AC 588