

**THE LAW REFORM COMMISSION OF HONG KONG**

**REPORT**

**RULES FOR DETERMINING DOMICILE**

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**April 2005**

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***The Hon Ms Elsie Leung Oi-Sie, GBM, JP,  
Secretary for Justice (Chairman)  
The Hon Mr Justice Andrew Li, Chief Justice  
Mr Tony Yen, SBS, JP, Law Draftsman  
Dr John Bacon-Shone  
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Mr Anthony Chow, SBS, JP  
Professor Y K Fan, JP  
Mr Alan Hoo, SBS, SC, JP  
The Hon Mrs Sophie Leung, SBS, JP  
Professor Michael McConville  
Mr Benjamin Yu, SC***

The Secretary of the Commission is **Mr Stuart M I Stoker** and its offices are at:

***20/F Harcourt House  
39 Gloucester Road  
Wanchai  
Hong Kong***

***Telephone: 2528 0472  
Fax: 2865 2902  
E-mail: [hklrc@hkreform.gov.hk](mailto:hklrc@hkreform.gov.hk)  
Website: <<http://www.hkreform.gov.hk> >***

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## REPORT

### RULES FOR DETERMINING DOMICILE

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# Preface

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1. The concept of domicile is important in the Hong Kong legal system and plays a significant role in private international law. In the common law world the concept of domicile has traditionally been used as the major connecting factor to determine the personal law of an individual. In the civil law tradition nationality has played that role. Domicile can be distinguished from nationality in that, while the latter connects an individual to a state, the former relates to a legal jurisdiction. It differs, too, from nationality in that while a person can be stateless, or have more than one nationality at the same time, he cannot be without a domicile, and can only have a single domicile at any one time. Domicile does not equate to residence, for it is possible to be domiciled in a place other than one's country of residence.

2. What, then, is the concept of domicile? Domicile has been defined as "the place or country which is considered by law to be a person's permanent home."<sup>1</sup> The central notion of domicile is that of a long-term relationship between person and place. In other words, a person is domiciled in the country where he intends to live permanently or indefinitely.

3. Domicile is what is termed in private international law a "connecting factor": it determines under which system of law and within the jurisdiction of which country's courts certain issues (principally those relating to status and property) are to be determined. The concept of domicile connects a person with the country in which he has his permanent home or in which he intends to live indefinitely. The effect of that connection is that matters which are intimately connected with a person's personal life fall to be determined by the law of the place with which he is most intimately connected (ie the law of his domicile), rather than a place with which he has only tenuous or short-term connections.

4. Despite the significance of the concept of domicile, the rules for determining a person's domicile have repeatedly been criticised as unnecessarily complicated and technical, and as sometimes leading to absurd results. Various law reform bodies in the common law world<sup>2</sup> have critically examined the traditional concept of domicile and recommended, in particular, amending the rules for determining domicile. In a number of countries,

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<sup>1</sup> *Mason v Mason* (1885) EDC 330, at 337. In *Whicker v Hume*, 7 H L Cas 124, at 160, 11 E R 50, at 64 (1858), Lord Carnworth observed: "By domicile, we mean home, the permanent home; and if you do not understand your permanent home, I am afraid that no illustration drawn from foreign writers or foreign languages will very much help you to it."

<sup>2</sup> Such as the Uniform Law Conference in Canada (1961), the Law Reform Commission in Ireland (1983), the Law Commission in England and Scottish Law Commission (1987) and the South African Law Commission (1990).

including Australia, Canada, Ireland, New Zealand and South Africa,<sup>3</sup> those criticisms have been answered by legislation which amends the rules for determining domicile.

## Terms of reference

5. The Secretary for Justice and the Chief Justice considered it appropriate for the Law Reform Commission to review the way in which the law determines a person's domicile and referred the topic to the Commission with the following terms of reference:

*"To review the law governing the determination of domicile of natural persons and to consider and make recommendations for such reform as may be necessary."*

6. On 25 June 2002, the Law Reform Commission appointed a sub-committee to examine the current state of law and to make recommendations (the "Sub-committee"). The Sub-committee held a total of eleven meetings. The members of the Sub-committee are:

Ms Audrey Eu, SC	(Chairman) Senior Counsel
Mr Philip Smart	(Vice-chairman) Associate Professor Department of Law The University of Hong Kong
Ms Mimmie Chan	Solicitor Allen & Overy
Prof Fanny M Cheung	Professor & Chair Department of Psychology Chinese University of Hong Kong
HH Judge Chu	Family Court
Mr Jat Sew-tong, SC	Senior Counsel
Mr Anson Kan	Solicitor Johnson Stokes & Master
Ms Thelma Kwan	Head of Estate Planning Services Wealth Protection Solutions HSBC Trustee (Hong Kong) Ltd
Ms Jacqueline Leong, SC	Senior Counsel

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<sup>3</sup> The Domicile Act 1982, Australia (Commonwealth); the Domicile and Habitual Residence Act 1983, Manitoba; the Domicile and Recognition of Foreign Divorces Act 1986, Ireland; the Domicile Act 1976, New Zealand; and the Domicile Act 1992, South Africa.

Mr Billy Ma

Solicitor  
Hobson & Ma

Mr Byron Leung

(Secretary)

## **The consultation process**

7. The Sub-committee published a consultation paper on *Rules for Determining Domicile* (the "Consultation Paper") in March 2004, with a consultation period until the end of May 2004. The Sub-committee received responses to the Consultation Paper from those listed at Annex 1. We are grateful to all those who responded to the Consultation Paper.

8. The Consultation Paper was in general well received by those who commented upon it and the majority of respondents supported the Sub-committee's recommendations. Nevertheless, some respondents did have specific comments and observations on both the recommendations and the issues discussed in the Consultation Paper. We will deal with them in the following chapters.

## **Layout of this Report**

9. This Report is the result of careful consideration of the initial recommendations in the Consultation Paper in the light of the responses we received to the paper. This Report examines the rules for determining a person's domicile in Hong Kong and the anomalies in those rules, and presents a number of recommendations for reform.

10. Chapter 1 discusses the existing rules for determining a person's domicile, and the major areas of law in which the concept of domicile is used as a connecting factor. Chapter 2 highlights the problems of the existing law. Chapter 3 discusses other common connecting factors employed in Hong Kong, and whether domicile should be retained as a general connecting factor. Chapter 4 examines the law in other jurisdictions, and looks at the opinions of academics and practitioners, as well as the responses we received to the Consultation Paper before setting out our final recommendations. Chapter 5 summarises our recommendations, and sets out their practical effects.

# Chapter 1

## The existing rules for determining a person's domicile

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1.1 In this chapter, we set out the existing rules as to how a person's domicile is determined. This is not intended to be an exhaustive account of the law of domicile in Hong Kong. We discuss these rules as a background to the discussion in the next chapter of the problems of the existing law.

1.2 A person's domicile connects him with a system of law for the purposes of determining a range of matters, principally related to status or property. In order to connect him with a system, it is necessary to fix his domicile in a particular geographical area governed by one system of law, or what can be termed a "law district".<sup>1</sup> For the purpose of determining a person's domicile, Hong Kong is such a "law district", since it has its own system of law. There is more than one law district in a federal state such as Canada (British Columbia, Manitoba, Ontario, etc), or in a composite state such as the United Kingdom (England and Wales, Scotland and Northern Ireland). Similarly, in the People's Republic of China there are four law districts, namely Mainland People's Republic of China, Taiwan, the Hong Kong Special Administrative Region and the Macau Special Administrative Region.

1.3 The concept of domicile is highly technical. Its relevance and importance should perhaps be mentioned at the outset so as to put the concept in context. Hence, the major areas of law in which the concept is employed as a connecting factor are discussed below.

### Major areas of law where the concept of domicile is used

1.4 The concept of domicile is used in various areas of law, both at common law and by statute, to determine what system of law should govern a person's civil status and certain aspects of the administration of his property. The concept of domicile is relevant in various situations, and applies to all persons and countries. We emphasise that if there are anomalies in an area of law in which the concept of domicile is applied, that area of law but not the concept of domicile should be reformed. The major areas of law where the concept of domicile is used are as follows:

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<sup>1</sup> *Dicey and Morris on the Conflict of Laws* (Sweet and Maxwell, 13<sup>th</sup> Ed, 2000) at para 1-060.

(a) *Legal capacity to marry*

Legal capacity to marry is governed by the law of each party's antenuptial domicile.<sup>2</sup> A marriage is valid in respect of legal capacity if each of the parties has capacity to marry under the law of his or her antenuptial domicile.

(b) *Succession to an intestate's movables*

Succession to an intestate's movables, wherever situated, is governed by the law of his domicile at the date of his death.<sup>3</sup> By contrast, all questions of succession to an intestate's immovables are governed by the *lex situs* (ie the law of the place where the land is situated).<sup>4</sup>

(c) *Personal capacity to make a will*

A testator's personal capacity to make a will of movables is governed by the law of his domicile.<sup>5</sup> Personal capacity is determined by criteria which relate to a person himself, rather than his property. Those criteria, according to which domiciliary law applies, may include his physical or mental state, or his age or marital status.

(d) *Formal validity of a will*

A will is treated as properly executed if its execution conformed to the internal law in force in the territory where it was executed, or in the territory where, at the time of its execution or of the testator's death, the testator was domiciled or had his habitual residence, or was a national.<sup>6</sup>

(e) *Jurisdiction of court in proceedings for divorce, etc*

The court has jurisdiction in proceedings for divorce and nullity if either party to the marriage was domiciled at the date of the petition or habitually resident for a period of three years before that date, in Hong Kong.<sup>7</sup> The court has jurisdiction in proceedings for judicial separation if either party to the marriage was domiciled at the date of the petition in Hong Kong.<sup>8</sup>

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<sup>2</sup> *Ong Constantino Erminda v Chau Shui Hing* [1989] 1 HKC 237; *Brook v Brook* (1858) 3 Sm & G 481; *Mette v Mette* (1859) 1 Sw & Tr 416 at 423.

<sup>3</sup> *Pipon v Pipon* (1744) Amb 25; *Re Maldonado, State of Spain v Treasury Solicitor* [1954] P 223 at 233.

<sup>4</sup> *Balfour v Scott* (1793) 6 Bro Parl Cas 550.

<sup>5</sup> *Re Maraver's Goods* (1828) 1 Hag Ecc 498; *Re Fuld's Estate (No 3), Hartley v Fuld* [1968] P 675 at 696. It is uncertain whether the domicile at the date of execution or at the date of death governs where there has been a change of domicile after execution.

<sup>6</sup> Section 24 of the Wills Ordinance (Cap 30).

<sup>7</sup> Sections 3 and 4 respectively of the Matrimonial Causes Ordinance (Cap 179). In *Coyne v Coyne* [1960] HKLR 163, the question was whether the plaintiff had, at the time when the petition was presented, a Hong Kong domicile upon which to found the jurisdiction of the Court (section 4(1)(b) of the repealed Divorce Ordinance).

<sup>8</sup> Section 5 of Cap 179.

(f) *Jurisdiction of court in proceedings for presumption of death and dissolution of marriage*

The court has jurisdiction in proceedings for presumption of death and dissolution of marriage if a petitioner was domiciled at the date of the petition or habitually resident for a period of three years before that date, in Hong Kong.<sup>9</sup>

(g) *Declarations of legitimacy, etc*

A person may, if he is domiciled in Hong Kong, apply by petition to the court for a decree declaring that he is a legitimate child of his parents; or that the marriage of his parents or of his grand-parents was a valid marriage; or that his own marriage was a valid one.<sup>10</sup>

(h) *Recognition of overseas divorces or legal separations*

An overseas divorce or legal separation will be recognised in Hong Kong if, at the time of the institution of the proceedings in the country concerned, either spouse was domiciled in, habitually resident in, or a national of, that country.<sup>11</sup>

(i) *Legitimation by subsequent marriage of parents*

If the father of an illegitimate child is domiciled in Hong Kong at the date of his subsequent marriage with the mother of the child, the child will be legitimated.<sup>12</sup>

(j) *Declaration of a person's status*

If a person is domiciled or habitually resident in Hong Kong, he may apply to the court for a declaration that (1) a person named in his application is or was his parent; (2) he is a legitimate child of his parents; or (3) he has become a legitimated person.<sup>13</sup>

(k) *Service of process out of the jurisdiction*

Service of a writ out of the jurisdiction is permissible in Hong Kong if relief is sought against a person domiciled or ordinarily resident within the jurisdiction, or the claim is made for the administration of the estate of a person who died domiciled within the jurisdiction.<sup>14</sup>

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<sup>9</sup> Section 6 of Cap 179.

<sup>10</sup> Section 49 of Cap 179.

<sup>11</sup> Section 56 of Cap 179.

<sup>12</sup> Section 3 of the Legitimation Ordinance (Cap 184).

<sup>13</sup> Section 6 of the Parent and Child Ordinance (Cap 429).

<sup>14</sup> Order 11 rule 1 of the Rules of the High Court (Cap 4A).

(l) *Direct application of Chinese law and custom as Hong Kong domestic law*

The direct application of Chinese law and custom as Hong Kong domestic law is confined to Chinese persons domiciled in Hong Kong. Hong Kong law does not treat Chinese law and custom as the personal law of all ethnic Chinese, regardless of their domicile. Merely being an ethnic Chinese or a Chinese inhabitant of Hong Kong does not suffice.<sup>15</sup>

The Hong Kong Bar Association observed in its response to the Consultation Paper that six of these twelve areas of law had already adopted habitual or ordinary residence as a connecting factor, and wondered whether domicile should still be retained as the general connecting factor, given its artificialities. We will discuss this issue in Chapter 3. Suffice to say at this juncture that while at common law domicile is employed as the general connecting factor, this does not preclude other connecting factors from being used in addition to domicile as alternative or supplementary connecting factors in legislation on a case-by-case basis for one reason or another.

## **General rules in respect of domicile**

1.5 Before examining the rules for determining a person's domicile in Hong Kong, it may be helpful to set out some of the general rules which apply to domicile.

1.6 First, no person can be without a domicile. It is well established that everyone must have a domicile.<sup>16</sup> A person cannot choose to be without a domicile, even though he can choose to change his domicile. Every independent person must have a domicile, either of origin or of choice. Every dependent person must also have a domicile, either that of the person on whom he is dependent or that otherwise attributed by law.

1.7 Secondly, no person can at the same time for the same purpose have more than one domicile.<sup>17</sup> However, in a federal or composite state consisting of a number of different jurisdictions, there may be statutes creating one domicile for one purpose and another domicile for other purposes. For example, section 39(3)(b) of the Family Law Act 1975 (Commonwealth) in Australia creates an Australian domicile (as distinct from a domicile in one of the various states, such as Queensland) for the purpose of divorce jurisdiction.

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<sup>15</sup> *Suen Toi Lee v Yau Yee Ping* [2002] 1 HKLRD 197.

<sup>16</sup> *Udny v Udny* (1869) LR 1 Sc & Div 441, at 448, 453, 457; *Bell v. Kennedy* (1868) LR 1 Sc & Div 307, at 320; *Re Craignish* [1892] 3 Ch 180, at 192.

<sup>17</sup> *Udny v Udny* (1869) LR 1 Sc & Div 441, at 448. It has been suggested that a person may have different domiciles for different purposes: *Att-Gen v Rowe* (1862) 1 H & C 31, at 45 and *Lawrence v Lawrence* [1985] Fam 106, at 132-133. However, according to *Dicey and Morris on the Conflict of Laws* (13<sup>th</sup> Ed, Sweet and Maxwell, 2000 at para 6-015), this proposition would raise many problems which are as yet unresolved. At para 6-016, it recognised that to a very limited extent, a person could be domiciled in two different countries for different purposes at the same time.

Therefore, a person can have two domiciles in Australia: one for matrimonial causes and another for other issues. Conversely, in the absence of any equivalent legislation, a person domiciled in Hong Kong cannot concurrently be domiciled in the PRC and *vice versa*.

1.8 Thirdly, an existing domicile is presumed to continue until it is proved that a new domicile has been acquired.<sup>18</sup> The burden of proving a change of domicile rests with the person asserting such a change.<sup>19</sup> The strength of the presumption differs for different types of domicile, ranging from domicile of dependency (which is weakest) to domicile of origin which is "more enduring,... hold[s] stronger, and [is] less easily shaken off".<sup>20</sup>

1.9 Fourthly, the courts in Hong Kong will apply Hong Kong law in determining a person's domicile. The person's nationality or foreign connection may be irrelevant to that determination. Hence, applying the Hong Kong law of domicile, the Hong Kong courts may determine that a person has acquired a domicile of choice in another jurisdiction, even though he has not satisfied the requirements for domicile imposed by the law of that other jurisdiction. Similarly, where a person has a domicile of origin in another jurisdiction, the law of domicile of that jurisdiction is not relevant to the Hong Kong courts' decision as to whether he has acquired a Hong Kong domicile of choice.<sup>21</sup>

## **Existing rules for determining a person's domicile**

1.10 The existing rules for determining a person's domicile can best be outlined by beginning with the domicile of a new born baby, followed by that of a child and then an adult. We will also discuss the domicile of some special cases, such as married women and the mentally incapacitated. For the purposes of this discussion, when we refer to "country" we mean a "law district" or distinct jurisdiction (ie a "territory subject under one sovereign to one body of law"<sup>22</sup>), unless the context requires otherwise.

### ***Domicile of children***

#### *Domicile of origin*

1.11 By the operation of law, every person receives at birth a domicile of origin which depends on the domicile of the appropriate parent at the time of his birth, but not on where he was born or where the parents live.<sup>23</sup> A domicile of origin is determined in the following ways.<sup>24</sup>

<sup>18</sup> *Att-Gen v Rowe* (1862) 1 H & C 31, at 42; *Bell v. Kennedy* (1868) LR 1 Sc & Div 307, at 319.

<sup>19</sup> *Winans v Att-Gen* [1904] AC 287.

<sup>20</sup> *Winans v Att-Gen* [1904] AC 287, at 290.

<sup>21</sup> *Re Martin* [1900] P 211, at 227(CA).

<sup>22</sup> *Dicey and Morris on the Conflict of Laws* (Sweet and Maxwell, 13<sup>th</sup> Ed, 2000) at paras 6-007 and 1-060.

<sup>23</sup> *Udny v Udny* (1869) LR 1 Sc & Div 441, at 457.

<sup>24</sup> *Dicey and Morris on the Conflict of Laws* (Sweet and Maxwell, 13<sup>th</sup> Ed, 2000) Rule 9 at para

- (a) a legitimate child born during the lifetime of his father has a domicile of origin in the country of his father's domicile at the time of his birth;<sup>25</sup>
- (b) a legitimate child born after his father's death,<sup>26</sup> or an illegitimate child, has a domicile of origin in the country of his mother's domicile at the time of his birth;<sup>27</sup>
- (c) a foundling has a domicile of origin in the country where he was found.<sup>28</sup>

1.12 The domicile of a legitimate child born after the divorce of his parents is not entirely certain. It has been suggested that he should have his mother's domicile at the time of his birth.<sup>29</sup> Where the parents are not divorced but merely living apart at the time of the child's birth, the domicile of origin of the child will be that of his father.<sup>30</sup>

1.13 As a result of adoption,<sup>31</sup> legitimation or a change in the parents' domicile, a child's domicile may be changed. In the case of legitimation or a change in the parents' domicile, the child's new domicile is a domicile of dependency but not a domicile of origin.<sup>32</sup> The significance is that, as discussed later in this chapter, a domicile of origin can revive at any time during the child's life while a domicile of dependency cannot.

1.14 This potential for revival of the domicile of origin is one of its distinctive features. Domicile of origin is a creature of law. It remains with a child for his entire life, even when he has grown up and acquired a domicile of choice. At that time, his domicile of origin remains in abeyance, but will revive immediately when he relinquishes his domicile of choice without acquiring a new domicile of choice.<sup>33</sup>

### *Domicile of dependency of children*

1.15 A dependent person's domicile is generally the same as, and changes with, the domicile of the person on whom he is, in respect of his

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<sup>25</sup> *Udny v Udny* (1869) LR 1 Sc & Div 441. In applying the principle that children not born in lawful wedlock are legitimate in Hong Kong if they are legitimate by the law of the domicile of each of their parents at the date of their birth, Kaplan J held that a child, with both parents domiciled in China which did not have a concept of legitimacy, was a legitimate child. (*Re Sit Woo Tung* [1990] 2 HKLR 410)

<sup>26</sup> It is generally accepted that a posthumous child should have his mother's domicile at birth although no authority can be found on this (*Dacey and Morris on the Conflict of Laws* (Sweet and Maxwell, 13<sup>th</sup> Ed, 2000) at para 6-028).

<sup>27</sup> *Udny v Udny* (1869) LR 1 Sc & Div 441, at 457.

<sup>28</sup> This rule is generally accepted, though there is no direct authority to support it. This rule not only applies to a foundling in the strict sense, but also to a child whose parents are not known. *Dacey and Morris on the Conflict of Laws* (Sweet and Maxwell, 13<sup>th</sup> Ed, 2000) at para 6-029.

<sup>29</sup> *Dacey and Morris on the Conflict of Laws* (Sweet and Maxwell, 13<sup>th</sup> Ed, 2000) at para 6-028.

<sup>30</sup> *Dacey and Morris on the Conflict of Laws* (Sweet and Maxwell, 13<sup>th</sup> Ed, 2000) at para 6-028.

<sup>31</sup> See the following part on "Domicile of dependency of children".

<sup>32</sup> *Henderson v Henderson* [1967] P 77.

<sup>33</sup> *Udny v Udny* (1869) LR 1 Sc & Div 441.

domicile, legally dependent. For the purpose of the law of domicile, children are regarded as dependent persons. Other dependent persons are married women and mentally incapacitated persons.<sup>34</sup> A dependent person cannot acquire a domicile of choice by his own act.

1.16 A domicile of dependency of a child under eighteen<sup>35</sup> is determined as follows:

- (a) a legitimate child's domicile is, during the lifetime of his father, the same as, and changes with, his father's domicile;<sup>36</sup>
- (b) the domicile of an illegitimate child and of a child whose father is dead is the same as, and changes generally with,<sup>37</sup> his mother's domicile;<sup>38</sup>
- (c) a legitimated child's domicile is, from the time at which the legitimation takes effect, during the lifetime of his father, the same as, and changes with, his father's domicile if the legitimation is due to the marriage of the child's parents;<sup>39</sup> before the legitimation or after the father's death, the child's domicile depends on his mother's as mentioned in (b) above;
- (d) the domicile of a legitimate or legitimated child without living parents, or of an illegitimate child without a living mother (though with a living father) probably cannot be changed, and it is doubtful whether the domicile of a child without living parents can be changed by his guardian.<sup>40</sup>

1.17 If the mother of an illegitimate child or of a fatherless legitimate child changes her domicile, she may also choose to change her child's domicile. It was held in *Re Beaumont*<sup>41</sup> that the remarriage of a widow, which at that time led to her getting a new domicile of dependence, did not of itself affect the domicile of her children:

*"The change in the domicile of an infant which ... may follow from a change of domicile on the part of the mother, is not to be regarded as a necessary consequence of a change of the mother's domicile, but as the result of the exercise by her of a power vested in her for the welfare of the infants, which, in their interest, she may abstain from exercising, even when she changes her own domicile."*<sup>42</sup>

<sup>34</sup> The following paragraphs of this chapter will consider them.

<sup>35</sup> Section 2 of the Age of Majority (Related Provisions) Ordinance (Cap 410).

<sup>36</sup> *Re Duleep Singh* (1890) 6 TLR 385 (CA); *Henderson v Henderson* [1967] P 77.

<sup>37</sup> See the following paragraph.

<sup>38</sup> *Pottinger v Wightman* (1817) 3 Mer 67.

<sup>39</sup> No authority can be found on this point. But see *Dacey and Morris on the Conflict of Laws* (Sweet and Maxwell, 13<sup>th</sup> Ed, 2000) at para 6-092 for this submission.

<sup>40</sup> No authority can be found on this point. But see *Dacey and Morris on the Conflict of Laws* (Sweet and Maxwell, 13<sup>th</sup> Ed, 2000) at para 6-094 for this submission.

<sup>41</sup> [1893] 3 Ch 490.

<sup>42</sup> [1893] 3 Ch 490, at 496-497.

Where a mother of an illegitimate child or of a fatherless legitimate child acquires a new domicile of choice but leaves her child in the country of her previous domicile, she can be regarded as abstaining from exercising her power of changing her child's domicile.<sup>43</sup>

1.18 No authority can be found concerning the position of adopted children. Section 13 of the Adoption Ordinance (Cap 290) provides for the effect of adoption orders. When an adoption order is made, certain rights, duties and obligations relating to the child pass from the natural parents to the adoptive parents. These various rights and duties are set out in section 13.<sup>44</sup> It is patent from its wording that these rights and duties are not all embracing, but are limited to those relating to the future custody, maintenance and education of the child (including all rights to appoint a guardian to consent or give notice of dissent to marriage). The Court of Appeal unanimously held in *Xie Xiaoyi & others v Director of Immigration*<sup>45</sup> that section 13 was limited in scope and did not treat an adopted child as a child born of the marriage of the adoptive parents:

*"In summary, therefore, the provisions of the Adoption Ordinance are limited. They do not extend to a blanket treatment in law of the adopted child as if it had been born a child of the marriage of the adoptive parents. In this respect, it would seem that the law of adoption in Hong Kong has remained stationary being still modelled on the Adoption Act 1950 (in England) which was the law pertaining in England and Wales half a century ago. In contrast, it can be noted that the Adoption Act 1976 (in England) contains in s.39 a provision, the effect of which is to treat the child 'in law' as if he had been 'born as a child of the marriage'. ...*

*Whilst therefore, the nature of adoption as recognised by the law of Hong Kong gives the adopted child rights, those rights are by no means all encompassing as they might be if the legislation had been similar to current United Kingdom legislation."*<sup>46</sup>

1.19 It is therefore uncertain whether section 13 would cover the issue of an adopted child's domicile. It has, however, been argued<sup>47</sup> that it would be reasonable in principle to say that, during the lifetime of an adoptive parent, the adopted child's domicile would be the same as, and would change with, that parent's domicile.

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<sup>43</sup> *Dicey and Morris on the Conflict of Laws* (Sweet and Maxwell, 13<sup>th</sup> Ed, 2000) at para 6-093.

<sup>44</sup> "...all rights, duties, obligations and liabilities of the parents or guardians of the infant in relation to the future custody, maintenance and education of the infant, including all rights to appoint a guardian to consent or give notice of dissent to marriage...".

<sup>45</sup> [2000] 2 HKLRD 161.

<sup>46</sup> [2000] 2 HKLRD 161, at 168G, 173H and 180G.

<sup>47</sup> *Dicey and Morris on the Conflict of Laws* (Stevens & Sons Ltd, 9<sup>th</sup> Ed, 1973) at 121 and *Dicey's Conflict of Laws* (Stevens & Sons Ltd, 7<sup>th</sup> Ed, 1958) at 117. Both editions were before the enactment of section 39 of the Adoption Act 1976 in England which puts it beyond doubt that an adopted child is regarded as the legitimate child of his adoptive parent or parents.

1.20 No authority can be found to support the proposition that a child's abandonment or emancipation will enable him to acquire a domicile.<sup>48</sup> On ceasing to be dependent, a person continues to be domiciled in the country of his last domicile of dependency. In the case of a child reaching eighteen years of age, he will retain his existing domicile of dependency as a domicile of choice,<sup>49</sup> even though he now has the legal ability to change his domicile.

### ***Domicile of adults***

1.21 According to the Age of Majority (Related Provisions) Ordinance (Cap 410), a person attains majority for most purposes when he is eighteen years of age.<sup>50</sup> On reaching eighteen years of age, a person remains domiciled in the country where he was domiciled immediately before reaching the age of eighteen.<sup>51</sup> If he abandons that domicile, either he will acquire a domicile of choice or his dormant domicile of origin will revive.<sup>52</sup> Cap 410 came into operation on 1 October 1990, and the former age of majority (twenty-one) still applies to transactions which occurred prior to that date.

### ***Domicile of choice***

1.22 Where a person has left his homeland with the intention of not returning, his domicile of origin continues until he acquires a domicile of choice.<sup>53</sup> A person can acquire a domicile of choice by the combination of residence in a country and the intention of permanently or indefinitely residing there, but not otherwise. Mere residence without intention is not enough, and the intention must be demonstrated by actual residence.

1.23 "Residence" appears to involve little more than mere physical presence, but it does not include the case where a person is present "casually or as a traveller".<sup>54</sup> The "residence" must be physical presence in a country "as an inhabitant of it".<sup>55</sup> Apart from this, residence may be established without any mental element.<sup>56</sup> The length of residence is not by itself conclusive, and is only important as evidence of *animus manendi*, the intention of permanent or indefinite residence.<sup>57</sup> It is not necessary that the

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<sup>48</sup> *Dicey and Morris on the Conflict of Laws* (Sweet and Maxwell, 13<sup>th</sup> Ed, 2000) at para 6-091.

<sup>49</sup> *In the goods of Patten* (1860) 6 Jur (NS) 151; *Gulbenkian v Gulbenkian* [1937] 4 All E R 618.

<sup>50</sup> Section 2 of the Age of Majority (Related Provisions) Ordinance (Cap 410).

<sup>51</sup> *In the Goods of Patten* (1860) 6 Jur (NS) 151; *Re Macreight* (1885) 30 Ch D 165.

<sup>52</sup> *Henderson v Henderson* [1967] P 77. See the following paragraphs on "Revival of domicile of origin".

<sup>53</sup> *Bell v Kennedy* (1868) LR 1 Sc & Div 307.

<sup>54</sup> *Manning v Manning* (1871) LR 2 P & D 223, at 226. The decision was not on a point of domicile.

<sup>55</sup> *IRC v Duchess of Portland* [1982] Ch 314, at 318-9.

<sup>56</sup> *Dicey and Morris on the Conflict of Laws* (Sweet and Maxwell, 13<sup>th</sup> Ed, 2000) at para 6-034.

<sup>57</sup> *Dicey and Morris on the Conflict of Laws* (Sweet and Maxwell, 13<sup>th</sup> Ed, 2000) at R11 para 6R-046.

length of residence be long.<sup>58</sup> Residence for a few days,<sup>59</sup> or for a period even shorter than that,<sup>60</sup> may be enough.

1.24 The "intention" required is to reside permanently or for an unlimited time in a particular country.<sup>61</sup> The residence must be general and indefinite in its future contemplation, and not just for a limited period or particular purpose.<sup>62</sup> The intention must be directed exclusively towards one country.<sup>63</sup> The intention need not be irrevocable in nature,<sup>64</sup> nor is it necessary that it be for the purpose of acquiring a domicile.<sup>65</sup> It also suffices if the intention is negative in form: residing in a country without any intention of leaving it for one's former country of domicile or any other country.<sup>66</sup> A possible move to another country which is dependent on a contingency may have different consequences according to the nature of the contingency. If it is unlikely to occur, such as making a fortune,<sup>67</sup> this would not be sufficient to detract from the individual's intention of permanent or indefinite residence in the country where he is residing. However, if the contingency is clearly foreseen and reasonably anticipated, such as the termination of a contract of employment,<sup>68</sup> this may prevent him from establishing the requisite intention to settle in the country where he is residing.

1.25 Any fact which is evidence of a person's residence, or of his intention to reside permanently or indefinitely in a country, must be considered in deciding whether he has acquired a domicile of choice in that country.<sup>69</sup> No fact can be regarded as a definite criterion of the existence of the required intention. A fact may be considered as relevant in one case, but can be regarded as irrelevant in another.<sup>70</sup>

#### *Abandonment of a domicile of choice*

1.26 A domicile of choice can be abandoned by ceasing both to reside and to intend to reside in that country permanently or indefinitely, and not otherwise.<sup>71</sup> Giving up residence<sup>72</sup> or the intention to reside<sup>73</sup> alone will not abandon a domicile of choice. As far as intention is concerned, it is

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<sup>58</sup> *Bell v. Kennedy* (1868) LR 1 Sc & Div 307, at 319; *Stone v Stone* [1958] 1 WLR 1287.

<sup>59</sup> *Fasbender v Att-Gen* [1922] 2 Ch 850, at 857-858.

<sup>60</sup> *White v Tennant*, 31 W Va 790, 8 SE 596 (1888).

<sup>61</sup> *Att-Gen v Pottinger* (1861) 6 H & N 733, at 747-748.

<sup>62</sup> *Udny v Udny* (1869) LR 1 Sc & Div 441, at 458.

<sup>63</sup> *Bell v. Kennedy* (1868) LR 1 Sc & Div 307.

<sup>64</sup> *Gulbenkian v Gulbenkian* [1937] 4 All E R 618.

<sup>65</sup> *Re Annesley* [1926] Ch 692, at 701.

<sup>66</sup> *Bell v Bell* [1922] 2 IR 152; *Re Flynn* [1968] 1 WLR 103.

<sup>67</sup> *In the Estate Fuld* (No 3) [1968] P 675, at 685; *IRC v Bullock* [1976] 1 WLR 1178 (CA).

<sup>68</sup> *In the Estate Fuld* (No 3) [1968] P 675, at 684.

<sup>69</sup> *Dacey and Morris on the Conflict of Laws* (Sweet and Maxwell, 13<sup>th</sup> Ed, 2000) at R11 para 6R-046. See also *Drevon v Drevon* (1864) 34 LJ Ch 129, at 133: "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. A trivial act might possibly be of more weight with regard to determining this question than an act which was of more importance to a man in his life-time."

<sup>70</sup> *Drevon v Drevon* (1864) 34 LJ Ch 129.

<sup>71</sup> *Udny v Udny* (1869) LR 1 Sc & Div 441, at 450.

<sup>72</sup> *Lyall v Paton* (1856) 25 LJ Ch 746.

<sup>73</sup> *In the Goods of Raffanel* (1863) 3 Sw & Tr 49; *IRC v Duchess of Portland* [1982] Ch 314.

sufficient to prove the absence of an intention to continue to reside and there is no need to prove a positive intention not to return.<sup>74</sup> However, a mere dissatisfaction with the country of the domicile of choice is not sufficient.<sup>75</sup> Residence can simply be given up, and not necessarily only by arriving in another country.<sup>76</sup>

### *Revival of domicile of origin*

1.27 On abandoning his domicile of dependency or his domicile of choice, a person may acquire a new domicile of choice. Alternatively, he may simply abandon his domicile of dependency or his domicile of choice without acquiring a home in another country. In this case, his domicile of origin revives,<sup>77</sup> irrespective of where he is or what his plans are for the future.

### ***Domicile of dependency of married women***

1.28 For the purpose of the law of domicile, a married woman is a dependent person. Accordingly, she cannot acquire a domicile of choice<sup>78</sup> by her own actions, and is dependent upon her husband. If she is a minor, her dependence on her husband will prevail over her dependence on her father. In other words, a married woman's domicile is the same as, and changes with her husband's domicile. This rule applies even where the spouses live apart in different countries,<sup>79</sup> whether or not this is according to a formal separation agreement.<sup>80</sup> The rule also applies where a wife has obtained a decree of judicial separation.<sup>81</sup> Where a marriage is void from the beginning, a woman remains capable of acquiring a domicile of her choice.<sup>82</sup> However, if a marriage is valid or subsisting initially (voidable), a woman shares her husband's domicile until it is annulled.<sup>83</sup>

1.29 On ceasing to be dependent, a person continues to be domiciled in the country of his or her last domicile of dependency. In the case of a married woman, she will retain her existing domicile of dependency as a domicile of choice, even after she acquires the legal ability to change it. A married woman's dependency ends, for instance, on her husband's death or the granting of a decree of divorce, but she will continue to be domiciled in the country of her last domicile of dependency until she acquires a different

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<sup>74</sup> *Re Flynn (No 1)* [1968] 1 WLR 103, at p113-5, per Megarry J (obiter); *Qureshi v Qureshi* [1972] Fam 173, at 191.

<sup>75</sup> *Re Marrett* (1887) 36 Ch D 400 (CA).

<sup>76</sup> See *Dicey and Morris on the Conflict of Laws* (Sweet and Maxwell, 13<sup>th</sup> Ed, 2000) at para 6-075 for this submission.

<sup>77</sup> *Udny v Udny* (1869) LR 1 Sc & Div 441.

<sup>78</sup> See the following paragraphs for the situation in which married women can have their own independent domicile for certain limited purposes.

<sup>79</sup> In *Re Scullard* [1957] Ch 107, the spouses had separated for 46 years and were in different countries for about 30 of those years.

<sup>80</sup> *Warrender v Warrender* (1835) 2 Cl & F 488. See *Dicey and Morris on the Conflict of Laws* (Sweet and Maxwell, 8<sup>th</sup> Ed, 1967) at 113, Rule 13.

<sup>81</sup> *AG for Alberta v Cook* [1926] AC 444.

<sup>82</sup> *De Reneville v De Reneville* [1948] P 100.

<sup>83</sup> *De Reneville v De Reneville* [1948] P 100.

domicile of choice. Such a change can be the result of acts done during dependency. Hence, a married woman who is settled in a country other than that of her husband's domicile during her dependency can acquire a new domicile in that country as soon as her dependency ends.<sup>84</sup>

1.30 In Hong Kong, a married woman can have her own independent domicile for certain limited purposes. Section 11C of the Matrimonial Causes Ordinance (Cap 179) provides that a married woman's domicile shall "*be ascertained by reference to the same factors as in the case of any other individual capable of having an independent domicile*", instead of merely following her husband's. However, this provision applies only for the purposes of Part II of Cap 179 (ie the jurisdiction of court in respect of divorce, nullity, judicial separation, etc). Generally speaking, a married woman's domicile still follows her husband's.

### ***Domicile of dependency of the mentally incapacitated***<sup>85</sup>

1.31 Although different jurisdictions discussed in Chapter 4 may use different terminologies, we are essentially referring to the same type of persons, ie those who are unable to exercise their will because of their mental condition. Not every person who suffers from any of the recognised types of mental incapacity will be treated as a "dependent person". It is a question of fact as to whether or not a mentally incapacitated person is an independent person and can therefore change his domicile.<sup>86</sup> The question is whether the person has the ability to form the necessary intention to make his home in a country permanently or indefinitely. It does not seem appropriate to link the question of capacity for the purposes of the law of domicile to the use of compulsory detention or guardianship.<sup>87</sup>

1.32 The general rule is that a mentally incapacitated person who is regarded as a dependent person for the purpose of the law of domicile cannot acquire a domicile of choice by his own actions, but retains the domicile which he had when he was first legally regarded as mentally incapacitated for so

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<sup>84</sup> *Dicey and Morris on the Conflict of Laws* (Sweet and Maxwell, 13<sup>th</sup> Ed, 2000) at para 6-086.

<sup>85</sup> "Mental incapacity" (精神上無行為能力) is widely defined in section 2 of the Mental Health Ordinance (Cap 136): meaning "(a) mental disorder; or (b) mental handicap, and "mentally incapacitated" (精神上無行為能力) shall be construed accordingly."

"Mental disorder" (精神紊亂) means- "a) mental illness; (b) a state of arrested or incomplete development of mind which amounts to a significant impairment of intelligence and social functioning which is associated with abnormally aggressive or seriously irresponsible conduct on the part of the person concerned; c) psychopathic disorder; or (d) any other disorder or disability of mind which does not amount to mental handicap, and "mentally disordered" (精神紊亂) shall be construed accordingly".

"Mental handicap" (弱智) means "sub-average general intellectual functioning with deficiencies in adaptive behaviour, and "mentally handicapped" shall be construed accordingly".

<sup>86</sup> No authority can be found on this point. See *Dicey and Morris on the Conflict of Laws* (Sweet and Maxwell, 13<sup>th</sup> Ed, 2000) at para 6-107 for this submission.

<sup>87</sup> See *Dicey and Morris on the Conflict of Laws* (Sweet and Maxwell, 13<sup>th</sup> Ed, 2000) at para 6-107 for this submission. The reason is that the use of these measures depends, in part at least, on the practice of social workers and hospital staff which may be more closely related to the immediate circumstances and willingness to co-operate of the patient than to factors relevant to the law of domicile.

long as he remains in that condition.<sup>88</sup> The rationale is that acquisition and abandonment of a domicile of choice require the exercise of will, and a mentally incapacitated person may be "unable to exercise any will".<sup>89</sup>

1.33 There is, however, an exception to this general rule. The domicile of a person who is born mentally incapacitated, or becomes mentally incapacitated while he is a dependent child, is determined, while he remains mentally incapacitated, as if he continued to be a dependent child.<sup>90</sup>

### ***Burden and standard of proof***

1.34 The burden of proving a change of domicile rests with the person alleging such a change. A domicile of origin is more tenacious and it is harder to prove that a person has abandoned his domicile of origin than his domicile of choice.<sup>91</sup> Where the change is from a domicile of origin to a domicile of choice, the older case law indicates that the standard of proof is more onerous than the balance of probabilities<sup>92</sup> applied in other civil cases, and the elements of "residence" and "intention" must be shown with "perfect clearness and satisfaction"<sup>93</sup> or "beyond a mere balance of probabilities".<sup>94</sup> More recent cases,<sup>95</sup> however, prefer the balance of probabilities as the standard of proof. The position appears to be uncertain.

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<sup>88</sup> *Hepburn v Skirving* (1861) 9 WR 764.

<sup>89</sup> *Urquhart v Butterfield* (1887) 37 Ch D 357, at 382 (CA); but Cotton LJ added the qualification: "whatever his wish may have been."

<sup>90</sup> *Sharpe v Crispin* (1869) LR 1 P & D 611 (but in this case, the court held that if the person in question was capable of choosing a domicile he had, as a matter of fact, chosen that of his father). *Re G* [1966] NZLR 1028.

<sup>91</sup> *Jopp v Wood* (1865) 4 DJ & S 616; *Winans v Att-Gen* [1904] AC 287.

<sup>92</sup> *Winans v Att-Gen* [1904] AC 287; *Ramsay v Liverpool Royal Infirmary* [1930] AC 588.

<sup>93</sup> *Bell v Kennedy* (1868) LR 1 Sc & Div 307, at 321 per Lord Westbury; *Winans v Att-Gen* [1904] AC 287, at 292 per Lord Macnaghten.

<sup>94</sup> *Henderson v Henderson* [1967] P 77 at 80 per Sir Jocelyn Simon P.

<sup>95</sup> *In the Estate Fuld* (No 3) [1968] P 675, at 685-6; *Buswell v IRC* [1974] 1 WLR 1631, at 1637.

## Chapter 2

### Problems of the existing law

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2.1 In this chapter, we discuss the problems of the existing law of domicile highlighted in the last chapter. We begin with the domicile of a newborn baby, followed by that of a child and then an adult. We consider thereafter the domicile of some special cases, such as married women and the mentally incapacitated, as well as the standard of proof and domicile in a federal or composite state.

#### Domicile of children

##### *Domicile of origin*

2.2 As discussed in the previous chapter, there are two sets of concepts and rules for determining a child's domicile: (a) domicile of origin, which determines domicile at birth; and (b) domicile of dependency, which determines domicile during childhood. It is doubtful whether there is a need or advantage to have two separate sets of concepts and rules.

2.3 A domicile of origin is ascribed to every person at birth by operation of law. It reflects the domicile of the relevant parent at the time of birth. Where a child is born or where his parents live is irrelevant in this regard. As a consequence, the same domicile of origin can be passed on from generation to generation even though few members of the family have actually lived in the country of their domicile.

##### *Illustration*

*A, whose domicile of origin was England, went to India where he had a legitimate son B. B, while resident in India, had a legitimate son C who also, while resident in India, had a legitimate son D. A, B and C intended to return to England when they retired at sixty years of age, but they all died in India before reaching that age. D's domicile of origin remains England, even though he has never lived there.<sup>1</sup>*

2.4 In addition, the concept of revival of domicile of origin has been much criticised.<sup>2</sup> The rationale for the concept of revival is that if no substantial connection has been established with another place, the country

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<sup>1</sup> *Dicey and Morris on the Conflict of Laws* (Sweet and Maxwell, 13<sup>th</sup> Ed, 2000) at para 6-032.

<sup>2</sup> *Dicey and Morris on the Conflict of Laws* (Sweet and Maxwell, 13<sup>th</sup> Ed, 2000) at para 6-076.

of domicile at birth provides the most appropriate domicile. That may be questionable, however, where there is no substantial connection with the country of domicile at birth. A person may find himself domiciled in a country with which he has only a stale or tenuous connection, or even which he has never visited.

### *Illustrations*

(1) *T's domicile of origin was England. In 1947 he moved to the United States. In 1953 T became a naturalised American citizen and acquired a domicile of choice in New York. In 1960, without losing his domicile of choice, T moved to Germany. In 1967 T decided to make his permanent home in England, but he did not return to England until 1972. It was held that T's domicile of origin revived in 1967, even though he had left England twenty years earlier and had not yet physically returned to reside there.<sup>3</sup> When T formed his intention, after years of absence from the domicile of choice, of going to England and not going back to the United States, his domicile of origin in England revived automatically on the intention being formed.*

(2) *B, born in New Zealand to Hong Kong domiciled parents, received at birth a domicile of origin in Hong Kong. He lived in New Zealand continuously, and acquired a domicile of choice there on reaching the age of majority. At the age of 50 he left New Zealand with the intention of settling permanently in Australia, and so abandoned his domicile of choice. Before deciding in which state he would settle in Australia, B died in a car accident shortly after his arrival. B's domicile of origin in Hong Kong would revive (even though he had never been there), as he had abandoned his domicile of choice in New Zealand without acquiring a new one.*

2.5 There are also a number of matters which remain unsettled in respect of domicile of origin. First, no authority can be found as to the domicile of origin of a foundling, even though it is generally accepted that the domicile of origin should be the country where the child is found.<sup>4</sup> Secondly, as discussed in Chapter 1, the domicile of origin of an adopted child is unclear, since it is uncertain whether section 13 of the Adoption Ordinance (Cap 290) would cover the issue of adopted children's domicile.<sup>5</sup> In *Xie Xiaoyi & others v Director of Immigration*,<sup>6</sup> the Court of Appeal unanimously held that section 13 was limited in scope and did not treat an adopted child as a child born of the marriage of the adoptive parents. Thirdly, the position of a legitimate child who was born after the divorce of his parents remains unclear. It can be argued that the child should take his mother's domicile at birth.<sup>7</sup>

<sup>3</sup> *Tee v Tee* [1974] 1 WLR 213.

<sup>4</sup> *Dicey and Morris on the Conflict of Laws* (Sweet and Maxwell, 13<sup>th</sup> Ed, 2000) at para 6-029.

<sup>5</sup> *Xie Xiaoyi & others v Director of Immigration* [2000] 2 HKLR 161, at 168G, 173H and 180G.

<sup>6</sup> [2000] 2 HKLRD 161, at 168G, 173H and 180G.

<sup>7</sup> *Dicey and Morris on the Conflict of Laws* (Sweet and Maxwell, 13<sup>th</sup> Ed, 2000) at para 6-028.

Fourthly, no authority can be found as to the position of a posthumous child, even though it is generally assumed that he should take his mother's domicile at birth.<sup>8</sup>

### ***Domicile of dependency***

2.6 The rules determining the domicile of dependency of children differentiate between legitimate and illegitimate children. In general terms, a legitimate child's domicile of dependency follows that of his father, while an illegitimate child's follows that of his mother. This is a well-settled rule even though it can lead to some strange results. For instance, where the parents of a legitimate child live apart, and the child lives with the mother in England and has no home with the father in Hong Kong, the child's domicile still follows that of his father. It is also difficult to justify in principle why the domicile of a child depends on whether his parents are married or not. Bart Rwezaura has said:

*"The major function of domicile is to establish a relationship between an individual and a particular legal system. It is based on the primary consideration that a child should acquire the domicile of a parent who has legal responsibility towards him/her and, presumably, with whom the child resides. It might be argued then, that where the law has been changed to remove most legal distinctions between all children irrespective of whether or not their parents are married, the law of domicile should be modified accordingly to reflect this policy."*<sup>9</sup>

2.7 Another problem of the existing law is that it cannot satisfactorily deal with the situation where a child's parents die, or he is fostered or taken into the care of a local authority. In the former case, a child's domicile of dependency freezes (ie his domicile of dependency from the parents cannot be changed). In the latter case, the child's domicile will continue to follow that of his parents even though he is taken into the care of a local authority or lives with a third person, either under a court order or a private arrangement.

#### *Illustration*

*B migrated to New South Wales from Hong Kong with his parents. B's domicile of dependency changed with his parents' to New South Wales. Both of his parents subsequently died in New South Wales and B returned to Hong Kong to be brought up by relatives. Despite the fact that B has not returned to, and has had no further connection with, New South Wales, his domicile remains there until he can acquire a domicile of choice after attaining the age of majority.*

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<sup>8</sup> *Dicey and Morris on the Conflict of Laws* (Sweet and Maxwell, 13<sup>th</sup> Ed, 2000) at para 6-028.

<sup>9</sup> Bart Rwezaura, "Birth in or out of wedlock: does it matter any more? - The Parent and Child Ordinance 1993" 1994 *Law Lectures for Practitioners* 264, at 293.

2.8 The domicile of an illegitimate child or of a fatherless legitimate child depends on that of his mother, who may effect a change in her child's domicile when changing her own.<sup>10</sup> A child's domicile may be changed "as the result of the exercise by [his mother] of a power vested in her for the welfare of the infants, which, in their interest, she may abstain from exercising, even when she changes her own domicile."<sup>11</sup>

#### *Illustration*

*Two illegitimate children B and C live with their mother in Hong Kong. The mother, domiciled in Hong Kong, then goes with B to New Zealand while leaving C with a relative in Hong Kong, and then marries a New Zealand domiciled man. The mother obtains a New Zealand domicile, and so will B. C, the other child, will remain domiciled in Hong Kong.*

2.9 Some matters concerning the domicile of dependency of children are uncertain. First, no authority can be found as to the position of a legitimated child's domicile, but it is argued that his domicile follows and changes with his father's.<sup>12</sup> Secondly, because it is doubtful whether section 13 of the Adoption Ordinance (Cap 290) deals with the issue of an adopted child's domicile,<sup>13</sup> the domicile of an adopted child is uncertain. Thirdly, it remains unclear whether a guardian can alter a child's domicile where the parents are no longer alive. It has been argued<sup>14</sup> that in those circumstances, the domicile cannot be changed and that the same applies to the domicile of an illegitimate child without a living mother (though with a living father).

## **Domicile of adults**

### *Domicile of choice*

2.10 The principal criticisms of the rules for acquiring a domicile of choice are:

- (a) they are artificial: an existing domicile persists long after any connection with the country in question has ended;
- (b) they also lead to uncertainty: it is hard to decide a person's domicile because of the inherent difficulty of ascertaining his intention.

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<sup>10</sup> *Re Beaumont* [1893] 3 Ch 490.

<sup>11</sup> *Re Beaumont* [1893] 3 Ch 490, at 496-497.

<sup>12</sup> See *Dicey and Morris on the Conflict of Laws* (Sweet and Maxwell, 13<sup>th</sup> Ed, 2000) at para 6-092 for this submission.

<sup>13</sup> *Xie Xiaoyi & others v Director of Immigration* [2000] 2 HKLR 161, at 168G, 173H and 180G.

<sup>14</sup> See *Dicey and Morris on the Conflict of Laws* (Sweet and Maxwell, 13<sup>th</sup> Ed, 2000) at para 6-094 for this submission.

2.11 A number of factors combine to make it difficult to establish a new domicile of choice. First, the burden of proving a change of domicile rests with the person alleging that change of domicile. Secondly, a change from domicile of origin to domicile of choice may call for a higher standard of proof than just a balance of probabilities.<sup>15</sup> Thirdly, the "intention" required is to reside "permanently" or for an unlimited time in a particular country, and the burden to prove this is onerous. Fourthly, it is inherently difficult to prove the intention of a person, especially where that person is deceased. Lord Atkinson<sup>16</sup> said that the tastes, habits, conduct, actions, ambitions, health, hopes and projects of the person in question were all relevant. Kindersley VC<sup>17</sup> also said that no act or circumstance in a man's life, however trivial, should be left out in considering whether there was an intention to change his domicile.

2.12 The problems stemming from the difficulties and uncertainties of determining a person's domicile were well summarised as follows:

*"Trials are apt to be long and expensive; for since a man's state of mind must be investigated, evidence even of the smallest matter is relevant. Besides, the difficulty of reaching certainty in matters of domicile in the absence of any decision by a competent court is a serious inconvenience to numerous people when they come to make a will or in the many other circumstances in which it is necessary to know which legal system is applicable. The practitioner may find it impossible to advise his client with confidence, since he cannot prophesy what impact the facts will have upon the judge's mind."*<sup>18</sup>

## Domicile of dependency of married women

2.13 Article 15(4) of the Convention on the Elimination of All Forms of Discrimination against Women (which applies to Hong Kong) provides that the states parties *"shall accord to men and women the same rights with regard to the law relating to ... the freedom to choose their residence and domicile"*.<sup>19</sup> The Committee on the Elimination of All Forms of Discrimination against Women considered: *"[d]omicile, like nationality, should be capable of change at will by an adult woman regardless of her marital status"*.<sup>20</sup> The Committee

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<sup>15</sup> We will deal with this further in the later part of this chapter.

<sup>16</sup> *Casdagli v Casdagli* [1919] AC 145 at 178.

<sup>17</sup> *Drevon v Drevon* [1864] 34 LJ (NS) 129 at 133.

<sup>18</sup> *First Report of the Private International Law Committee* (1954), England, Cmd 9068 para 9.

<sup>19</sup> The People's Republic of China is a signatory to the Convention and in a notification to the United Nations dated 10 June 1997, it extended the application to Hong Kong.

The application of the Convention to Hong Kong is subject to some reservations, including a reservation of the right to continue to apply relevant immigration legislation governing the entry into, stay in, and departure from, Hong Kong. The reservations can be found in the notification of 10 June 1997.

<sup>20</sup> United Nations, Report of the Committee on the Elimination of Discrimination Against Women, General recommendation 21 (thirteenth session) on Equality in marriage and family relations, para 9, also available at <<http://www.un.org/documents/ga/docs/49/plenary/a49-38.htm>>, the United Nations' web-page, (last visit on 28 January 2005).

also recommended that the states parties "*should, where necessary to comply with the Convention, in particular in order to comply with [article 15] ..., enact and enforce legislation*".<sup>21</sup> It seems clear that the common law rule as to the domicile of married women contravenes article 15(4).

2.14 It is also questionable whether this common law rule satisfies the Hong Kong Bill of Rights Ordinance (Cap 383) and the Basic Law. Article 22 of section 8 of Cap 383 (equivalent to article 26 of the International Covenant on Civil and Political Rights<sup>22</sup> (the "ICCPR")) provides:

*"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."*

2.15 Article 39 of the Basic Law provides that the ICCPR remains in force in Hong Kong, and that the rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the above provision that the ICCPR remains in force in Hong Kong. Article 25 of the Basic Law expressly states that all Hong Kong residents shall be equal before the law. No authority can be found as to whether the common law rule of the domicile of dependency of married women survives article 25 of the Basic Law. In *JW v JW*,<sup>23</sup> the Supreme Court of Ireland, however, decided that the common law rule could not survive a provision in the Irish Constitution<sup>24</sup> similar to article 25 of the Basic Law. Article 8 of the Basic Law, however, provides that the laws previously in force in Hong Kong (ie common law, rules of equity, ordinances, subordinate legislation and customary law) shall be maintained, except for any that contravene the Basic Law. Hence, the common law rule of the married women's domicile of dependency may have impliedly been repealed already.

2.16 The rule as to the domicile of dependency of married women applies even where the spouses have lived apart for a long time in different countries, whether or not this is according to a formal separation agreement.<sup>25</sup> In *Re Scullard*,<sup>26</sup> where the husband and wife had lived apart for forty-seven years, some thirty years of which had been in different countries, it was held that the rule still applied. Danckwerts J said: "*the intention [of residing elsewhere permanently which] had in fact formed ... was only prevented by a*

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<sup>21</sup> Cited above, at para 49.

<sup>22</sup> It is available at <[http://www.unhchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhchr.ch/html/menu3/b/a_ccpr.htm)>, the United Nations' web page, (last visit on 28 January 2005).

<sup>23</sup> [1993] 2 IR 476.

<sup>24</sup> Article 40, s 1 of the Constitution provides: "*All citizens shall, as human persons, be held equal before the law*".

<sup>25</sup> *Warrender v Warrender* (1835) 2 Cl & F 488. See *Dicey and Morris on the Conflict of Laws* (Sweet and Maxwell, 8<sup>th</sup> Ed, 1967) at 113, Rule 13.

<sup>26</sup> [1957] Ch 107.

*rule of law relating to the domicile of a wife from being effective in law*".<sup>27</sup> The rule also applies where a wife has obtained a decree of judicial separation.<sup>28</sup> Lord Cranworth suggested in *Dolphin v Robins* that the rule should be qualified.<sup>29</sup>

*"... there may be exceptional cases to which, even without judicial separation, the general rule would not apply, as for instance, where the husband has abjured the realm, has deserted his wife, and established himself permanently in a foreign country, or has committed felony and been transported."*<sup>30</sup>

2.17 It is not surprising that this rule has long been criticised. It reflects "social conditions and attitudes of a past age ... [and produces] serious inconvenience in practice".<sup>31</sup> Lord Denning explained<sup>32</sup> that it was an old notion in English law that "a husband and wife [were] one, and the husband [was] that one". The rule had been swept away in almost all branches of the law except for domicile. Lord Denning said that it was "the last barbarous relic of a wife's servitude". Bart Rwezaura echoed this view:

*"It need not be stressed here that married women have a right to an independent domicile not only for purposes of divorce but also for all other purposes. Let us hope, therefore, that this 'barbarous relic of the wife's servitude' will be removed from the Hong Kong law as soon as possible."*<sup>33</sup>

## **Domicile of dependency of the mentally incapacitated**

2.18 The effect of the existing law is to freeze the domicile of a mentally incapacitated person at the time of the onset of his mental incapacity, even though there is a subsequent change in circumstances, such as his making his permanent home in another country.

### *Illustration*

*A, domiciled in Hong Kong, became mentally incapacitated and was sent to England. Even though A resides in England for many years, his Hong Kong domicile persists so long as he remains mentally incapacitated.*

2.19 Where a person is born mentally incapacitated or becomes so while he is a dependent child, the effect of the existing law is that his domicile

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<sup>27</sup> [1957] Ch 107 at 117.

<sup>28</sup> *AG for Alberta v Cook* [1926] AC 444.

<sup>29</sup> 7 HLC 390.

<sup>30</sup> 7 HLC 390, at 418-9.

<sup>31</sup> *Dicey and Morris on the Conflict of Laws* (Sweet and Maxwell, 13<sup>th</sup> Ed, 2000) at para 6-084.

<sup>32</sup> *Gray v Formosa* [1963] R 259, at 267.

<sup>33</sup> Bart Rwezaura, "Recent Developments in the Divorce law of Hong Kong: Towards Minimal Adjudication and Consensual Divorce" (1996) HKLJ 81, at 100.

of dependency continues while he remains mentally incapacitated. This is still the case even if he no longer lives as part of the family, or if his parents' legal duty to care for him no longer exists.

#### *Illustration*

*B, a legitimate child with a New Zealand domicile of origin, became mentally incapacitated. At thirteen, she was sent by her mother to an institution in Scotland after her father's death. B was still mentally incapacitated at twenty-nine when her mother married a man domiciled in England. Her mother accordingly acquired a domicile in England. There was no evidence of her intention to change B's domicile. B remained domiciled in New Zealand, even though she had left there sixteen years earlier.*<sup>34</sup>

### **Burden and standard of proof**

2.20 As discussed in Chapter 1, there is a suggestion that the standard of proof required to change a domicile of origin to a domicile of choice is more onerous than the balance of probabilities applied in other civil cases.<sup>35</sup> The position remains uncertain. It has been suggested that there is a historical reason for the special tenacity of a domicile of origin. William Binchy has said:

*"It is possible that the greater difficulty in shaking off a domicile of origin derived from the view of English courts over a century ago, during the formative period of the principles of domicile, that persons with an English domicile of origin would be very slow to abandon it. This was perhaps a correct inference when, at the height of British imperialism, Britain exercised control over countries spread throughout the world. The pattern of colonists frequently sending their children back to Britain for their education and of retiring there supported the view that the domicile of origin would be difficult to dislodge."*<sup>36</sup>

2.21 The English and Scottish Law Commissions have corroborated this view:

*"The rationale of its peculiar tenacity seems to be the identification of the country of that domicile with the patria or homeland of the person concerned and the allegedly reasonable expectation of expatriates that, despite prolonged periods abroad, their private and family life will continue to be governed by the law of their homeland. It could be argued that the pre-Second World War attitudes displayed in cases such as*

<sup>34</sup> Re G [1966] NZLR 1028.

<sup>35</sup> *Winans v Att-Gen* [1904] AC 287; *Ramsay v Liverpool Royal Infirmary* [1930] AC 588.

<sup>36</sup> William Binchy, *Irish Conflicts of Law* (Butterworth (Ireland) Ltd, 1988) at 75.

*Winans v Attorney General and Ramsay are anachronistic today, being a direct response to the demands of a now vanished Empire and the desire of imperial and colonial servants and the businessmen who accompanied them to retain their domiciles in the United Kingdom.*<sup>37</sup>

2.22 This rationale for the special tenacity of the domicile of origin has little relevance to Hong Kong's current circumstances. It is difficult to justify imposing a higher standard of proof when the change is from a domicile of origin to a domicile of choice than that applied when the change is from one domicile of choice to another.

## **Domicile in a federal or composite state**

2.23 As mentioned in Chapter 1, a federal state such as Canada or a composite state such as the United Kingdom consists of more than one "country" (ie Manitoba, Ontario, etc, for the former and England, Scotland, etc, for the latter). The state itself (Canada or the United Kingdom) is not a "country" for the purpose of domicile. A person going to a federal or composite state will therefore acquire a new domicile only when he resides in one of its constituent "countries" with an intention of residing there permanently or indefinitely. This may have undesirable effects.

### *Illustrations*

(1) *A, with a Hong Kong domicile of origin, left Hong Kong with the intention of settling permanently in Australia. He spent a few months in Sydney but died in a car accident before deciding in which city to settle down. In these circumstances, he died domiciled in Hong Kong.*

(2) *B, with a Hong Kong domicile of origin, left for Singapore at the age of two and later acquired a domicile of choice in New Zealand. At sixty, he moved to Australia with the intention of settling there permanently, but without deciding in which city to make his home. He died shortly after arriving in Australia. Since he had abandoned his New Zealand domicile without acquiring a new one, his Hong Kong domicile of origin revived although he had never returned to Hong Kong and had had no further connection with it since the age of two.*

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<sup>37</sup>

The Law Commission and the Scottish Law Commission, *Private International Law, the Law of Domicile*, WP No 88 and CM No 63, 1985, at para 5.9.

## Chapter 3

### Should domicile be retained as a general connecting factor?

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3.1 In the last chapter, we have identified the various problems associated with determining a person's domicile under the existing law. It may be opportune at this juncture to point out that other connecting factors are also employed in Hong Kong for the purposes of connecting a person with a system of law. We discuss in this chapter these connecting factors and consider whether any of them should replace domicile as a general connecting factor in Hong Kong.

#### Other common connecting factors

3.2 Apart from domicile, the more common connecting factors are habitual residence, nationality and ordinary residence. We will also consider permanent residency and right of abode as possible options.

#### *Habitual residence*

3.3 Habitual residence is applied in a number of contexts, including: (a) determining the formal validity of a will<sup>1</sup>; (b) determining jurisdiction of the court in proceedings for divorce and nullity<sup>2</sup>; (c) determining jurisdiction of the court in proceedings for presumption of death<sup>3</sup>; (d) recognition of overseas divorces or legal separations<sup>4</sup>; and (e) declaration of a person's status<sup>5</sup>.

3.4 The term "habitual residence" is adopted in the Hague Conference on Private International Law. The term is deliberately left undefined<sup>6</sup>, and is not treated as a term of art but according to the ordinary and natural meaning of the two words. The English Court of Appeal has stressed that habitual residence is basically a question of fact to be determined by referring to the circumstances of each case.<sup>7</sup> Habitual

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<sup>1</sup> Section 24 of the Wills Ordinance (Cap 30).

<sup>2</sup> Sections 3 and 4 of the Matrimonial Causes Ordinance (Cap 179).

<sup>3</sup> Section 6 of Cap 179.

<sup>4</sup> Section 56 of Cap 179.

<sup>5</sup> Section 6 of the Parent and Child Ordinance (Cap 429).

<sup>6</sup> The aim is to leave the notion free from technical rules which can produce rigidity and inconsistencies as between different legal systems.

<sup>7</sup> *Re M (Minors) (Residence Order: Jurisdiction)* [1993] 1 FLR 495. Hartmann J of the Court of First Instance in Hong Kong applied this principle in determining a child's habitual residence in a case of international child abduction, *Re N (a Child)* [2001] 2 HKLRD 377.

residence must, however, be distinguished from mere residence and the word "habitual" connotes a quality of residence but not its length.

### **Nationality**

3.5 In Hong Kong, nationality is also applied as a connecting factor in a number of circumstances, such as in determining the formal validity of a will<sup>8</sup>, and recognition of overseas divorces or legal separations<sup>9</sup>.

3.6 Until the beginning of the 19<sup>th</sup> century, domicile was universally regarded as the basis for determining an individual's personal law.<sup>10</sup> It was the Code Napoleon in 1804 in France which pioneered a shift from domicile to nationality in continental Europe. Belgium, Luxembourg, Austria and the Netherlands subsequently adopted the provisions of the French code. The real catalyst for the shift from domicile to nationality on the continent of Europe was the Italian Civil Code. In the second half of the 19<sup>th</sup> century, domicile was replaced by nationality in code after code in continental Europe. The use of nationality later spread to Japan and some South American countries. Nationality has traditionally been used as the major connecting factor in the civil law system on the Mainland of the People's Republic of China.

### **Ordinary residence**

3.7 Ordinary residence as a connecting factor appears in various contexts, including: (a) as a condition for presenting a bankruptcy petition<sup>11</sup>; (b) as a condition for making an order prohibiting a debtor from leaving Hong Kong<sup>12</sup>; and (c) as a prerequisite for entitlement of a trade mark to protection under the Paris Convention as a "well-known trade mark"<sup>13</sup>.

3.8 It has been suggested in some cases that ordinary residence is nothing more or less than residence.<sup>14</sup> It is submitted that the better view is that the word "ordinary" does add something: an element of continuity, order or settled purpose.<sup>15</sup> There are also different views as to the relationship between habitual residence and ordinary residence. Some cases suggest that habitual residence is "something more than" ordinary residence,<sup>16</sup> but that "something more" is elusive. It has, however, been held that there is no

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<sup>8</sup> Section 24 of Cap 30.

<sup>9</sup> Section 56 of Cap 179.

<sup>10</sup> See generally *Dicey and Morris on the Conflict of Laws* (Sweet and Maxwell, 13<sup>th</sup> Ed, 2000) at para 6-128.

<sup>11</sup> Section 4 of the Bankruptcy Ordinance (Cap 6).

<sup>12</sup> Section 21B of the High Court Ordinance (Cap 4).

<sup>13</sup> Section 4 of the Trade Marks Ordinance (Cap 559).

<sup>14</sup> *Levene v IRC* [1928] AC 217, at 225 per Viscount Cave, LC. Mr Justice Bokhary PJ stated that the expression "ordinarily resident" should be given its natural and ordinary meaning. (*Fateh Muhammad v Commissioner of Registration* (2001) 4 HKCFAR 278 at 283).

<sup>15</sup> *Dicey and Morris on the Conflict of Laws*, 13<sup>th</sup> Ed, 2000, at para 6-118.

<sup>16</sup> *Cruse v Chittum* [1974] 2 All ER 940, at 943.

real distinction between the two.<sup>17</sup> It has also been said that the two concepts of habitual residence and ordinary residence share "a common core of meaning".<sup>18</sup> In *Ikimi v Ikimi*<sup>19</sup>, the Court of Appeal held that in respect of family law legislation, the two concepts must be synonymous.

### ***Permanent residence and right of abode***

3.9 Article 24 of the Basic Law defines the categories of permanent residents having the right of abode in Hong Kong. This is a familiar and important concept. It might be asked why this should not replace domicile as a connecting factor. However, the right of abode is used to determine a person's status in public law, whereas domicile is used to determine a person's private or personal law. Applying the law of a jurisdiction in which a person has permanent residence or right of abode would in certain circumstances prove more restrictive than domicile. It would, for instance, (unlike domicile) exclude a jurisdiction to which a person has recently moved with the intention of permanently residing there. A further difficulty in using right of abode as a general connecting factor is that, unlike domicile, a person may have a right of abode in more than one jurisdiction at the same time, or he may not have a right of abode anywhere.

### **Reform proposals considered in other jurisdictions**

3.10 Nauru, one of the smallest Commonwealth jurisdictions, has been a pioneer in replacing domicile as a general connecting factor with habitual residence.<sup>20</sup> The Irish Law Reform Commission recommended the same change in its 1983 report on domicile.<sup>21</sup> In contrast, the law reform Commissions in England, Scotland and South Africa have all recommended retaining the concept of domicile as a general connecting factor.

3.11 In their joint report on domicile in 1987, the English and Scottish Law Commissions set out the advantages and drawbacks of using habitual residence and nationality as connecting factors.<sup>22</sup> According to the two Commissions, habitual residence has the following advantages over domicile:

- (1) it is generally easier to establish than domicile since it is less dependent on the intention of the person in question;
- (2) it is more easily understood by laymen; and

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<sup>17</sup> *Cameron v Cameron*, 1996 SC 17.

<sup>18</sup> *Nessa v Chief Adjudication Officer* [1999] 1 WLR 1937, 1941 (HL). Lord Slynn, however, reserved the question whether the terms were always synonymous. Each might take a shade of meaning from the context in which it was used.

<sup>19</sup> [2001] EWCA Civ 873, [2002] Fam 72 (CA).

<sup>20</sup> Conflict of Laws Act 1974.

<sup>21</sup> The Irish Law Reform Commission, *Report on Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws*, 1983, paras 7 to 18.

<sup>22</sup> The Law Commission and the Scottish Law Commission, *Private International Law, the Law of Domicile*, (Law Com No 168 and Scot Law Com No 107), paras 3.4 to 3.16.

- (3) it is directly applicable to all persons, including children, without the need for additional concepts such as domicile of dependency.

3.12 There are, however, a number of disadvantages of habitual residence:

- (1) The connection between a person and his place of habitual residence may not be sufficiently strong to justify his civil status and affairs being determined according to the law of that place.<sup>23</sup>
- (2) The concept of habitual residence is relatively undeveloped as a legal concept. In particular, there are uncertainties:
  - (i) as to the importance of intention in determining whether residence is habitual;
  - (ii) as to how long residence must persist to become habitual; and
  - (iii) as to the position where a person has more than one habitual residence or none.

Special statutory provisions may be needed to address these uncertainties, which would detract from the simplicity of the concept which is one of its claimed advantages.

3.13 The English and Scottish Law Commissions also analysed the advantages of nationality over domicile:

- (1) The concept of nationality is more readily understood by laymen.
- (2) It provides a degree of certainty in that it is more easily ascertained and proved, since the change of nationality is a public and conscious act of record, either involving naturalisation or a marriage which brings a new nationality. This can be more easily determined than a person's intention.
- (3) Acquiring a new nationality involves the consent of the person and the country in question. Hence, the connection created by a new nationality is less likely to be criticised by those affected by it.

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<sup>23</sup> This can best be illustrated by the situation of a person who works or lives abroad for a prolonged but temporary period, such as an English domiciled oil field worker in Saudi Arabia on a long term contract. If habitual residence were adopted as the connecting factor, various "intimate" matters relating to his status and property, such as his legal capacity to marry, would be determined by the law of Saudi Arabia. This will cut his links with his homeland, isolating him from its law and courts. It would be especially acute where the cultural background of the place of habitual residence is very different from that of a person's homeland.

3.14 In the Commissions' opinion, however, shifting to nationality would have a number of drawbacks:

- (1) Additional rules will be required to deal with stateless persons or those with more than one nationality. In federal or composite states, nationality alone would not indicate the particular jurisdiction within the state with which a person should be connected.
- (2) Nationality as a connecting factor may connect a person with a country which he may have never visited, since nationality does not depend on residence.
- (3) Nationality as a connecting factor may apply to a man, against his wishes, the law of a country from which he has risked his life to escape.

Despite the Irish Law Reform Commission's recommendation that domicile should be replaced with habitual residence, the English and Scottish Commissions did not support such a course in the United Kingdom. The two Commissions were aware that nationality would not affect temporary expatriates as adversely as habitual residence. They nonetheless concluded that, because of the drawbacks of habitual residence and nationality which they had identified, domicile should be retained as a connecting factor, though it should be modified in the ways recommended in their report.

3.15 The South African Law Commission in its 1990 report<sup>24</sup> also considered the possibility of replacing domicile with nationality or habitual residence. The advantages and drawbacks of these two alternatives set out in the report were similar to those mentioned in the English and Scottish Law Commissions' report. The South African Law Commission observed that replacing domicile with other connecting factors was a drastic step. In the Commission's opinion, a convincing case had not been made out that such a course would present more benefits than difficulties. The Commission accordingly recommended that domicile should be retained as a general connecting factor.

3.16 In contrast, the Irish Law Reform Commission in its "thinly-argued"<sup>25</sup> report recommended that habitual residence should be substituted for domicile as a general connecting factor. The Commission's recommendation has yet to be implemented, however.

## Conclusion

3.17 We have considered in some detail the advantages and disadvantages of replacing domicile with nationality or habitual residence

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<sup>24</sup> South African Law Commission, *Report on Domicile*, Project 60, March 1990, paras 5.1 to 5.29.

<sup>25</sup> *Dicey and Morris on the Conflict of Laws*, 13<sup>th</sup> Ed, 2000, at para 6-134.

which have been identified by law reform agencies elsewhere. Some of the drawbacks have particular force in Hong Kong. For instance, the fact that there are four law districts within the People's Republic of China means that it would be impracticable in many cases to use nationality to replace domicile unless the concept were further refined so as to be able to identify one of the four separate law districts within the People's Republic of China. This might be done by adopting a two-stage approach: ie (1) nationality and (2) habitual residence. Thus the court might select Hong Kong law for Chinese nationals living in Hong Kong and Mainland law for Chinese nationals living in, for example, Shanghai. However, such an approach might be thought to combine all the disadvantages of both nationality and habitual residence.

3.18 Conversely, the adoption of habitual residence as a connecting factor would mean that the personal law of Hong Kong people who live and work on the Mainland for a prolonged but temporary period may be that of the Mainland. In this case, the individual's personal law would in most cases no longer reflect the place which they would generally regard as their permanent home. The problem is that the connection between a Hong Kong person and his place of habitual residence on the Mainland may not be sufficiently strong to justify his civil status and affairs being determined according to the law of that place. In addition, the increased mobility of people in today's world means that the adoption of habitual residence as the test may have the effect of changing the individual's personal law too readily. The Hong Kong Bar Association believed that imposing a minimum requirement for the period of residence might alleviate this concern. The Bar also pointed out that a short-term stay would be unlikely to be regarded as habitual residence since the House of Lords held *In Re J (A Minor) (Abduction)* that residence for an "appreciable period of time and a settled intention" to reside on a long term basis were required for acquisition of a new habitual residence.<sup>26</sup> We note, however, that this opinion was *obiter*, as the case was concerned with the loss of habitual residence, rather than its acquisition.<sup>27</sup> We do not think that the solution is to stipulate a minimum period of residence in the legislation, since that does not take account of individual circumstances. In our view, substituting domicile with habitual residence or nationality may lead to strange results which would not necessarily be the most appropriate outcome.

3.19 We note that none of the overseas law reform bodies whose reports we have discussed above considered ordinary residence as a possible alternative to domicile. Ordinary residence is less commonly used than other connecting factors and has particular shortcomings. It is, for instance, possible for an individual to have more than one ordinary residence at a time. The ease with which ordinary residence can be established or changed is also a drawback, and could lead to confusion and uncertainty.

3.20 We see the force in the argument that the greater fluidity of modern society and the increasing global trend for businessmen and others to work away from their homeland call for a concept which promotes a stable legal background against which people can conduct their domestic affairs, but

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<sup>26</sup> [1991] 1 FLR 266.

<sup>27</sup> See *Dicey and Morris on the Conflict of Laws*, 13<sup>th</sup> Edition, 2000, at para 6.124 footnote 36).

not for a concept which allows their civil status and rights to fluctuate as they move from one place to another.<sup>28</sup> Having weighed the arguments for and against adopting other connecting factors, we are persuaded that domicile, a concept which links the individual to the country where he has his home, is more appropriate for determining which system of law should govern a person's civil status and other personal affairs. While connecting factors other than domicile can be employed in particular cases as alternative or supplementary connecting factors, we consider that domicile should be retained as a general connecting factor.

3.21 The Hong Kong Bar Association observed that the circumstances in which domicile would be overridden or supplemented by other connecting factors are unclear. This in turn means that the concept of domicile may vary in meaning, depending on the situation.<sup>29</sup> Although the court might have more room to manoeuvre so as to achieve the most appropriate conclusion, this would be at the expense of consistency and certainty. We do not agree with the Bar's view on this point. Although the legislation may adopt other connecting factors in addition to domicile as alternative or supplementary connecting factors on a case-by-case basis, this does not mean that the concept of domicile may vary in meaning.

3.22 While we recommend that domicile as a general connecting factor should be maintained, the numerous problems set out in Chapter 2 pertaining to the existing rules for determining a person's domicile make it clear that these rules require modification. We make recommendations later in this Report as to how we believe the rules should be changed to remove the anomalies of the present law.

#### **Recommendation 1**

**Domicile should be retained as a general connecting factor, but the existing rules for determining a person's domicile should be modified as recommended in this Report.**

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<sup>28</sup> Law Com No 168 and Scot Law Com No 107, para 3.8.

<sup>29</sup> W W Cook, *Logical and Legal Bases of the Conflicts of Laws* (Harvard University Press, 1942) at 194. We are of the view that the reference to W W Cook's book by the Hong Kong Bar Association is not relevant to the present discussion.

## Chapter 4

# The law in other jurisdictions, options for reform and recommendations

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4.1 In the last chapter, we recommended that domicile be retained as a general connecting factor and that the rules for determining a person's domicile be reformed. In this chapter, we will examine the position in a number of other common law jurisdictions before formulating options for reforming the law. We also consider views expressed by academics and practitioners, and the responses we received to the Consultation Paper, before making our final recommendations. Annex 2 provides a comparison table of the rules for determining a person's domicile in the jurisdictions we discuss in this chapter. We will follow the sequence adopted in the previous chapters and begin with the domicile of a newborn baby, followed by that of a child and then an adult.

### Domicile of children

#### *Australia*

4.2 In Australia, there is broadly similar legislation which applies in each state and territory. Domicile Acts in almost identical terms were enacted by all the States,<sup>1</sup> the Northern Territory<sup>2</sup> and the Commonwealth.<sup>3</sup> Cited collectively as the Domicile Acts, they have changed the common law significantly, but have not completely replaced it. If the relevant time at which a domicile is to be determined is on or after 1 July 1982,<sup>4</sup> domicile will be determined according to the Domicile Acts (together with the common law). On the other hand, if the relevant time at which a domicile is to be determined is before 1 July 1982, it will be determined only according to the common law. For the sake of convenience, we refer in this Report only to the Commonwealth Domicile Act 1982.

4.3 The Australian common law rules on the domicile of origin are similar to those in force in Hong Kong:

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<sup>1</sup> (NSW) Domicile Act 1979; (QLD) Domicile Act 1981; (SA) Domicile Act 1980; (TAS) Domicile Act 1980; (VIC) Domicile Act 1978; (WA) Domicile Act 1981.

<sup>2</sup> (NT) Domicile Act 1979.

<sup>3</sup> (CTH) Domicile Act 1982 also applies to the ACT. The Commonwealth Act has its own additional provisions and its arrangement is not necessarily the same as other Domicile Acts.

<sup>4</sup> The commencement date of the Domicile Acts.

- (a) a legitimate child born during the lifetime of his father has a domicile of origin in the country of his father's domicile at the time of the child's birth;<sup>5</sup>
- (b) a legitimate child born after his father's death, or an illegitimate child, has a domicile of origin in the country of his mother's domicile at the time of his birth<sup>6</sup> (but note the possible effect of the broadly similar legislation on the status of children<sup>7</sup>);
- (c) a child about whose parents nothing is known, such as a foundling, has a domicile of origin in the country where he is found.<sup>8</sup>

4.4 Where the relevant time at which a domicile of origin is to be determined is on or after 1 July 1982, these rules continue to apply where the parents are living together. If, on the other hand, a child has his principal home with one of his parents and the other parent is living separately or is dead, the child's domicile will be that of the first mentioned parent.<sup>9</sup> In addition, the domicile of a child who is adopted by two adoptive parents would be the same as if he were born in wedlock to those parents.<sup>10</sup> If there is only one adoptive parent, the child will acquire the domicile of that parent.<sup>11</sup> If the adoption is rescinded, the child's domicile will be determined according to the order rescinding the adoption and, if there is no such provision, as if the adoption had not taken place.<sup>12</sup>

4.5 The Australian common law rules on a child's domicile of dependency are more or less the same as those in Hong Kong:

- (a) a legitimate child's domicile is, during the lifetime of his father, the same as, and changes with, his father's domicile;<sup>13</sup>

<sup>5</sup> *Udny v Udny* (1869) LR 1 Sc & Div 441.

<sup>6</sup> *Udny v Udny* (1869) LR 1 Sc & Div 441, at 457.

<sup>7</sup> (NSW) Status of Children Act 1996 s 5; (VIC) Status of Children Act 1974 s 3(1); (Qld) Status of Children Act 1978 s 3(1); (SA) Family Relationships Act 1975 s 6(1); (Tas) Status of Children Act 1974 s 3(1); (NT) Status of Children Act s 4(1); (ACT) Birth (Equality of Status) Act 1988 s 5. This legislation (for example s 3(1) of the (Qld) Status of Children Act 1978) provides that "*the relationship between every person and his father and mother shall be determined irrespective of whether the father and mother are, or have been, married to each other*".

It has been interpreted to mean that "*the putative father occupies the same position in law in relation to his natural child as he does to a child born in wedlock*". See *G v P* [1977] VR 44 at 46 per Kaye J, approved by the High Court in *Douglas v Longano* (1981) 147 CLR 212 at 216 per Gibbs CJ, Mason and Murphy JJ. See also: *Youngman v Lawson* [1981] 1 NSWLR 439 at 443-4 per Street CJ. If this view is correct, the effect will be that in all States and territories, other than Western Australia, an ex-nuptial child, like a nuptial child, takes the domicile of its father at birth regardless of marital status. See P E Nygh, *Conflict of Laws in Australia*, Butterworths, 6<sup>th</sup> Ed, 1995, at 203.

For a contrary view on the effect of the above legislation, see Sykes and Pryles, *Australian Private International Law* (3<sup>rd</sup> Ed, 1991, The Law Book Co Ltd, at 353). Cosgrove J also took a more cautious view in *Re Glynn; Glynn v Harries* [1980] Tas R 248 at 251-2.

<sup>8</sup> *Re McKenzie* (1951) 51 SRNSW 293.

<sup>9</sup> Section 9(1) of the Domicile Act 1982 (Commonwealth). This applies whether the parents are married to each other or not (section 4(2) of the Domicile Act 1982).

<sup>10</sup> Section 9(2)(a) of the Domicile Act 1982 (Commonwealth).

<sup>11</sup> Section 9(2)(b) of the Domicile Act 1982 (Commonwealth).

<sup>12</sup> Section 9(5) of the Domicile Act 1982 (Commonwealth).

<sup>13</sup> *Henderson v Henderson* [1967] P 77.

- (b) the domicile of an illegitimate child and of a child whose father is dead is the same as, and changes generally<sup>14</sup> with, his mother's domicile (but note the possible effect of the legislation on the status of children as discussed above).

4.6 These rules may be modified where the relevant time at which a domicile of dependency is to be determined is on or after 1 July 1982. Where a child's parents are living together, these rules will still apply. Just as with a domicile of origin, where a child has his principal home with only one of his parents and the other parent is living separately or is dead, the child's domicile will be that of the first mentioned parent.<sup>15</sup> The child's domicile will thereafter change with that of that parent, even if the child subsequently makes his home with a third person.<sup>16</sup> The child's domicile will follow the first mentioned parent's until such time as the child makes his principal home with the other parent, or his parents resume or start living together.<sup>17</sup> If the first mentioned parent dies, the last domicile of that parent continues as the child's domicile until the child makes his home with the surviving parent (if any), or the child acquires his own domicile on reaching majority.<sup>18</sup> As in the case of a domicile of origin, the domicile of a child who is adopted by two adoptive parents would be the same as if he were born in wedlock to the parents.<sup>19</sup>

## **Canada**

4.7 In Canada, only Manitoba has a general statute governing domicile: the Domicile and Habitual Residence Act 1983. In other provinces and territories, the common law and some scattered pieces of legislation together govern the determination of a person's domicile. The following discussion will focus on the 1983 Act in Manitoba. The 1983 Act codifies, *inter alia*, the law of domicile for all purposes of the law of Manitoba, and is substantially similar to the Draft Model Act to Reform and Codify the Law of Domicile adopted by the Uniform Law Conference in 1961. The common law rules on domicile are abolished.<sup>20</sup> The domicile of a person is to be determined under the 1983 Act to the exclusion of the laws of any other state or subdivision thereof.<sup>21</sup>

4.8 A "child" is defined as an unmarried person who is under the age of majority, and who is not a parent with legal custody of his child.<sup>22</sup> The common law rule that a child's domicile differs according to whether his parents are married or not no longer applies in Manitoba. Where parents

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<sup>14</sup> *Re Beaumont* [1893] 3 Ch 490.

<sup>15</sup> Section 9(1) of the Domicile Act 1982 (Commonwealth). This applies whether the parents are married to each other or not (section 4(2) of the Domicile Act 1982).

<sup>16</sup> Section 9(1) of the Domicile Act 1982 (Commonwealth).

<sup>17</sup> Section 9(3) of the Domicile Act 1982 (Commonwealth).

<sup>18</sup> Section 9(1), (3) and (4) of the Domicile Act 1982 (Commonwealth).

<sup>19</sup> Section 9(2)(a) of the Domicile Act 1982 (Commonwealth).

<sup>20</sup> Section 3 of the Domicile and Habitual Residence Act 1983, Manitoba.

<sup>21</sup> Section 2 of the Domicile and Habitual Residence Act 1983, Manitoba.

<sup>22</sup> Section 1 of the Domicile and Habitual Residence Act 1983, Manitoba.

have a common domicile, a child's domicile follows that of his parents.<sup>23</sup> If parents do not have a common domicile, their child has the domicile of the parent with whom the child normally and usually resides.<sup>24</sup> In other cases, a child's domicile is in the state or subdivision where he normally and usually resides.<sup>25</sup>

## **India**

4.9 The law of domicile in India is a combination of both common law and the Indian Succession Act 1925.<sup>26</sup> The domicile of origin of a legitimate child born during the lifetime of his father is that of his father at the time of the child's birth.<sup>27</sup> A legitimate child born after his father's death has his domicile in the country where his father was domiciled when he died.<sup>28</sup> An illegitimate child has a domicile of origin in the country of his mother's domicile at the time of his birth.<sup>29</sup> Indian law therefore appears to fix the domicile of a legitimate child with his father and the domicile of an illegitimate child with his mother even after the father or mother has died.<sup>30</sup> It has been argued that a foundling has his domicile in the country in which he is found.<sup>31</sup>

4.10 A child's domicile of dependency follows the domicile of the parent from whom he derived his domicile of origin.<sup>32</sup> Section 14 of the 1925 Act provides for three exceptions where a child's domicile does not change with that of his parent. These are if the child: (a) is married; (b) holds any office or employment in the Government; or (c) has set up, with the parents' consent, any distinct business. The domicile of a child whose parents have separated is not clear.<sup>33</sup> According to section 12 of the Hindu Adoptions and Maintenance Act 1956, an adopted child is deemed to be the child of his adoptive father or mother for all purposes from the date of the adoption. From such date all the ties of the child to the family of his or her birth are deemed to be severed and replaced by those created by the adoption in the adoptive family. It is therefore submitted that an adopted child's domicile should be that of the adopter and should change with it.<sup>34</sup>

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<sup>23</sup> Section 9(1)(a) of the Domicile and Habitual Residence Act 1983, Manitoba.

<sup>24</sup> Section 9(1)(b) of the Domicile and Habitual Residence Act 1983, Manitoba.

<sup>25</sup> Section 9(1)(c) of the Domicile and Habitual Residence Act 1983, Manitoba.

<sup>26</sup> See J D McClean, *Recognition of Family Judgments in the Commonwealth*, 1983, Butterworths, at para 1.07.

<sup>27</sup> Section 7 of the Indian Succession Act 1925.

<sup>28</sup> Section 7 of the Indian Succession Act 1925.

<sup>29</sup> Section 8 of the Indian Succession Act 1925.

<sup>30</sup> Paras Diwan and Peeyushi Diwan, *Private International Law, Indian and English*, 4<sup>th</sup> Ed, 1998, Deep & Deep Publications, at 177.

<sup>31</sup> Paras Diwan and Peeyushi Diwan, *Private International Law, Indian and English*, 4<sup>th</sup> Ed, 1998, Deep & Deep Publications, at 155-156.

<sup>32</sup> Section 14 of the Indian Succession Act 1925.

<sup>33</sup> It is submitted that the child's domicile should be that of the parent with whom the child lives under a court order or *de facto*. Paras Diwan and Peeyushi Diwan, *Private International Law, Indian and English*, cited above, at 178.

<sup>34</sup> Paras Diwan and Peeyushi Diwan, *Private International Law, Indian and English*, cited above, at 176.

## **Ireland**

4.11 In Ireland, common law is still the main source of the law of domicile, even though the Domicile and Recognition of Foreign Divorces Act 1986 has supplemented it. A person's domicile of origin is determined solely according to the common law, and differs according to whether he is legitimate or illegitimate.<sup>35</sup> The position of a foundling is uncertain, but it is generally accepted that it should be the place where he is found.<sup>36</sup>

4.12 As to domicile of dependency, a legitimate child will have, during the lifetime of his father, the domicile of his father.<sup>37</sup> After the death of his father the child will take the domicile of his mother, as is the case with an illegitimate child.<sup>38</sup> No authority can be found as to the position of legitimated children.<sup>39</sup> Furthermore, the domicile of an adopted child is also a matter of uncertainty<sup>40</sup> with which neither the Adoption Act 1952 nor the Domicile and Recognition of Foreign Divorces Act 1986 has dealt.

4.13 At common law, there is some uncertainty as to the domicile of a child whose parents are divorced, legally separated, or otherwise living apart.<sup>41</sup> Section 4 of the Domicile and Recognition of Foreign Divorces Act 1986 has to some extent made the position more certain:

- (a) where the parents of a legitimate child<sup>42</sup> are living apart, and the child has his home with the mother but not the father, section 4(1) of the 1986 Act provides that the child's domicile will be that of the mother;
- (b) if a child's domicile follows that of his mother by virtue of section 4(1), that domicile will continue even after the child has ceased to have his home with her. The child's domicile will cease following that of his mother only when the child makes his home with his father or the parents cease to live apart.<sup>43</sup> This is the case even where the child has had his home with his mother for only a short period of time;<sup>44</sup>
- (c) On the death of the mother of a child who has taken her domicile by virtue of section 4(1), the child's domicile will be

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<sup>35</sup> *Udny v Udny* (1869) LR 1 Sc & Div 441, at 457. The domicile of origin of a legitimate child born during the lifetime of his father is in the country of his father's domicile at the time of the child's birth. That of a legitimate child born after his father's death, or an illegitimate child, is in the country of his mother's domicile at the time of his birth.

<sup>36</sup> William Binchy, *Irish Conflicts of Law*, 1988, Butterworth (Ireland) Ltd, at 83-84.

<sup>37</sup> *Udny v Udny* (1869) LR 1 Sc & Div 441, at 457; *Spurway v Spurway* [1894] 1 IR 385.

<sup>38</sup> *Udny v Udny* (1869) LR 1 Sc & Div 441, at 457.

<sup>39</sup> William Binchy, *Irish Conflicts of Law*, 1988, Butterworth (Ireland) Ltd, at 83.

<sup>40</sup> William Binchy, *Irish Conflicts of Law*, 1988, Butterworth (Ireland) Ltd, at 84.

<sup>41</sup> William Binchy, *Irish Conflicts of Law*, 1988, Butterworth (Ireland) Ltd, at 85.

<sup>42</sup> Section 4(3) expressly provides that section 4 does not affect the common law position that an illegitimate child's domicile depends on his mother's.

<sup>43</sup> William Binchy, *Irish Conflicts of Law*, 1988, Butterworth (Ireland) Ltd, at 89.

<sup>44</sup> William Binchy, *Irish Conflicts of Law*, 1988, Butterworth (Ireland) Ltd, at 89.

frozen as at the time of the mother's death until the child makes his home with his father;<sup>45</sup>

- (d) the phrase "living apart" is not defined, but should presumably include situations where the parents have ceased to cohabit by desertion, court decree, separation agreement or even informal mutual agreement.<sup>46</sup>

## **Malaysia**

4.14 The law of domicile in Malaysia generally follows that in England.<sup>47</sup> Where a legitimate child is born during his father's lifetime, his domicile of origin is in the country of his father's domicile at the time of the child's birth.<sup>48</sup> However, where a child is a legitimate child born after his father's death or is an illegitimate child, his domicile of origin is in the country of his mother's domicile at the time of his birth.<sup>49</sup> While there is no clear authority on the point, it has been argued that the domicile of a foundling should be in the place where he is found.<sup>50</sup>

4.15 It has been argued that by virtue of section 9 of the Adoption Act 1952 in Malaysia, an adopted child's domicile is determined as if he were the legitimate child of the adoptive parent or parents and his domicile of origin may change as a result of adoption.<sup>51</sup> This section is almost identical to section 13 of the Adoption Ordinance (Cap 290) in Hong Kong. Both are modelled on section 10 of the Adoption Act 1950 in England. According to section 13 of Cap 290, when an adoption order is made, certain rights, duties and obligations relating to the child pass from the natural parents to the adoptive parents. It is clear from the wording of the section that these rights and duties are not all-embracing.<sup>52</sup> As discussed in Chapters 1 and 2, the Hong Kong Court of Appeal unanimously held that section 13 was limited in scope and did not treat an adopted child as a child born of the marriage of the adoptive parents.<sup>53</sup> It is therefore uncertain whether section 13 would cover the issue of adopted children's domicile. Whether the Malaysian courts would reach a similar conclusion in relation to section 9 of the Adoption Act is, of course, conjecture.

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<sup>45</sup> Section 4(2) of the Domicile and Recognition of Foreign Divorces Act 1986, Ireland.

<sup>46</sup> William Binchy, *Irish Conflicts of Law*, 1988, Butterworth (Ireland) Ltd, at 87.

<sup>47</sup> RH Hickling and Wu Min Aun, *Conflict of Laws in Malaysia*, 1995, Butterworths Asia, at 54.

<sup>48</sup> *Udny v Udny* (1869) LR 1 Sc & Div 441, at 457.

<sup>49</sup> *Udny v Udny* (1869) LR 1 Sc & Div 441, at 457.

<sup>50</sup> RH Hickling and Wu Min Aun, *Conflict of Laws in Malaysia*, 1995, Butterworths Asia, at 55. See also Tan Yock Lin, *Conflicts Issues in Family and Succession Law*, 1993, Butterworths Asia, at 147. No relevant cases can be found after publication of the two books.

<sup>51</sup> RH Hickling and Wu Min Aun, *Conflict of Laws in Malaysia*, 1995, Butterworths Asia, at 55. See also Tan Yock Lin, *Conflicts Issues in Family and Succession Law*, 1993, Butterworths Asia, at 153.

<sup>52</sup> These various rights and duties are set out in section 13: "...all rights, duties, obligations and liabilities of the parents or guardians of the infant in relation to the future custody, maintenance and education of the infant, including all rights to appoint a guardian to consent or give notice of dissent to marriage...".

<sup>53</sup> *Xie Xiaoyi & others v Director of Immigration* [2000] 2 HKLRD 161, at 168G, 173H and 180G.

4.16 A child's domicile of dependency differs according to whether the child is legitimate or illegitimate in ways similar to that of the domicile of origin. The above discussion of adopted children also applies to the determination of their domicile of dependency.

### ***New Zealand***

4.17 In New Zealand, domicile was initially purely a common law concept. Subsequently, the Domicile Act 1976 substantially modified, though did not completely replace, the common law rules for determining a person's domicile. A person's domicile at any time after 1 January 1981<sup>54</sup> will be determined as if the Act had always been in force. On the other hand, a person's domicile at any time before 1 January 1981 will be determined as if the Act had never been passed.<sup>55</sup>

4.18 At common law, a child's domicile of origin and domicile of dependency, as in other jurisdictions, depended on whether his parents were married or not. The changes made in the Domicile Act 1976 have the effect of replacing these common law rules.<sup>56</sup>

- (a) a child whose parents are living together has the domicile for the time being of his father;<sup>57</sup>
- (b) a child whose parents are not living together has the domicile for the time being of his mother (or if she is dead, the domicile she had at her death);<sup>58</sup>
- (c) where a child whose parents are not living together has his home with his father, the child has the domicile for the time being of his father; and after he ceases to have his home with his father, he continues to have the domicile for the time being of his father (or if he is dead, the domicile he had at his death) until he has his home with his mother.<sup>59</sup>

4.19 Until a foundling has his home with one of his parents, both of his parents shall be deemed to be alive and domiciled in the country in which the foundling was found.<sup>60</sup> The domicile of an adopted child is that of his adoptive parent or parents, and thereafter it will be determined as if the child had been born to the adoptive parent or parents.<sup>61</sup> A "child" is defined as a person under the age of sixteen who has not married.<sup>62</sup>

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<sup>54</sup> Section 4 of the Domicile Act 1976, New Zealand. The date of 1 January 1981 was the commencement date of the 1976 Act.

<sup>55</sup> Section 3 of the Domicile Act 1976, New Zealand.

<sup>56</sup> Section 6(1) of the Domicile Act 1976, New Zealand.

<sup>57</sup> Section 6(3) of the Domicile Act 1976, New Zealand.

<sup>58</sup> Section 6(5) of the Domicile Act 1976, New Zealand.

<sup>59</sup> Section 6(4) of the Domicile Act 1976, New Zealand.

<sup>60</sup> Section 6(6) of the Domicile Act 1976, New Zealand.

<sup>61</sup> Section 16(2)(f) of the Adoption Act 1955, New Zealand.

<sup>62</sup> Section 6(2) of the Domicile Act 1976, New Zealand.

## **Singapore**

4.20 The law of domicile in Singapore is generally similar to that in Malaysia. In determining a person's domicile of origin and domicile of dependency, as in Malaysia, it is necessary to differentiate between legitimate and illegitimate children.<sup>63</sup> It is generally accepted that the domicile of origin of a foundling should be in the place where he is found.<sup>64</sup> It has been argued that an adopted child's domicile of dependency should follow that of his adoptive parent or parents.<sup>65</sup> This is because the Adoption of Children Act<sup>66</sup> in Singapore "makes provisions for all matters in which domicile is controlling and in all such matters, declares in effect the severance of the former parent-child relationship and its replacement by a new."<sup>67</sup>

## **South Africa**

4.21 In South Africa, the Domicile Act 1992 sets out the rules for determining a person's domicile. The Act implements recommendations made by the South African Law Commission.<sup>68</sup> A child is domiciled at the place with which he is most closely connected.<sup>69</sup> If, in the normal course of events, a child has his home with his parents or one of them, it is presumed that the parental home is the child's domicile.<sup>70</sup> A "child" is defined as a person under the age of eighteen years while the term "parents" includes adoptive parents and parents who are not married to each other.<sup>71</sup>

## **United Kingdom**

4.22 The rules which govern the determination of a person's domicile are essentially the same in England and Wales and Scotland. Where there is a difference, we will mention the Scottish position separately.

4.23 As in Hong Kong, a child's domicile of origin depends on whether he is legitimate or illegitimate.<sup>72</sup> The position of a legitimate child born after his parents' divorce is uncertain.<sup>73</sup> Where the parents are not

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<sup>63</sup> *Udny v Udny* (1869) LR 1 Sc & Div 441, at 457.

<sup>64</sup> Tan Yock Lin, *Conflicts Issues in Family and Succession Law*, 1993, Butterworths Asia, at 147. No relevant cases can be found after publication of the book.

<sup>65</sup> Tan Yock Lin, *Conflicts Issues in Family and Succession Law*, 1993, Butterworths Asia, at 153.

<sup>66</sup> Section 7 of this Act is almost identical to section 9 of the Adoption Act 1952 in Malaysia and section 13 of the Adoption Ordinance (Cap 290) in Hong Kong. These provisions provide that when an adoption order is made, certain rights, duties and obligations relating the child pass from the natural parents to the adopting parents. For the discussion on these provisions, please see the discussion under "Malaysia".

<sup>67</sup> In Professor Tan's e-mail to the author of this Report dated 6 June 2001.

<sup>68</sup> South African Law Commission, *Report on Domicile*, Project 60, March 1990.

<sup>69</sup> Section 2(1) of the Domicile Act 1992, South Africa.

<sup>70</sup> Section 2(2) of the Domicile Act 1992, South Africa.

<sup>71</sup> Section 2(3) of the Domicile Act 1992, South Africa.

<sup>72</sup> *Udny v Udny* (1869) LR 1 Sc & Div 441, at 457.

<sup>73</sup> *Dacey and Morris on the Conflict of Laws*, 13<sup>th</sup> Ed, Sweet and Maxwell, 2000, at para 6-028. It was submitted there that he should have his mother's domicile at birth.

divorced but are living apart at a child's birth, the child's domicile of origin will be that of his father.<sup>74</sup> A foundling has a domicile of origin in the country where he is found.<sup>75</sup>

4.24 A child's domicile may be changed as a result of adoption, legitimation or a change in the parents' domicile. As a result of adoption, a child will acquire a new domicile of origin since he is regarded as born to the adopters in wedlock.<sup>76</sup> In the case of legitimation or a change in the parents' domicile, the child's new domicile is a domicile of dependency but not a domicile of origin.<sup>77</sup>

4.25 Like domicile of origin, a child's domicile of dependency also differs according to whether his parents are married or not. A legitimated child's domicile is, from the time of the legitimation and during his father's lifetime, the same as and changes with his father's if the legitimation is due to his parents' marriage.<sup>78</sup> Before the legitimation or after his father's death, the child's domicile follows that of his mother. The domicile of a legitimate or legitimated child without living parents, or of an illegitimate child without a living mother (though with a living father), probably cannot be changed.<sup>79</sup> Adopted children are treated as the legitimate children of the adoptive parent or parents and their domicile will be determined accordingly.<sup>80</sup>

4.26 Section 4 of the Domicile and Matrimonial Proceedings Act 1973 has altered the common law rule governing the domicile of dependency of legitimate and legitimated children, though in a limited way:

- (a) where the parents are alive but living apart, and their legitimate or legitimated child<sup>81</sup> has his home with the mother (but not the father), the child's domicile of dependency depends on that of the mother;<sup>82</sup> and the child's domicile will remain dependent on his mother's until he has his home with his father;<sup>83</sup>
- (b) at his mother's death, the child's domicile will be frozen as it is at the time of her death until the child has a home with his father;<sup>84</sup>

<sup>74</sup> *Dicey and Morris on the Conflict of Laws*, 13<sup>th</sup> Ed, Sweet and Maxwell, 2000, at para 6-028. See the following discussion on the effect of section 4 of the Domicile and Matrimonial Proceedings Act 1973 on a child's domicile of dependency.

<sup>75</sup> This rule is generally accepted, though there is no direct authority to support it. *Dicey and Morris on the Conflict of Laws*, 13<sup>th</sup> Ed, Sweet and Maxwell, 2000 at para 6-029.

<sup>76</sup> Section 39(1) and (5) of the Adoption Act 1976, with effect from the date of adoption or 1 January 1976, whichever the later. For Scotland, see section 39(1) of the Adoption (Scotland) Act 1978.

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

<sup>78</sup> No authority can be found on this point. But see *Dicey and Morris on the Conflict of Laws*, 13<sup>th</sup> Ed, Sweet and Maxwell, 2000 at para 6-092 for this submission.

<sup>79</sup> No authority can be found on this point. But see *Dicey and Morris on the Conflict of Laws*, 13<sup>th</sup> Ed, Sweet and Maxwell, 2000 at para 6-094 for this submission.

<sup>80</sup> Section 39(1) and (5) of the Adoption Act 1976, with effect from the date of adoption or 1 January 1976, whichever the later. For Scotland, see section 39(1) of the Adoption (Scotland) Act 1978.

<sup>81</sup> Section 4(4) of the Domicile and Matrimonial Proceedings Act 1973 expressly provides that section 4 does not affect the common law position that an illegitimate child's domicile depends on his mother's.

<sup>82</sup> Section 4(2)(a) of the Domicile and Matrimonial Proceedings Act 1973.

<sup>83</sup> Section 4(2)(b) of the Domicile and Matrimonial Proceedings Act 1973.

<sup>84</sup> Section 4(3) of the Domicile and Matrimonial Proceedings Act 1973.

- (c) the phrase "living apart" is not defined but means something more than a short period of living separately.<sup>85</sup> The amount of time spent living together and the state of the relationship are relevant in determining whether a child has a home with a parent.<sup>86</sup>

4.27 In 1987, the English and Scottish Law Commissions issued a joint report on the law of domicile which contained a number of proposals for reform of the rules for determining a person's domicile.<sup>87</sup> The relevant recommendations in the report were that:

- (a) a child's domicile should be in the country with which he is most closely connected;<sup>88</sup>
- (b) where a child's parents have their domicile in the same country and the child has his home with either or both of them, it is presumed that he is most closely connected with that country;<sup>89</sup>
- (c) where the child's parents are not domiciled in the same country and the child has his home with only one of them, he is presumed to be most closely connected with the country in which the parent with whom he has his home is domiciled,<sup>90</sup> and
- (d) the concepts of domicile of origin and domicile of dependency should be discarded.<sup>91</sup>

4.28 The recommendations have not yet been implemented. Although the proposals for reform in the report are desirable in themselves, the United Kingdom government has decided not to take forward these reforms.<sup>92</sup> The reason given was that these proposals did not contain sufficient practical benefits to outweigh the risks of proceeding with them and to justify disturbing the long-established body of case law on this area.<sup>93</sup> The decision to a large extent was made under the influence of strong lobbying by foreign businessmen resident in the United Kingdom.<sup>94</sup> Although they were not domiciled there, they were concerned that the implementation of the report would adversely affect their liability to tax in the United Kingdom. The relevant Ministers considered these concerns to be unfounded, and the Commissions considered that their proposals would be unlikely to have any significant impact on the incidence of taxation. The Government nevertheless decided not to implement the joint report.

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<sup>85</sup> *Dicey and Morris on the Conflict of Laws*, 13<sup>th</sup> Ed, Sweet and Maxwell, 2000, at para 6-100.  
<sup>86</sup> *Dicey and Morris on the Conflict of Laws*, 13<sup>th</sup> Ed, Sweet and Maxwell, 2000, at para 6-100.  
<sup>87</sup> The Law Commission and the Scottish Law Commission, *Private International Law, the Law of Domicile*, (Law Com No 168, Scot Law Com No 107) 1987.  
<sup>88</sup> Law Com No 168, Scot Law Com No 107, 1987 at para 4.13.  
<sup>89</sup> Law Com No 168, Scot Law Com No 107, 1987 at para 4.15.  
<sup>90</sup> Law Com No 168, Scot Law Com No 107, 1987 at para 4.16.  
<sup>91</sup> Law Com No 168, Scot Law Com No 107, 1987 at paras 4.13 and 4.24.  
<sup>92</sup> *Hansard* HC, 16 Jan 1996, col 487.  
<sup>93</sup> *Hansard* HC, 16 Jan 1996, col 487.  
<sup>94</sup> In an e-mail dated 5 Jan 2001 from Mr Oliver Parker, International Division of the Lord Chancellor's Department in the United Kingdom to the author of this Report.

## **Options**

4.29 It is clear from the above discussion that a range of different approaches are followed in other jurisdictions, though the common law rules which apply to Hong Kong are also applicable to most of these jurisdictions. In some jurisdictions, legislation has supplemented the common law rules. In others, the common law rules have been largely replaced by general statutory provisions on domicile. There would appear to be three options to be considered in Hong Kong in relation to reform of the law determining a child's domicile:

- (a) maintain the status quo;
- (b) supplement the existing common law with statutory provisions;  
or
- (c) replace the major common law rules with statutory provisions.

4.30 The effect of option (a) would be to keep the concepts of domicile of origin and domicile of dependency and the differentiation between legitimate and illegitimate children. The domiciles of a legitimated child, a foundling, an adopted child and a legitimate child born after his parents' divorce would have to be addressed individually. This is still basically the position in India, Malaysia and Singapore.

4.31 In option (b), the scope of the supplementary statutory provisions could be to amend the major common law principles or it could be restricted to filling gaps in the common law (as in Australia, Ireland and the United Kingdom). These three jurisdictions have maintained the concepts of domicile of origin and domicile of dependency, and the differentiation between legitimate and illegitimate children.

4.32 For example, in Australia the domicile was unclear of a child who had his principal home with one of his parents, where the other parent was either living separately or was dead. Section 9(1) of the Domicile Act 1982 makes it clear that the child's domicile follows that of the parent with whom he has his principal home.<sup>95</sup> In both Ireland and the United Kingdom there are similar provisions, but with a more limited scope. Where parents of a legitimate child are living apart and the child has his home with his mother but not with his father, the child's domicile (of dependency) follows that of his mother.<sup>96</sup> In addition, there are provisions in Australia and the United Kingdom which provide that adopted children are treated as the legitimate children of their adoptive parent or parents and their domicile will be determined accordingly.<sup>97</sup>

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<sup>95</sup> It applies whether the parents are married to each other or not: section 4(2) of the Domicile Act 1982 (Commonwealth, Australia).

<sup>96</sup> Section 4(1) of the Domicile and Recognition of Foreign Divorces Act 1986, Ireland; and section 4(2)(a) of the Domicile and Matrimonial Proceedings Act 1973, the United Kingdom.

<sup>97</sup> Section 9(2)(a) of the Domicile Act 1982 (Commonwealth, Australia); and section 39(1) and (5) of the Adoption Act 1976, with effect from the date of adoption or 1 January 1976, whichever the later.

4.33 The crux of option (c) is to discard the concepts of domicile of origin and domicile of dependency and the differentiation between legitimate and illegitimate children. In Manitoba (Canada), a child's domicile depends on whether his parents have the same domicile, but not on whether his parents are married or not. Where they have a common domicile, the child's domicile will follow theirs,<sup>98</sup> but if they do not, the child will have the domicile of the parent with whom he normally and usually resides.<sup>99</sup> In New Zealand, a child's domicile hinges on whether his parents are living together and with which parent a child lives. A child whose parents are living together has the domicile of his father.<sup>100</sup> Where parents are not living together, a child has the domicile of his mother,<sup>101</sup> but if he has his home with his father, his domicile follows that of his father.<sup>102</sup> In South Africa, a child is domiciled in the country with which he is most closely connected,<sup>103</sup> but if the child has his home with his parents or one of them, he is presumed to be domiciled where the parental home is.<sup>104</sup> The English and Scottish Law Commissions' joint report has recommended the adoption of provisions similar to those in South Africa.<sup>105</sup>

## Conclusions

### (a) Abolishing the existing rules

4.34 The concept of domicile of origin and its revival, the rigid dependency of children on their parents for domicile, the dual-concept approach (domicile of origin and domicile of dependency) and the differentiation between legitimate and illegitimate children all contribute to the anomalies in the existing law. There is also uncertainty in respect of the domiciles of a legitimated child, a foundling, a posthumous child, an adopted child and a legitimate child born after his parents' divorce.

4.35 In reviewing the English and Scottish Law Commissions' proposals, Peter North observes that the abolition of the domicile of origin and domicile of dependency would greatly simplify the position.<sup>106</sup> The various anomalies and gaps in the existing law have convinced us that the concept of domicile of origin should be discarded. Similarly, the sometimes unfortunate consequences of the application of the concept of domicile of dependency to those cases where a child does not reside with both parents have led us to the conclusion that the concept of domicile of dependency should also be abolished. This recommendation and the rationale behind it were expressly endorsed by, *inter alios*, the Hong Kong Bar Association and the Health,

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<sup>98</sup> Section 9(1)(a) of the Domicile and Habitual Residence Act 1983, Manitoba.

<sup>99</sup> Section 9(1)(b) of the Domicile and Habitual Residence Act 1983, Manitoba.

<sup>100</sup> Section 6(3) of the Domicile Act 1976, New Zealand.

<sup>101</sup> Section 6(5) of the Domicile Act 1976, New Zealand.

<sup>102</sup> Section 6(4) of the Domicile Act 1976, New Zealand.

<sup>103</sup> Section 2(1) of the Domicile Act 1992, South Africa.

<sup>104</sup> Section 2(2) of the Domicile Act 1992, South Africa.

<sup>105</sup> Law Com No 168, Scot Law Com No 107, 1987 at paras 4.13, 4.15 and 4.16.

<sup>106</sup> North and Fawcett, *Cheshire and North's Private International Law*, 12<sup>th</sup> Edition, 1992, Butterworths, at 175.

Welfare and Food Bureau in response to our Consultation Paper. The British Chamber of Commerce, however, pointed out that Hong Kong, as an international financial centre, probably had residents who were from jurisdictions which retained the concepts of domicile of origin and domicile of dependence. The Chamber wondered how the new regime in Hong Kong would dovetail with those jurisdictions' domiciliary rules, and was concerned that the discrepancy would lead to anomalies. We do not share the view that Hong Kong's new regime needs to dovetail with other jurisdictions' domiciliary rules. It is well settled that a jurisdiction can have its own set of rules for determining domicile which may be different from those in other jurisdictions.<sup>107</sup> For instance, Manitoba, New Zealand and South Africa no longer apply the concepts of domicile of origin and children's domicile of dependency when determining a person's domiciliary status, while other jurisdictions still retain these rules. In determining where a person is domiciled, Hong Kong courts would apply Hong Kong's domiciliary rules, and this should not be regarded as anomalous.

**Recommendation 2**

**We recommend that the concept of domicile of origin and that of domicile of dependency should be discarded.**

4.36 The enactment of the Parent and Child Ordinance (Cap 429) has removed most of the legal disabilities associated with illegitimacy of children. A distinction is still drawn between legitimate and illegitimate children, however, in respect of their domicile. We find it hard to justify in principle why a child's domicile should depend on the marital status of his parents, and therefore recommend eradicating this discriminatory differentiation. Our recommendation is supported by, *inter alios*, the Health, Welfare and Food Bureau, the Hong Kong Bar Association and the Legal Policy Division of the Department of Justice.

**Recommendation 3**

**We recommend that there should be no differentiation between legitimate and illegitimate children in determining their domicile.**

(b) *Adopting the test of closest connection and associated presumptions*

4.37 To replace the existing concepts of domicile of origin and domicile of dependency, we are in favour of a single test which ties the child's

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<sup>107</sup> *Dicey and Morris on the Conflict of Laws* (Sweet and Maxwell, 13<sup>th</sup> Edition, 2000), at para 6R-021 (Rule 8).

domicile to the jurisdiction with which he is most connected. We believe this would significantly simplify the law. We reject the option of maintaining the existing law (presented as option (a) in paragraph 4.29 above), and we do not consider that the halfway-house of option (b) (which retains the existing common law but supplements this with a statutory gloss) goes far enough to rectify the law's anomalies. In practice, the interplay of common law principles and statutory provisions on domicile has complicated the rules for determining a child's domicile, especially in the case of Australia.

4.38 The jurisdictions in option (c) have discarded the concepts of domicile of origin and domicile of dependency and the difference of treatment between legitimate and illegitimate children. In New Zealand, a child's domicile depends on whether his parents are living together and with which parent he lives. The New Zealand legislation also makes provision for specific circumstances, such as the domicile of a foundling and that of an adopted child. The Act, however, has not formulated a general test to be applied in all situations.

4.39 In Manitoba (Canada), a child's domicile depends on whether his parents have the same domicile. Where parents have a common domicile, a child's domicile follows that of his parents, but if they do not have a common domicile, their child will have the domicile of the parent with whom the child normally and usually resides. In other cases, a child's domicile is in the state or subdivision where he normally and usually resides. The difficulty with this approach, however, is that it does not necessarily follow from the fact that parents have the same domicile that their child is living with them, or has any substantial connection with the country of their domicile. In addition, the test of where a child normally and usually resides is, in our opinion, too narrow, and leaves out other relevant circumstances which should be taken into account.

4.40 In contrast, the English and Scottish Law Commissions proposed a broader test: a child is domiciled in the country with which he is most closely connected. The United Kingdom Commissions considered that such a test would allow the courts to reach the most appropriate conclusion by considering all the circumstances of the case. Those factors would include the child's intention and nationality and that of his parents, his family background, his education and where he resided at the time in question.<sup>108</sup> This view is shared by C F Forsyth who considers that the test allows domicile to be "*determined objectively with reference to all the circumstances surrounding*" a child.<sup>109</sup> Peter North also considers that the English and Scottish Law Commissions' recommended test would ensure that a child's domicile is fixed in a country with which he has a close connection.<sup>110</sup>

4.41 In addition, in the English and Scottish Law Commissions' opinion, the test would also provide some built-in protection against a third

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<sup>108</sup> Project 60, March 1990, at para 2.94. Law Com No 168, Scot Law Com No 107, 1987 at para 4.12.

<sup>109</sup> CF Forsyth. *Private International Law*, 3rd Edition 1996, Juta & Co, Ltd, at 133.

<sup>110</sup> North and Fawcett, *Cheshire and North's Private International Law*, 12<sup>th</sup> Edition, 1992, Butterworths, at 175.

party's attempt to manipulate a child's domicile for improper purposes.<sup>111</sup> The court would have sufficient flexibility in such a case to take account of circumstances where, for ulterior motives, a child has been removed from the country to which he is most closely connected.

4.42 We share the English and Scottish Commissions' view that the closest connection test not only provides clear guidance for the courts, but also allows the courts sufficient flexibility to ensure that all relevant factors can be taken into account. With this test, the law would also be better positioned to fill the gaps in the existing law in respect of the domiciles of a legitimated child, a foundling, a posthumous child, an adopted child and a legitimate child born after his parents' divorce. The new test would also be better able to address other problematic circumstances, such as where a child has his home with parents who live together but have different domiciles, or where a child lives with his grandparents, or in an orphanage. In response to our Consultation Paper, the Hong Kong Bar Association stressed that the child's intention should not be ignored in applying the test. We agree with the Bar that the child's intention should be one of the factors for the court to consider in applying the test.

4.43 Another respondent to our Consultation Paper was in favour of providing guidance to the court by including in the recommended legislation (the "Recommended Legislation") a non-exhaustive list of relevant factors to be considered, such as the child's intention, the parents' intention, the parents' lifestyle, ordinary residence, etc. It is noteworthy, however, that the English and Scottish Law Commissions and the South African Law Commission share the view that it would be undesirable to list relevant factors in the legislation since to do so might mislead the court or hamper its proper finding of fact.<sup>112</sup> The English and Scottish Law Commissions emphasised that the court should be able to look at all the child's circumstances before deciding his domicile.<sup>113</sup> Devising a legislative list would inhibit that flexibility and run the risk that a relevant consideration might be overlooked. No single factor should be of decisive significance, and before identifying the country with which a child is most closely connected, the courts should weigh all relevant factors. We therefore prefer not to spell out a list of such factors in the legislation and instead to leave the courts with the flexibility to take all relevant circumstances into account. Those circumstances would include the child's intention, but any reference to a child's intention by the courts would need to take account of the fact that the weight to be attached to the views of, say, a child of fifteen would generally be expected to be greater than to those of a child of seven. We therefore recommend a general test that a child is domiciled at the place with which he is most closely connected. In applying this test, the courts should take account of all relevant factors, including the child's intention.

4.44 The English and Scottish Law Commissions also recommended that, for the sake of certainty, the general test of closest connection should be

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<sup>111</sup> Law Com No 168, Scot Law Com No 107, 1987 at para 4.13.

<sup>112</sup> Law Com No 168, Scot Law Com No 107, 1987 at para 4.18; South African Commission Project 60, March 1990, at para 2.95.

<sup>113</sup> Law Com No 168, Scot Law Com No 107, 1987 at para 4.18.

used in conjunction with two rebuttable presumptions which would deal with the most common circumstances. First, where a child's parents have their domicile in the same country and the child has his home with either or both of them, it is presumed that he is most closely connected with that country. Secondly, where a child's parents are not domiciled in the same country and he has his home with only one of them, he is presumed to be most closely connected with the country where the parent with whom he has his home is domiciled. The South African Law Commission, which adopted the English and Scottish Law Commissions' "closest connection" test, also recommended the use of rebuttable presumptions, but of a slightly different effect. Under the South African Law Commission's proposals, where, in the normal course of events, a child has his home with his parents or one of them, the parental home is presumed to be the child's domicile.<sup>114</sup>

4.45 The English and Scottish Law Commissions considered the rebuttable presumptions would:

*"... provide a high degree of certainty whilst still allowing the court to reach an appropriate result in a difficult case through the closest connection test, and thereby also avoiding the arbitrary allocation to a child of the domicile of the father or of the mother."<sup>115</sup>*

The South African Law Commission endorsed the English and Scottish Law Commissions' move away from the principle of dependency, and considered the proposal went a long way towards establishing a functional alternative without undermining clarity and legal certainty.<sup>116</sup>

4.46 We agree that there are considerable advantages in the use of rebuttable presumptions. Such presumptions are particularly helpful in cases where there is a shortage of evidence. In the most common cases where a child lives with one or both parents, the rebuttable presumptions would enhance the ease and certainty of determining the child's domicile. Where, for instance, the parents are domiciled in country A but live with their child in country B, the child would be presumed to be most closely connected with country A under the English and Scottish Law Commissions' presumptions. J J Fawcett is of the view that the child in the example may have a link with his parents but not necessarily with their domicile (country A), and the presumption may thus link the child to a country with which he does not have much connection.<sup>117</sup> We must, however, emphasise that the presumptions are rebuttable. If the child is, as a matter of fact, most closely connected with country B, the presumption can be subject to rebuttal.

4.47 We like the conciseness of the South African version of the presumption, but we are concerned that the term "parental home" might

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<sup>114</sup> Section 2(2) of the Domicile Act 1992, South Africa.

<sup>115</sup> Law Com No 168, Scot Law Com No 107, 1987 at para 4.14.

<sup>116</sup> South African Law Commission, *Report on Domicile*, Project 60, March 1990, at para 2.89.

<sup>117</sup> J J Fawcett, "Law Commission Working Paper No 88: the law of domicile" (1986) 49 MLR 225, at 228. Fawcett continues to say that a child should have a domicile which is appropriate in terms of connections and this may not happen if the child's domicile is dependent on that of the parent.

create unnecessary difficulties. Applying the South African rule to the above example, the parental home is likely to be regarded as being in country B. The child will therefore be presumed to be domiciled there. While that may be the appropriate determination in some cases, we prefer a presumption that the child is domiciled in country A, where his parents have their domicile, instead of country B, where their residence may not necessarily be long term. On balance, the Consultation Paper suggested adopting the two presumptions recommended in the English and Scottish Law Commissions' report, and putting it beyond doubt that "parents" includes adoptive parents of a child.

4.48 In response to our Consultation Paper, the Health, Welfare and Food Bureau endorsed the recommendation, while the British Chamber of Commerce suggested that in phrasing the two presumptions, the child should be "presumed to be domiciled in" the relevant country, instead of being "presumed to be most closely connected with" that country. The Consultation Paper phrased the two presumptions in terms of the closest connection test because that is the general test for determining a child's domicile. On further reflection, we agree that it would be more direct to adopt the wording suggested by the British Chamber of Commerce. In adopting the Chamber's suggestion, the rebuttal part of the two presumptions should also be rephrased so that "unless he is proved to be most closely connected with another country" replaces "unless the contrary is proved". The Legal Aid Department pointed out that there was an increasing number of cases where grandparents were left to care for grandchildren whose parents were either untraceable or deceased. The Department is of the view that if the term "parents" is intended to include persons *in loco parentis*, this should be spelt out in the Recommended Legislation. For the avoidance of doubt, we propose that the situations mentioned by the Legal Aid Department could be dealt with by applying the general closest connection test but not the two presumptions. We have also considered whether to adopt additional presumptions but have concluded that it is unnecessary to do so. In our view, the two recommended presumptions would cover most sets of circumstances and would be likely to provide a natural and sensible result. Devising other presumptions for other scenarios might bring about unwanted artificiality, and it would be simpler to apply the general test of closest connection.

#### **Recommendation 4**

**We recommend the following rules for determining a child's domicile:**

- (a) a child's domicile should be in the country<sup>118</sup> with which he is most closely connected;**

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"country" means a "law district" or distinct jurisdiction ie a territory subject under one sovereign to one body of law.

**(b) where a child's parents have their domicile in the same country and the child has his home with either or both of them, he is presumed to be domiciled in that country, unless he is proved to be most closely connected with another country; and**

**(c) where a child's parents are not domiciled in the same country and the child has his home with only one of them, he is presumed to be domiciled in the country where the parent with whom he has his home is domiciled, unless he is proved to be most closely connected with another country.**

**In this context, "parents" includes adoptive parents of a child. In applying the closest connection test, the courts should take account of all relevant factors, including the child's intention.**

*(c) Other issues*

4.49 A number of other issues remain to be considered in relation to the domicile of children. Firstly, the question arises as to what constitutes the concept of "home" which is employed in the two recommended presumptions. The English and Scottish Law Commissions observed that the concept of "home" used in section 4 of the Domicile and Matrimonial Proceedings Act 1973 had caused no difficulty and concluded that the same concept should also work well in the presumptions. Section 4 has no equivalent in Hong Kong, and hence the jurisprudence concerning that section would not be applicable here. Nonetheless, we believe that if the concept can operate satisfactorily in England, it should also do so in Hong Kong. We therefore conclude that what constitutes a home should depend on the facts of each case, and should be left to the courts to decide. To provide greater certainty, we intend that a child should be regarded as having his home with his parents where they live together on a day-to-day basis, even though there are regular temporary separations.<sup>119</sup> Obvious examples include a child attending a boarding school, or staying in a hospital, or a child with a parent who must frequently absent himself from the home for the purpose of his work. There is, however, no need to make express provisions for these cases in the legislation since what constitutes a home should depend on the facts of each case, and the matter should be left to the courts.

4.50 Secondly, the English and Scottish Law Commissions considered whether the court should have power to vary a child's domicile for his welfare. They observed that it was wrong in principle for the court to have such a power, since domicile should be a legal status deduced from the

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<sup>119</sup> Law Com No 168, Scot Law Com No 107, 1987 at para 4.19; *The Law of South Africa*, Butterworths, Vol 2, at para 430.

facts. We share the English and Scottish Law Commissions' conclusion that no person or court should have the power to abrogate or override the rules governing the domicile of children.

4.51 We note that a child may well have a domicile different from that of his parents after the commencement of the Recommended Legislation.<sup>120</sup> For instance, where parents have their domicile in country A and their child was born and brought up in Hong Kong, the child might be held to be most closely connected with Hong Kong while the parents would still retain their domicile in country A.

## Domicile of adults

### *Australia*

4.52 In Australia, any person who is over eighteen years of age or is married has the ability to acquire an independent domicile.<sup>121</sup> However, a person suffering from mental incapacity is not capable of obtaining a domicile of his choice.<sup>122</sup>

4.53 At common law, where a person has left his homeland with the intention of not returning, his domicile of origin continues until he acquires a domicile of choice.<sup>123</sup> He can acquire a domicile of choice in another country by being there lawfully with the intention of remaining there permanently or indefinitely. The two conditions of physical presence and the required intention must co-exist. The length of the physical presence is not determinative. Even though a person's permission to stay in a country is only for a limited period, he can still obtain a domicile of choice there if his presence there is lawful when his intention to stay there indefinitely is formed.<sup>124</sup> His new domicile once acquired is not lost upon expiry of the permission to stay,<sup>125</sup> or even after deportation.<sup>126</sup>

4.54 The word "permanent" in connection with the required intention at common law ("an intention to reside permanently or indefinitely in a country") at times imposes a stringent requirement which makes it impossible to obtain a domicile of choice unless the person in question has abandoned any intention of eventually returning to his home country. Asprey JA of the New South Wales Court of Appeal, however, in *Hyland v Hyland*<sup>127</sup> put the common law test in a more flexible way:

*"In the context of the principles applicable to a domicile of choice I am of the opinion that the use of the word 'permanent' means nothing more than Lord Westbury's phrase 'general and*

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<sup>120</sup> *The Law of South Africa*, Butterworths, Vol 2, at para 430.  
<sup>121</sup> Section 8(1) of the Domicile Act, 1982 (Commonwealth).  
<sup>122</sup> Section 8(2) of the Domicile Act, 1982 (Commonwealth).  
<sup>123</sup> *Bell v Kennedy* (1868) LR 1 Sc & Div 307.  
<sup>124</sup> *Lim v Lim* [1973] VR 370.  
<sup>125</sup> *In the Marriage of Salacup* (1993) 17 Fam LR 141.  
<sup>126</sup> Section 7 of the Domicile Act 1982 (Commonwealth).  
<sup>127</sup> (1971) 18 FLR 461(Sugerman ACJ consenting; Taylor AJA dissenting).

*indefinite' which, as I understand it, produces the result that the person's intention is one which, when formed, is to remain a resident of the country for a period then regarded by him as unlimited in time and without having addressed himself to the question of giving up such residence and leaving the country of his choice upon the happening of some particular and definite event in the foreseeable future notwithstanding that he may entertain in the phraseology which appears to have been coined by Story (Conflict of Laws, 8<sup>th</sup> ed p 50) a floating intention to return at some future period of time to his native country...*"<sup>128</sup>

The distinction is between a definite intention to leave and a "floating intention". According to Asprey JA, the required intention is to remain in a country for a period regarded as unlimited in time and without the intention of leaving in the foreseeable future, such as on the completion of a contract of employment.<sup>129</sup> A hope of returning to one's home country at some unspecified time in the future, or a willingness to move elsewhere for better opportunities, will not water down the intention to remain in a country.<sup>130</sup> A person, however, who has an intention to go back to his home country on the happening of a definite future event (though distant and unspecified in time, such as retirement) will not acquire a new domicile of choice.<sup>131</sup>

4.55 The Domicile Act 1982 (Commonwealth) has no specific provision on the nature of physical presence required, but it provides for the requisite intention: to make one's home indefinitely in the country concerned.<sup>132</sup> The question is whether it has changed the common law test as defined by Asprey JA in the *Hyland* case. No authority can be found in Australia, but a New Zealand decision on a similar provision<sup>133</sup> suggests that the test formulated by Asprey JA is still applicable. In this case, despite a residence of thirty-five years in the United States, it was held that a New Zealander had not acquired a domicile there since he had at all times a definite intention to go back to New Zealand upon retirement. This is in line with the common law test defined by Asprey JA.<sup>134</sup>

4.56 At common law, a person can lose his domicile of choice by leaving the country and by abandoning the intention of residing there indefinitely. The domicile of choice will be abandoned once these two elements co-exist. Under the pre-1982 law, if a person has not acquired a new domicile upon the abandonment of the old one, his domicile of origin will revive until he obtains another domicile of choice. Where a person who had

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<sup>128</sup> (1971) 18 FLR 461 at 464.

<sup>129</sup> (1971) 18 FLR 461 at 464.

<sup>130</sup> (1971) 18 FLR 461 at 464.

<sup>131</sup> *Humphries v Humphries* [1992] NZFLR 18.

<sup>132</sup> Section 10 of the Domicile Act 1982 (Commonwealth).

<sup>133</sup> Section 9(d) of the Domicile Act 1976, New Zealand.

<sup>134</sup> But see the contrary view: "If this is the correct interpretation of s 10 it only clarifies but does not change the common law. It does, however, seem strange that persons who have lived in a country for decades are held not to have acquired a domicile there because of an intention which at the date of the hearing was never acted upon. Surely that cannot have been the intention and purpose of the legislation." in P E Nygh, *Conflict of Laws in Australia*, Butterworths, 6<sup>th</sup> Ed, 1995, at 209.

a Tasmanian domicile of origin and a New Zealand domicile of choice decided to move permanently to England but died in a plane crash on his way there, his domicile as at the date of death would be Tasmanian. This is because he had abandoned his New Zealand domicile of choice but had not yet acquired a new domicile in England. Hence, his domicile of origin would revive. The post-1982 law expressly abolishes the concept of revival of domicile of origin, and an existing domicile continues until a different domicile is acquired.<sup>135</sup> Applying this to our example, the deceased's domicile of choice in New Zealand would continue until his actual arrival in England.

## **Canada**

4.57 In Manitoba, every person has the ability to acquire an independent domicile provided he is not a child or mentally incompetent.<sup>136</sup> His domicile of choice is in the place where he has his principal home and where he intends to reside.<sup>137</sup> There is a presumption that a person intends to reside indefinitely where his principal home is, subject to his contrary intention.<sup>138</sup> The common law requirements of physical presence and intention are retained, though in different wording. It is difficult to say how much the statutory provision has changed the common law and, indeed, whether it has changed the common law at all.<sup>139</sup>

4.58 The common law rule which results in the revival of the domicile of origin is abolished,<sup>140</sup> and a person's existing domicile continues until a new one is obtained.<sup>141</sup> The effect of this should be the same as that of the equivalent Australian provision abolishing the concept of revival of domicile of origin discussed above.

## **India**

4.59 In India, a person's domicile of origin prevails until he acquires a new domicile.<sup>142</sup> If a person is not insane,<sup>143</sup> on reaching eighteen years of age<sup>144</sup> he may acquire a domicile of choice in a country by fulfilling two conditions: residence in the country concerned and intention to live there permanently. The co-existence of residence and intention is necessary for obtaining a domicile of choice, but intention can precede residence, or it can be formed after years of residence.

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<sup>135</sup> Section 7 of the Domicile Act 1982 (Commonwealth).

<sup>136</sup> Section 7 of the Domicile and Habitual Residence Act 1983, Manitoba.

<sup>137</sup> Section 8(1) of the Domicile and Habitual Residence Act 1983, Manitoba.

<sup>138</sup> Section 8(2) of the Domicile and Habitual Residence Act 1983, Manitoba.

<sup>139</sup> Marvin Baer and others, *Private International Law in Common Law Canada, Cases, Text and Materials*, Emond Montgomery Publications Limited, Toronto Canada, 1997 at 131.

<sup>140</sup> Section 3(a) of the Domicile and Habitual Residence Act 1983, Manitoba.

<sup>141</sup> Section 6 of the Domicile and Habitual Residence Act 1983, Manitoba.

<sup>142</sup> Section 9 of the Indian Succession Act 1925.

<sup>143</sup> Section 18 of the Indian Succession Act 1925.

<sup>144</sup> Section 2(e) of the Indian Succession Act 1925.

4.60 Section 10 of the Indian Succession Act 1925 provides that a person acquires a new domicile by taking up his fixed habitation in a country which is not his domicile of origin. It was held by the Supreme Court of India in *Central Bank of India v Ram Narayan*<sup>145</sup> that even though the defendant had the intention to move to India, he was still domiciled in Pakistan before he actually lived in India. The period of residence need not be long, and brief residence will not necessarily negative the possibility of acquiring a domicile.

4.61 The required intention is to reside in a country permanently or for an unlimited time. The intention must be fixed but not fickle, and must also be directed towards one particular country. A person's intention can be gathered from all the events and circumstances of his life.<sup>146</sup> It is the cumulative effect of all the facts which indicates his intention, and no one single fact is determinative. The intention to reside permanently or for an unlimited time in a country must be made voluntarily. A person is not deemed to have taken up his fixed habitation in India merely because of residing there in the civil, military, naval or air force service or in the exercise of any profession or calling.<sup>147</sup>

4.62 Where a person stops residing in the country of the domicile of choice and has no intention to reside there indefinitely, he abandons his domicile of choice. Mere intention to abandon, or mere residence in another country, will not suffice. The concept of revival of domicile of origin does not apply in India since a person's domicile continues until he acquires another one or his former domicile resumes.<sup>148</sup>

## ***Ireland***

4.63 On reaching the age of majority, a person can obtain a domicile of his choice in Ireland provided that he is not mentally incapable. The Age of Majority Act 1985<sup>149</sup> changed the age of majority from twenty-one to eighteen, or to the time of marriage where that takes place below the age of eighteen.

4.64 In Ireland, the acquisition and abandonment of a domicile of choice are still governed by the common law. In order to acquire a domicile of choice, a person is required to satisfy two conditions: residence and intention. Casual presence in a country (for example, as a traveller) is not enough, but the length of the residence is immaterial. The required intention is the intention of remaining in a country permanently or indefinitely. The words "permanent" and "indefinite" have been used interchangeably in a number of decisions.<sup>150</sup> Walker C of the Irish Court of Appeal observed that it was obvious that, as the word "indefinite" had no fixed legal meaning, every case had to depend on its own special facts.<sup>151</sup> Sir P O'Brien CJ in the same

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<sup>145</sup> 1955 SC 36.

<sup>146</sup> *Kedar Pande v Narayan Bikram Shah* 1966 SC 160.

<sup>147</sup> Explanation to Section 10 of the Indian Succession Act 1925.

<sup>148</sup> Section 13 of the Indian Succession Act 1925.

<sup>149</sup> Section 2(1).

<sup>150</sup> William Binchy, *Irish Conflicts of Law*, 1988, Butterworth (Ireland) Ltd, at 55.

<sup>151</sup> *Davies v Adair* [1895] 1 IR 379 at 425.

case quoted with approval and applied the following test formulated by Lord Westbury in the English case of *Udny v Udny*:<sup>152</sup>

*"Domicil of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time. This is a description of the circumstances which create or constitute a domicile, and not a definition of the term. There must be a residence, freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the relief from illness; and it might be a residence fixed, not for a particular purpose, but general and indefinite in its future contemplation. It is true that residence, originally temporary, or intended for a limited period, may afterwards become general and unlimited; and in such a case, so soon as the change of purpose, or animus manendi, can be inferred, the fact of domicile is established."*

Sir P O'Brien CJ commented:

*"This is the language of Lord Westbury in what appears to me to be the greatest, the most luminous, and, though not long, the most comprehensive judgment that is to be found in our English law books upon the law of domicile. It has been adopted as laying down the true test by which domicile has been determined in all subsequent cases, ..."*<sup>153</sup>

4.65 To obtain an independent domicile, a person's residence in a country must co-exist with the required intention, but it does not matter which comes first. An emigrant may have the required intention before leaving for the new country; a person fleeing from persecution may form the required intention years later.<sup>154</sup>

4.66 Any person can abandon his domicile of choice by ceasing to reside<sup>155</sup> in the country where he is domiciled and by ceasing to intend to reside there permanently or indefinitely. He may prove this<sup>156</sup> by, for instance, establishing the acquisition of another domicile of choice. He may, however, abandon his existing domicile of choice without obtaining another one.<sup>157</sup> In this case, his domicile of origin will then revive and apply automatically until he acquires a new domicile. Budd J summarised the position well:

*"A person abandons a domicile of choice in a country by ceasing to reside there and by ceasing to intend to reside there permanently or indefinitely and not otherwise. On abandoning*

<sup>152</sup> (1869) LR 1 Sc & Div 441, at 458.

<sup>153</sup> *Davies v Adair* [1895] 1 IR 379 at 437.

<sup>154</sup> William Binchy, *Irish Conflicts of Law*, 1988, Butterworth (Ireland) Ltd, at 53.

<sup>155</sup> *Bank of Ireland Trustee Co Ltd v Adams* [1967] IR 424, at 452.

<sup>156</sup> *Revenue Commissioners v Shaw* [1982] ILRM 433, at 436 (High Court, McWilliam J).

<sup>157</sup> *Sproule v Hopkins* [1903] 2 IR 133, at 138 (KB Div, Andrews J).

*a domicil of choice, a person either acquires a new domicil of choice or resumes his domicil of origin.*"<sup>158</sup>

## **Malaysia**

4.67 In Malaysia, any person being *sui juris* (not an infant or a mentally incapable person) has the ability to acquire a domicile of choice. The age of majority is eighteen years.<sup>159</sup> It is still the common law which governs the acquisition and abandonment of domicile of choice in Malaysia. A person can obtain his domicile of choice by establishing his chief residence in the country in which he wishes to be domiciled, and by having the intention of residing there permanently or indefinitely. The intention need not be directed to the acquisition of domicile,<sup>160</sup> but an individual must have a definite and final intention of changing the existing domicile.<sup>161</sup> No single fact is ever decisive or too trivial.<sup>162</sup> Each trivial fact of a person's life is relevant, such as membership of social clubs.<sup>163</sup>

4.68 Continued residence is not required to retain a newly acquired domicile of choice. In other words, a person will not lose his domicile of choice merely because he is frequently absent from the country of domicile. He can, however, abandon his domicile of choice by ceasing to reside in the country concerned and by ceasing to intend to reside there permanently or indefinitely. Lord Hatherley, the Lord Chancellor, stated in *Udny v Udny*.<sup>164</sup>

*"It seems reasonable to say that if the choice of new abode and actual settlement there constitute a change of the original domicile, then the exact converse of such a procedure, viz, the intention to abandon the new domicile, and an actual abandonment of it, ought to be equally effective to destroy the new domicile. That which may be acquired may surely be abandoned..."*

Upon abandoning his domicile of choice, a person either acquires a new domicile of choice or his domicile of origin revives.<sup>165</sup>

## **New Zealand**

4.69 A person becomes capable of acquiring an independent domicile on reaching sixteen years of age or on marrying at an earlier age.<sup>166</sup> This is subject to the common law rule that the mentally incapable cannot

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<sup>158</sup> *Bank of Ireland Trustee Co Ltd v Adams* [1967] IR 424, at 434.

<sup>159</sup> Section 2 of the Age of Majority Act 1971, Malaysia.

<sup>160</sup> Russell J in *Re Annesley* [1926] Ch 692.

<sup>161</sup> *Re Eu Keng Chee* [1961] MLJ 210.

<sup>162</sup> *Yap Tow On v Woon Ngee Yew* [1940] MLJ 96 (the fact of erecting a tombstone for the parents).

<sup>163</sup> *Joseph Wong Phui Lun v Yeoh Loon Goit* [1978] 1 MLJ 236.

<sup>164</sup> *Udny v Udny* (1869) LR 1 Sc & Div 441, at 450.

<sup>165</sup> Lord Westbury in *Udny v Udny* (1869) LR 1 Sc & Div 441, at 458.

<sup>166</sup> Section 7 of the Domicile Act 1976, New Zealand.

acquire an independent domicile.<sup>167</sup> Once a person becomes capable of obtaining an independent domicile, he continues to be so capable.<sup>168</sup> The domicile a person has immediately before becoming capable of obtaining an independent domicile of choice continues until he in fact acquires a new domicile under the Act, and will then cease.<sup>169</sup> He acquires a new domicile in a country at a particular time if, immediately before that time, he:

- (a) is not domiciled in that country;
- (b) is capable of obtaining an independent domicile;
- (c) is in that country; and
- (d) intends to live there indefinitely.<sup>170</sup>

In the absence of an intention to live in the country concerned indefinitely, mere long residence there will not suffice.<sup>171</sup> The domicile acquired in the above manner continues until another domicile is acquired in the same manner.<sup>172</sup> The common law doctrine of revival of domicile of origin is abolished.<sup>173</sup>

## **Singapore**

4.70 The law governing a person's domicile of choice in Singapore is the same as that in Malaysia.<sup>174</sup> The difference is that the age of majority in Singapore is the common law age of twenty-one years.<sup>175</sup> In all other respects, the discussion above on Malaysia also applies to Singapore.

## **South Africa**

4.71 Any person who is of or over the age of eighteen years, or who is under that age but otherwise by law has the status of a major, has the ability to acquire a domicile of choice, regardless of the sex or marital status of that person.<sup>176</sup> However, this does not apply to a person who does not have the mental capacity to make a rational choice.<sup>177</sup> In order to obtain a domicile of choice in a place, a person needs to be lawfully present there and to have the intention to settle there for an indefinite period.<sup>178</sup>

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<sup>167</sup> Section 7 of the Domicile Act 1976, New Zealand.

<sup>168</sup> Section 7 of the Domicile Act 1976, New Zealand.

<sup>169</sup> Section 8 of the Domicile Act 1976, New Zealand.

<sup>170</sup> Section 9 of the Domicile Act 1976, New Zealand.

<sup>171</sup> *Thuran Investments Pty Ltd v Rowles* (1991) 3 PRNZ 385; *Humphries v Humphries* [1992] NZFLR 18.

<sup>172</sup> Section 11 of the Domicile Act 1976, New Zealand.

<sup>173</sup> Section 11 of the Domicile Act 1976, New Zealand.

<sup>174</sup> Tan Yock Lin, *Conflicts Issues in Family and Succession Law*, 1993, Butterworths Asia, at 125-147. This book covers both Malaysian and Singaporean law.

<sup>175</sup> Tan Yock Lin, *Conflicts Issues in Family and Succession Law*, 1993, Butterworths Asia, at 142.

<sup>176</sup> Section 1(1) of the Domicile Act 1992, South Africa.

<sup>177</sup> Section 1(1) of the Domicile Act 1992, South Africa.

<sup>178</sup> Section 1(2) of the Domicile Act 1992, South Africa.

4.72 A person's existing domicile continues until he acquires another by his own choice or by operation of law.<sup>179</sup> The concept of revival of a person's domicile of origin no longer applies.<sup>180</sup>

### **United Kingdom**

4.73 In England and Wales and Northern Ireland, any mentally capable person becomes capable of acquiring an independent domicile on attaining the age of sixteen or on marrying under that age.<sup>181</sup> He remains domiciled in the country where he was domiciled immediately before either event until, as a matter of fact, he acquires a new domicile. If he abandons his existing domicile without acquiring a new one, his domicile of origin will revive. The position is more or less the same in Scotland, with the difference that marrying under sixteen years of age is irrelevant to the legal capacity in respect of domicile there.<sup>182</sup>

4.74 Once able to acquire an independent domicile, a person can acquire a domicile of choice in a country by fulfilling the requirements as to residence and intention of permanently or indefinitely residing there.<sup>183</sup> As in Hong Kong, "residence" involves no more than mere physical presence, and the "intention" must be general and indefinite in its future contemplation, not just for a limited period or particular purpose.<sup>184</sup> A person can abandon his domicile of choice by ceasing to reside in that country and no longer intending to reside there permanently or indefinitely.<sup>185</sup> On abandoning his domicile of choice, he may acquire another domicile of choice. Otherwise, his domicile of origin will revive.<sup>186</sup> The discussion in Chapter 1 of the Hong Kong position applies equally to the United Kingdom.

4.75 In their joint report in 1987, the English and Scottish Law Commissions made a number of proposals for reform of the law governing domicile of choice. These proposals were as follows:

- (a) a person on reaching the age of sixteen should continue to be able to obtain a domicile of choice, while a person married under sixteen should not.<sup>187</sup> The Commissions were of the view that the mere fact that a minor was married would not by itself ensure he had the ability to form the required intention to obtain a domicile;<sup>188</sup>

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<sup>179</sup> Section 3(1) of the Domicile Act 1992, South Africa.

<sup>180</sup> Section 3(2) of the Domicile Act 1992, South Africa.

<sup>181</sup> Section 3 of the Domicile and Matrimonial Proceedings Act 1973 (applicable to the whole United Kingdom except Scotland).

<sup>182</sup> Section 7 of the Age of Legal Capacity (Scotland) Act 1991.

<sup>183</sup> *Dicey and Morris on the Conflict of Laws*, 13<sup>th</sup> Ed, Sweet and Maxwell, 2000 at 6R-033.

<sup>184</sup> *Dicey and Morris on the Conflict of Laws*, 13<sup>th</sup> Ed, Sweet and Maxwell, 2000 at paras 6-034 and 6-039.

<sup>185</sup> *Dicey and Morris on the Conflict of Laws*, 13<sup>th</sup> Ed, Sweet and Maxwell, 2000 at 6R-074; *Udny v Udny* (1869) LR 1 Sc & Div 441, at 450.

<sup>186</sup> *Dicey and Morris on the Conflict of Laws*, 13<sup>th</sup> Ed, Sweet and Maxwell, 2000 at 6R-074; *Udny v Udny* (1869) LR 1 Sc & Div 441, at 450.

<sup>187</sup> Law Com No 168, Scot Law Com No 107, 1987 at para 4.32.

<sup>188</sup> Law Com No 168, Scot Law Com No 107, 1987 at para 4.32.

- (b) the term "presence"<sup>189</sup> is more appropriate than "residence", since the former will put beyond doubt that a person arriving in a country with the required intention will obtain a domicile there immediately upon arrival;<sup>190</sup>
- (c) the required intention to obtain a domicile of choice is to *settle*, rather than to "make a home",<sup>191</sup> in the country concerned for an indefinite period. The latter term may preclude a person from establishing a domicile in a country in which he intends to live indefinitely, but within which he travels without settling in a single spot;<sup>192</sup> and
- (d) the doctrine of the revival of domicile of origin should be discarded and an adult's domicile should continue until he acquires another one.<sup>193</sup>

### ***Options and conclusion***

4.76 As discussed in Chapter 2, the existing rules on domicile of choice have long been criticised for being artificial and for creating uncertainty. They are artificial in the sense that a person's domicile persists long after the ending of any connection with the country concerned and it is therefore difficult for him to establish a change in domicile. They lead to uncertainty because it is hard to determine a person's intention. A number of factors contributing to the artificiality and uncertainty have been mentioned in Chapter 2.<sup>194</sup> With the aim of dealing with these anomalies, we consider below the options for reform in respect of a number of key issues and present our recommendations for reform:

#### ***(a) Who is capable of acquiring a domicile of choice?***

4.77 In all of the jurisdictions discussed above, any person who is not suffering from mental incapacity may acquire a domicile of his choice once he attains the age of majority. In some jurisdictions (Australia, Ireland, New Zealand and the United Kingdom), marrying under that age also enables a minor to obtain an independent domicile. In other jurisdictions, marrying under the age of majority is irrelevant and the English and Scottish

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<sup>189</sup> This is to give effect to two authorities. First, an immigrant may obtain a domicile in a country immediately upon his arrival there with the required intention (*Bell v Kennedy* (1868) LR 1 Sc & Div 307 at 319). Secondly, "residence" means "little more than physical presence" (*Dacey and Morris on the Conflict of Laws*, 13<sup>th</sup> Ed, Sweet and Maxwell, 2000 at 6-034).

<sup>190</sup> Law Com No 168, Scot Law Com No 107, 1987 at para 5.7.

<sup>191</sup> As that in section 10 of the Domicile Act 1982, Australia (Commonwealth).

<sup>192</sup> Law Com No 168, Scot Law Com No 107, 1987 at para 5.14.

<sup>193</sup> Law Com No 168, Scot Law Com No 107, 1987 at para 5.25.

<sup>194</sup> They are as follows: (1) standard of proof; and (2) onerous burden to prove a person's intention. The first factor will be discussed separately later in this chapter under the heading "Standard of proof".

Commissions also made a recommendation to that effect.<sup>195</sup> Which approach is to be preferred in Hong Kong requires consideration.

4.78 Under the existing law in Hong Kong, any mentally capable person above the age of majority (eighteen years of age)<sup>196</sup> can acquire an independent domicile. We see no difficulty with this rule, which is in line with the position in all other jurisdictions. There are, however, some outstanding questions. The first is whether a married person should have the ability to acquire an independent domicile, regardless of his age. The second question is whether the age at which a child has capacity to marry (which, in Hong Kong domestic law, is sixteen, though only with parental consent<sup>197</sup>) is a more appropriate age at which to allow a person to acquire an independent domicile than the general age of majority (which is eighteen).

4.79 To deal with these questions, it may be useful first to understand the reasons in England for lowering the age for acquiring an independent domicile to the age of sixteen, and for enabling a married child to obtain a domicile of his choice. In England, a person is now capable of having an independent domicile when he attains the age of sixteen,<sup>198</sup> or marries under that age.<sup>199</sup>

4.80 According to Ian MacArthur who moved the Domicile and Matrimonial Proceedings Bill in the House of Commons<sup>200</sup>, the rationale behind section 3 was that if a person was considered fit to marry and set up his own home, there could be little reason why he should remain dependent for his personal law upon his parents. Since sixteen was the minimum age for marriage, it should also be the age at which a person could acquire an independent domicile. Furthermore, if a person married below that age under a foreign system of law which permitted earlier marriage, the time at which he could acquire an independent domicile should be the actual date of marriage in that special case. Section 3, in MacArthur's opinion, would remove an anomaly in the law. The English and Scottish Law Commissions, however, recommended that marriage by itself should not enable a person to obtain a domicile of his choice.

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<sup>195</sup> Law Com No 168, Scot Law Com No 107, 1987 at para 4.32.

<sup>196</sup> Section 2 of the Age of Majority (Related Provisions) Ordinance (Cap 410).

<sup>197</sup> Sections 13 and 14 respectively of the Marriage Ordinance (Cap 181). See also section 20(1) of the Matrimonial Causes Ordinance (Cap 179).

<sup>198</sup> The age of sixteen is the minimum age at which a person can legally marry in England. Nonetheless, parental consent is required where a person who has attained the age of sixteen but is not yet eighteen wishes to marry (section 3 of the Marriage Act 1949). A marriage solemnised between persons either of whom is under the age of sixteen is void (section 2 of the Marriage Act 1949).

<sup>199</sup> Section 3 of the Domicile and Matrimonial Proceedings Act 1973. The age of majority was originally twenty-one, but section 1 of the Family Law Reform Act 1969 reduced it to the age of eighteen with effect from 1 January 1970. This provision applies for the purposes of any rule of law. Hence, in the past, a person could acquire an independent domicile only when he attained the age of eighteen.

<sup>200</sup> HC, 16 Feb 1973, col 1626. Similarly, according to Lord Simon of Glaisdale who moved the bill in the House of Lords (*Hansard*, HL, 17 May 1973 col 940), the reasons given for lowering the age to sixteen were that sixteen was the age at which a person could marry and at which he could live independently of his father's wishes by English law, and since domicile was about a person's home, sixteen seemed to be the logical age.

4.81 We are well aware of the argument that if a person can marry at a young age under foreign law, he should be regarded as being mature enough to acquire a domicile of his choice. After considerable deliberation, we have come to the conclusion that, for a number of reasons, marriage should be irrelevant to a person's ability to obtain an independent domicile. First, we are not convinced that the mere fact of marriage in a foreign country which permits marriage at a young age means that a person of tender years would have the required capacity to form the intention necessary to acquire a domicile. Secondly, under certain systems of foreign law, marriage is possible at a very young age for their own unique religious or social reasons, unconnected with a person's maturity. Thirdly, to allow a married person to acquire an independent domicile, irrespective of his age, might be regarded as discriminatory against unmarried persons. Fourthly, the adoption of our recommendation that domicile should be based on "closest connection" would mean that the differences between the consequences arising from the rules for determining the domicile of a child and of an adult would be less striking in the case of a married child than under the existing law. For example, New Zealand domiciled parents are living in Hong Kong and their Cantonese-speaking child ("X"), born and brought up in Hong Kong, marries and has his own child at the age of seventeen. If X does not live with his parents, our recommended presumptions will not apply and his domicile will be determined by the closest connection test. The test will enable the court to weigh all relevant factors, including X's intention. The domicile of X, a married child, will no longer be linked to that of his parents as a matter of law. Even if X and his own child live with his parents, he would only be *presumed* to have the domicile of his parents, and his child would also be *presumed* to have his domicile. Under our proposed recommendation, the presumptions would be rebuttable on a balance of probabilities. Finally, the need to determine the domicile of a child married under the age of sixteen would be likely to arise only extremely rarely.

4.82 As to the second question, the argument for lowering the minimum age for acquiring an independent domicile to sixteen years of age is that a person can already marry and have his own home at that age. A reduction of the minimum age therefore seems sensible at first sight, especially when domicile relates to a person's home. We understand that there may be anomalies if a person between the age of sixteen and eighteen is unable to acquire an independent domicile. However, as the example in the preceding paragraph shows, the adoption of the "closest connection" test will mean that a child's domicile will be determined according to his individual circumstances, rather than automatically following that of his parents. Given that flexibility, and the fact that the period in question is relatively short (namely between the age of sixteen and eighteen) we have therefore concluded that there is no need to lower the minimum age to sixteen years of age.

4.83 A final question is whether an unmarried parent under the age of majority should be able to obtain an independent domicile. The concern is that, under the current law, the domicile of a child born to an unmarried mother below full age depends on the mother's domicile, which in turn hinges

on that of her own parents. The effect of our recommendation would be that a child's domicile will be determined by the closest connection test, and the possibility of such automatic "double dependency" will be avoided. We therefore conclude that parenthood should be irrelevant to a person's ability to acquire an independent domicile.

#### **Recommendation 5**

**We recommend that any person who is not mentally incapacitated may acquire a domicile of his choice once he attains the age of 18.**

4.84 Before discussing the requisite act and intention for acquiring a domicile of choice, we have considered whether the closest connection test recommended for the domicile of children would also be appropriate for adults. Applying the same test to adults and children would not only have the advantage of uniformity, but would also have the benefit of a simpler test than that of the present law. P B Carter advocates adopting the closest connection test for determining domicile generally. He argues that it would not only eliminate absurdity, but would also give rise to less uncertainty than the existing act and intention approach since, in Carter's opinion, there is no greater source of uncertainty than determining the unexpressed intention of a person at a possibly remote moment in time.<sup>201</sup> Similarly, the Hong Kong Bar Association also observed that the "closest connection test" should apply to both adults and children for a number of reasons. First, in ascertaining a person's intention, the court will not only examine his subjective mind, but also all the relevant circumstances. As a result, the court may come to the same conclusion as in the case of adopting the "closest connection test". Secondly, if a purely subjective test is adopted, it may lead to an anomaly that a person would be domiciled in a place where he claims to have the intention to make a home, even though he has only lived there briefly. The Bar Association stressed that "intention" did not exist in a vacuum and must be examined in conjunction with other circumstances. We have decided, however, that the closest connection test should not be extended to the domicile of adults for the following reasons. First, while children would not generally be regarded as being able to exercise their will so as to form the requisite intention, the same cannot be said of adults. Secondly, under the existing act and intention approach, a person arriving in a country with the requisite intention will acquire a domicile there immediately on arrival. This would not be the case under the closest connection test.

4.85 Furthermore, in applying the test, the intention of the person concerned will be considered only as one among a number of relevant factors. We believe, however, that the "intention" element should weigh more heavily in determining the domicile of an adult. Were that not the case, a person

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<sup>201</sup> P B Carter, "Domicile: the case for radical reform in the United Kingdom" (1987) 36 ICLQ 713, at 725.

may be held to be most closely connected with one place, even though he has an unequivocal intention to be domiciled in another. We nonetheless agree with the Hong Kong Bar Association that a person's intention should be ascertained in the light of all the relevant circumstances, and we are not proposing a purely subjective test. As to the anomaly referred to by the Bar Association, we believe that the length of time a person has lived in a place should not *per se* be indicative of whether he should be domiciled in that place. In our view, adopting the act and intention test in respect of an adult's domicile is more likely to achieve certainty than the closest connection test, when it is less easy to predict the weight which the court will accord to each relevant factor.<sup>202</sup> We therefore conclude that an adult's domicile should continue to be based on his acts and intention.

(b) *The act required to acquire a domicile of choice*

4.86 Before discussing the type of act required to acquire a domicile of choice, it may be useful first to consider the alternative of doing away altogether with the requirement of act. This suggestion was made in our discussions because of the anomalous case where a person domiciled in country A intends to settle in country B but dies on his way to country B. Despite his intention, the person will still retain his domicile in country A. If the requirement of an act is removed as suggested, that person will obtain a domicile in country B as soon as he abandons his existing domicile and forms the requisite intention to obtain a new one. In our view, however, allowing mere abandonment of the existing domicile together with the requisite intention to suffice, would create uncertainty and possible anomalies. It is also very difficult to justify in principle why a person can obtain a domicile in a place in which he has yet to physically arrive.

4.87 As to the act required to acquire a domicile of choice, different jurisdictions have different requirements. There are three categories: "presence" in the country concerned (Australia, New Zealand,<sup>203</sup> South Africa and the English and Scottish Commissions); "residence" in the country concerned (India, Ireland, Malaysia, Singapore and the United Kingdom); and having a "principal home" in the country concerned (Manitoba). Hong Kong now adopts the requirement of "residence" and it may be that the appropriateness of changing to "presence" or "principal home" should be considered.

4.88 Of three options, we are of the view that "presence" in the country concerned can best bring out the essence of the act required to acquire a domicile. Under the existing law, the required act is "residence"

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<sup>202</sup> In contrast, the closest connection test is more appropriate in the case of children who are not expected to exercise independent will. The test does not only provide some guidance for the courts in determining the domicile of children, but also allows the courts sufficient flexibility to take account of all relevant factors. To counter-balance the uncertainty created in the closest connection test, we recommended two rebuttable presumptions which should cover most sets of circumstances. In the case of adults who are generally regarded as being able to exercise their will, the act and intention test is a more suitable option.

<sup>203</sup> The wording in section 9 of the Domicile Act 1976 (New Zealand) is "in that country" which is more akin to "presence".

which "means very little more than physical presence".<sup>204</sup> It means physical presence as an inhabitant of the country concerned<sup>205</sup>, and it excludes those who are present "casually or as a traveller"<sup>206</sup>. The word "residence", however, gives the impression of connoting something more than mere physical presence. This is precisely what the South African Law Commission had in mind in recommending "presence":

*"Residence does not have the technical meaning ascribed thereto in other branches of the law: 'Residence here simply means lawful physical presence.' It could therefore be of short duration and one could say that mere presence is sufficient to comply with the factum requirement."*<sup>207</sup>

4.89 Moreover, the word "presence" better enshrines the existing law<sup>208</sup> where a person who arrives in a country with the requisite intention will acquire a domicile there immediately upon arrival. The person domiciled in country A in the above example can obtain a domicile in country B upon arrival in the latter country, provided he has the required intention, even though he passes away immediately after landing.

4.90 The question remains as to whether the "presence" in the country concerned has to be lawful in order to acquire a domicile. No Hong Kong cases can be found on this issue. In the English case, *Puttick v AG*<sup>209</sup>, a wanted German criminal entered the United Kingdom on a false passport and subsequently contracted a marriage of convenience to an Englishman so as to be able to continue to reside in England. Sir George Baker P held that a domicile could not be established through "residence...achieved by lies and impersonation and fraud". He adopted the following passage in *Dicey & Morris, The Conflict of Laws*<sup>210</sup>:

*"It has been held that a domicile of choice cannot be acquired by illegal residence. The reason for this rule is that a court cannot allow a person to acquire a domicile in defiance of the law which that court itself administers. Thus a person who is illegally resident in (for example) South Africa will not be regarded by the courts of that country as domiciled there. In the same way, it is submitted that an English court would hold that a person who was illegally resident in this country could not thereby acquire an English domicile of choice."*

It is, however, arguable whether the courts of one country will allow a person to acquire a domicile in another country by residence there which is unlawful under the law of that other country. It is submitted that an English court could do so.<sup>211</sup>

<sup>204</sup> *Dicey and Morris on the Conflict of Laws*, 13<sup>th</sup> Ed, Sweet and Maxwell, 2000 at paras 6-034.

<sup>205</sup> *IRC v Duchess of Portland* [1982] Ch 314, at 318-9.

<sup>206</sup> *Dicey and Morris on the Conflict of Laws*, 13<sup>th</sup> Ed, Sweet and Maxwell, 2000 at paras 6-034.

<sup>207</sup> *Report on Domicile*, Project 60, March 1990, at para 3.43.

<sup>208</sup> *Bell v Kennedy* (1868) LR 1 Sc & Div 307, at 319.

<sup>209</sup> [1980] Fam 1.

<sup>210</sup> 9<sup>th</sup> Ed, 1973, at 96.

<sup>211</sup> *Dicey and Morris on the Conflict of Laws*, 13<sup>th</sup> Ed, Sweet and Maxwell, 2000 at para 6-037.

4.91 In Australia, the presence in the country concerned must be lawful.<sup>212</sup> Thus, a person who enters a country unlawfully<sup>213</sup> or obtains permission to enter by fraud cannot acquire a domicile of choice there. If the presence is lawful when an intention to remain indefinitely in a country is formed, a person can still obtain a domicile there although permission to stay is granted for a limited period only.<sup>214</sup> Permission to remain may be temporary, such as a tourist's or student's visa, and such permission will suffice provided an intention to remain is formed while the permission is in force. A domicile once acquired will not be lost upon expiry of a temporary permit, even though the person concerned is subject to an order of deportation.<sup>215</sup>

4.92 In South Africa, section 1(2) of the Domicile Act 1992 provides that a person can acquire a domicile of choice when he is lawfully present at a particular place together with the requisite intention. The presence, therefore, must be lawful. The requirement was the same before the commencement of the 1992 Act.<sup>216</sup>

4.93 Under section 9 of the Domicile Act 1976 in New Zealand, in order to acquire a domicile in a particular country, a person is required, among other requirements, to be "in that country". In applying this section, both the District Court<sup>217</sup> and Family Court<sup>218</sup> adopted the following, in their opinion, helpful statement by the Australian Court of Appeal:

*"The acquisition of a domicile of choice is a concept which is difficult to define with precision. It may be inferred from the fact of voluntary and **lawful** residence in a particular place... ."*<sup>219</sup>  
(emphasis added)

Hence, in order to obtain a domicile, the presence in the country concerned must be lawful.

4.94 According to section 8 (1) of the Domicile and Habitual Residence Act 1987 in Manitoba, a person's domicile is in the place where his principal home is situated and where he intends to reside. Only one case on this section can be found, but it has not dealt with the issue of whether the presence has to be lawful.<sup>220</sup> In other common law provinces of Canada, common law is still the source of the law of domicile. In those provinces, where a person obtains residence illegally, the courts will examine the nature

<sup>212</sup> *Ah Yin v Christie* (1907) 4 CLR 1428, at 1431-2 per Griffith CJ; P E Nygh, *Conflict of Laws in Australia* (Butterworths, 6<sup>th</sup> Edition, 1995), at 207; *Halsbury's Laws of Australia*, Vol 4, at para 85-160. Kay J, however, stated in *Bashir v Bashir* ((Unreported) 1 February 1995, Australian Family Court) that there was a significant line of authority that one could obtain a domicile of choice even as an illegal immigrant. These cases were *Lim v Lim* [1973] VR 370 and *Salacup v Salacup* (1993) FLC92-431 which concerned persons whose presence at the material time was lawful.

<sup>213</sup> *Solomon v Solomon* (1912) 29 WN (NSW) 68.

<sup>214</sup> *Lim v Lim* [1973] VR 370 and *Salacup v Salacup* (1993) FLC92-431.

<sup>215</sup> *Cruh v Cruh* [1954] 2 All ER 545, at 546.

<sup>216</sup> *Ex p Parker* [1926] CPD 255; *Ex p MacLeod* [1946] CPD 312.

<sup>217</sup> *Steele v Steele* [1993] NZFLR 282.

<sup>218</sup> *Humphries v Humphries* [1992] NZFLR 18.

<sup>219</sup> *Hyland v Hyland* [1971] 18 FLR 461, per Asprey J A at 463.

<sup>220</sup> *Fareed v Latif* 31 RFL (3d) 354.

and purpose of the illegality to determine if the person can obtain a domicile in spite of the illegal residence.<sup>221</sup> An illegal immigrant may still acquire a domicile if the illegality arises from a technical breach of immigration law.<sup>222</sup> In contrast, a person who is in a country illegally in a bid to escape prosecution in another place cannot obtain a new domicile.<sup>223</sup> Although the 1987 Act abolished the common law rules respecting domicile, the courts in Manitoba are likely to follow the common law approach on "illegality" adopted in other provinces.

4.95 The position is less certain in Ireland. On balance, the more favoured view is that while the illegality of a person's residence may throw light on his intention, it should not, in itself, be a reason for denying that he is in fact residing in the country concerned.<sup>224</sup> It has, however, been argued that it is a sound policy for the *lex fori* to deny benefits to persons illegally residing in the jurisdiction.<sup>225</sup> No cases on this matter can be found in Singapore and Malaysia, but it seems reasonable to assume that case law from other common law jurisdictions would be persuasive. The *Puttick* case was indeed discussed by Tan Yock Lin, who did not consider the reasoning entirely convincing, however.<sup>226</sup> It remains unclear as to how the courts in Singapore and Malaysia would deal with this matter. Finally, no useful material can be found in respect of India.

4.96 Case law and academic opinion available at the time of publication of the Consultation Paper suggested that in order to obtain a domicile, the requisite presence or residence had to be lawful in Hong Kong. However, with *Mark v Mark*<sup>227</sup>, a recent Court of Appeal case in England, the position has become less certain. In this case, the wife, an overstayer in England, issued a divorce petition. The husband challenged the court's jurisdiction on the basis that as an overstayer the wife was disqualified by illegality from asserting a habitual residence or a domicile of choice upon which the court's jurisdiction could be based. The Court of Appeal affirmed the trial judge's decision that the wife was domiciled in England at the time of petition, despite her overstaying. Walker LJ stated that the acquisition of a domicile of choice should not be treated as obtaining a benefit by reference to which the public policy principle of not being allowed to rely on one's own illegal conduct must be applied. Thorpe LJ also stated:

*"... the imperative to prevent the acquisition by illegal conduct of what might be described as public law benefits (such as residence, income support, income-based job seekers' allowance, housing benefit, council tax benefit, housing assistance) has driven, unnecessarily, the adoption of an absolute rule which in the context of private rights is hard to understand or justify. Absolute rules have little place in family law. ... in the context of the court's*

<sup>221</sup> *Canadian Encyclopedic Digest* (3<sup>rd</sup> Digest) (Ontario), Vol 4A, para 112.

<sup>222</sup> *Jablonowski v Jablonowski* [1972] 3 OR 410 (HC).

<sup>223</sup> *Puttick v AG* [1980] Fam 1.

<sup>224</sup> William Binchy, *Irish Conflicts of Law*, 1988, Butterworth (Ireland) Ltd, at 54.

<sup>225</sup> William Binchy, *Irish Conflicts of Law*, 1988, Butterworth (Ireland) Ltd, at 54.

<sup>226</sup> Tan Yock Lin, *Conflicts Issues in Family and Succession Law*, 1993, Butterworths Asia, at 142.

<sup>227</sup> This book covers both Malaysian and Singaporean law.

[2004] 1 FLR 1069.

*jurisdiction to entertain a petition for divorce or judicial separation, [the court should have] a margin of discretion in determining whether or not an element of illegality tainting the entry or stay within the jurisdiction of either the petitioner or the respondent precludes the acquisition of a domicile of choice."*

Before reaching its conclusion, the Court of Appeal had considered the relevant judicial decisions in England and other common law jurisdictions,<sup>228</sup> as well as academics' views, including those of Mavis Pilkington.<sup>229</sup>

4.97 In Pilkington's opinion, there is no reason to say that the "traditional criteria" for acquiring a domicile of choice (residence and intention) impose the "lawfulness" requirement. She submits that the "lawfulness" requirement is only part of the wider overriding public policy that a man cannot benefit from, or take advantage of, his own wrong, and is expressed as an additional criterion in the context of domicile. She explains that in the case of matrimonial relief, the purpose of adopting domicile as a jurisdictional ground is to link the parties to a system of law with which they and their marriage are closely connected. The application of the "lawfulness" requirement may disconnect the parties from the system of law which is best placed to determine their matrimonial affairs.<sup>230</sup> She further elaborates that an illegal resident in England is liable to pay taxes and may be subject to criminal proceedings. An illegal resident may also challenge his detention under the Immigration Act in the court, and his rights to sue in civil matters (other than matrimonial matters) cannot be denied since, being subject to the law, he is also entitled to its protection. Thus, Pilkington submits that the "lawfulness" requirement creates an inexplicable dichotomy in an illegal resident's rights to invoke the jurisdiction of the court.

4.98 She also submits that the requirement in its present form does not properly reflect the public policy on which it is based. In some cases, it may deny domicile where there is no public interest involved. She explains that the distinction between matters of private right governed by domicile (such as questions of civil status, capacity to contract marriage and succession to personal property) and matters involving public interest (such as the question of a stranger's right to claim admission to a foreign country) has been clearly drawn<sup>231</sup>. Hence, she further submits that public policy should apply only to matters which concern the public domain, and political status is merely one aspect of it. Pilkington is of the view that the "lawfulness" requirement may cause considerable hardship by separating a person from the system of law with which he is most closely connected and which he expects to govern his personal affairs. She concludes that if the public policy upon which the "lawfulness" requirement is founded were

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<sup>228</sup> *Ah Yin v Christie* (1907) 4 CLR 1428; *Solomon v Solomon* (1912) 29 WN (NSW) 68; *Smith v Smith* 1962 (2) SA 930; *Jablonowski v Jablonowski* [1972] 3 OR 410 (HC); *Lim v Lim* [1973] VR 370; *Puttick v AG* [1980] Fam 1; *Salacup v Salacup* (1993) FLC92-431; *Bashir v Bashir* ((Unreported) 1 February 1995, Australian Family Court).

<sup>229</sup> "Illegal Residence and the Acquisition of a Domicile of Choice", M P Pilkington (1984) 33 ICLQ 885.

<sup>230</sup> As in the cases of *Smith v Smith* 1962 (2) SA 930 and *Solomon v Solomon* (1912) 29 WN (NSW) 68.

<sup>231</sup> *Ah Yin v Christie* (1907) 4 CLR 1428.

operated as a matter of discretion, public interest could be adequately protected without denying a person's rights and expectations concerning the application of his personal law. Pilkington hopes that the "lawfulness" requirement will not be applied to deny the acquisition of a domicile of choice without full consideration of the principle and authorities upon which it rests.

4.99 We note the recent judicial developments on domicile in England, specifically in the context of the court's jurisdiction to entertain a petition for divorce or judicial separation. We also see the force of Pilkington's arguments in saying that, as expressly endorsed by Walker LJ in *Mark v Mark*, domicile itself is not a benefit, and there are differences between cases involving advantages obtained from one's own wrongdoing and those not involving such advantages. The determination of an illegal immigrant's domicile for the purposes of personal matters, such as his capacity to marry or the devolution of his moveable property, is more about identifying the applicable law than about obtaining benefit from the individual's own wrongdoing. For example, where an illegal resident in Hong Kong dies, his last domicile would determine which system of law should govern the devolution of his moveable property. The determination of his domicile decides the applicable law. Where, in the course of determining an illegal immigrant's domicile, a benefit is obtained by his wrongdoing in relation to matters involving public interests (such as a claim to right of abode, nationality or permanent residency), public policy would come into play. It may be argued that the decision in *Mark v Mark* should be applied to cases other than those about the court's jurisdiction to entertain a petition for divorce or judicial separation.

4.100 Nevertheless, we appreciate that not requiring the requisite presence to be lawful, and invoking public policy as a matter of discretion to deny any benefit obtained by wrongdoing, could render the law confusing and uncertain. For the sake of certainty, we see the benefits of the recommendation in the Consultation Paper that the presence necessary to acquire a domicile should be lawful. This would achieve certainty, and consistency with some other common law jurisdictions. However, with *Mark v Mark* in mind, we are concerned that strict adherence to the requirement of legal presence may lead to hardship or injustice in exceptional cases.

For example, a man migrated through what he believed to be legal channels from country A to Hong Kong with his wife and son, with the intention of settling here indefinitely. He subsequently died in Hong Kong. The validity of his will and the devolution of his personal property are governed by the law of his domicile. It was then found that, due to a technicality, his residence in Hong Kong was unlawful. The requirement of legal presence prevented him from acquiring a Hong Kong domicile even though he had the requisite intention. As a result, the formal validity of his will and the devolution of his personal property would be governed by the law of country A, which remained his domicile, rather than Hong Kong. This might work to the disadvantage of his widow and son, who were the sole beneficiaries in his will.

We are concerned that strict adherence to the requirement of legal presence may lead to injustice or hardship in some circumstances. Fuelling this concern is the problem of overstayers and illegal immigrants from Mainland China. There are also cases where persons settling in Hong Kong on one-way permits may later find out that the permits were revoked because they were obtained by fraud of which the settlers were innocent. Hong Kong courts may be asked to resolve disputes as to which system of law should apply in determining family or succession issues relating to these individuals. All these concerns underscore the need for a more flexible rule. We therefore recommend that as a general rule for the sake of certainty the presence necessary to acquire a Hong Kong domicile should be lawful, but that the court should have discretion to depart from the rule where in exceptional circumstances, strict adherence to the rule would lead to injustice.

4.101 The ascertainment of a person's domicile may often become a legal issue only many years after the occurrence of the relevant facts and the passage of time may make it both difficult and time-consuming to positively prove that the presence at the material time was lawful. Hence, we further recommend that a person's presence should be presumed to be lawful, unless and until the contrary is established. In the case of a claim to a domicile in another jurisdiction, the existing position should also remain unchanged.

#### **Recommendation 6**

**We recommend that:**

- a) **the act necessary for a person of full age and capacity to acquire a domicile should be presence in the country<sup>232</sup> concerned;**
- b) **as a general rule, lawful presence in Hong Kong should be required to acquire a domicile in Hong Kong, but in exceptional circumstances, where strict adherence to the rule would lead to injustice, the court should have discretion to depart from the rule; and a person's presence should be presumed to be lawful, unless and until the contrary is established; and**
- c) **in deciding whether an individual has acquired a domicile in a country other than Hong Kong, one of the factors to be considered by the Hong Kong courts should be whether or not the presence in that country is lawful by the laws of that country.**

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"country" means a "law district" or distinct jurisdiction ie a territory subject under one sovereign to one body of law.

(c) *The intention required to acquire a domicile of choice*

4.102 In Hong Kong, the present intention required for acquiring a domicile of choice is the intention to reside in the country concerned permanently or indefinitely. This is the same as the position in India, Ireland, Malaysia, Manitoba,<sup>233</sup> Singapore and the United Kingdom. In Australia the requirement is that the person intends to make his home in the country in question indefinitely, while that in New Zealand is to intend to live there indefinitely. In South Africa, it is the intention to settle there indefinitely, an approach recommended by the English and Scottish Commissions. These are the possible options for Hong Kong to consider.

4.103 Under the existing law, there must be an intention to reside permanently in a place before a person can acquire a new domicile according to some older authorities.<sup>234</sup> This means that even a vague possibility of moving to another place would prevent a person from acquiring a domicile. This stringent requirement has been criticised as unrealistic<sup>235</sup> since it may well mean that "no man would ever have a domicile at all, except his domicile of origin"<sup>236</sup>. What is common among the new provisions in Australia, New Zealand and South Africa is that, relying on the more recent authorities<sup>237</sup>, the requisite intention is to intend to make a home<sup>238</sup> in the country concerned indefinitely. This "indefinitely" criterion would make the residence requirement more realistic. It also reflects the view of the recent authorities that a contingent move to another country may have different consequences according to the nature of the contingency. If the contingency is clearly foreseen and reasonably anticipated, such as the termination of a contract of employment,<sup>239</sup> this may prevent the requisite intention from being established. In contrast, if it is uncertain and unlikely to occur, such as making a fortune,<sup>240</sup> this would not hinder a person from forming the required intention.

4.104 Of the three options, we favour the Australian approach: an intention to make a home in the country concerned indefinitely. This is because the concept of domicile is related to a person's home. We think this approach better captures the essence of the concept, can be more readily understood and is more straightforward to operate. In addition, the concept of home has also been adopted in the case of children's domicile. One respondent to our Consultation Paper considered that the test of "making a

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<sup>233</sup> The required intention is that the individual intends to reside "in the state and a subdivision thereof" and, there is a presumption that he intends to reside indefinitely where his principal home is, subject to his contrary intention. Thus, it can be interpreted that the required intention is to reside indefinitely "in the state and a subdivision thereof".

<sup>234</sup> *Bell v Kennedy* (1868) LR 1 Sc & Div 307, 321 *per* Lord Westbury; at 314 *per* Lord Cairns; and *Douglas v Douglas* (1871) LR 12 Eq 617, at 645 *per* Wickens V-C; cited, with approval, by Lord Macnaghten in *Winans v Attorney-General* [1904] AC 287, at 291-2.

<sup>235</sup> Law Com No 168, Scot Law Com No 107, 1987 at para 5.10.

<sup>236</sup> *Att-Gen v Pottinger* (1861) 30 L J Ex 284, at 292.

<sup>237</sup> Lord Scarman J has observed in *In the Estate Fuld* (No 3): "... a domicile of choice is acquired only if...the propositus is resident within a territory...with the intention... of residing there indefinitely." ([1968] P 675, at 684-685). See also *IRC v Bullock* [1976] 1 WLR 1178 (CA).

<sup>238</sup> "to live" in the New Zealand provision; and "to settle" in the South African provision.

<sup>239</sup> *In the Estate Fuld* (No 3) [1968] P 675, at 684.

<sup>240</sup> *In the Estate Fuld* (No 3) [1968] P 675, at 685; *IRC v Bullock* [1976] 1 WLR 1178 (CA).

home indefinitely" raised some difficulties. First, it may not be easy to reconcile the concept of "home" with that of "settlement" under article 22 of the Basic Law. Secondly, domicile may not be the same as a person's "home". Thirdly, a person may be domiciled in a country which is not his "home". Fourthly, a person may have more than one "home" and he may live in those "homes" for equal periods of time. Finally, a person may be "homeless". He therefore prefers the test of "*intending to settle in a country indefinitely*". Responding to these points in sequence, we emphasise that the concept of domicile is separate from that of "settlement" in Article 22 of the Basic Law. Secondly, the concept of domicile is about a person's home.<sup>241</sup> Thirdly, a person should be domiciled in the country which he regards as his home for an indefinite period, even though he may not stay there on a day-to-day basis. Fourthly, the Recommended Legislation could spell out that no person can at the same time for the same purpose have more than one domicile. Where a person has a "home" in more than one country, it would be a matter for the court to decide which "home" constitutes his domicile. Fifthly, the Recommended Legislation could also provide that no person can be without a domicile.

4.105 We note that the English and Scottish Law Commissions also favoured the test of "intending to settle in a country indefinitely" in their final report<sup>242</sup>, although they had recommended "making a home indefinitely" as the test in their consultation paper. They were concerned, however, that such a test might preclude an itinerant, who intended to stay in a country but without establishing a fixed residence in any one place, from obtaining a domicile there. We note the English and Scottish Law Commissions' concern, but believe that an itinerant can establish his intention to make a home in a country, even though he wishes to wander within it. We prefer to apply a test of "making a home", rather than "settling", which we consider less precise and more technical. Timothy Lyons also points out that the exact scope of the concept of "to settle" would need clarification by the courts, and given the references to the concept of "permanent home" in the cases on domicile, it would be better to use the phrase "to make a home" which is more akin to existing case law.<sup>243</sup> In addition, the concept of "settling" has its own technical meaning in para 1(5) of Schedule 1 to the Immigration Ordinance (Cap 115).<sup>244</sup> This is a contentious area, and the Hong Kong Court of Final Appeal has recently considered the constitutionality of the additional requirement in para 1(5)(b) imposed on an applicant for permanent residency that there has been no limit on his stay in Hong Kong.<sup>245</sup> The court held that the requirement was unconstitutional. To avert possible complications, we are of the view that the concept of "settling" should be avoided in the context of domicile.

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<sup>241</sup> In *Whicker v Hume*, 7 H L Cas 124, at 160, 11 E R 50, at 64 (1858), Lord Carnworth observed: "By domicile, we mean home, the permanent home; and if you do not understand your permanent home, I am afraid that no illustration drawn from foreign writers or foreign languages will very much help you to it."

<sup>242</sup> Law Com No 168, Scot Law Com No 107, 1987 at para 5.14.

<sup>243</sup> Timothy Lyons, "The Reform of the Law of Domicile" [1993] BTR 42, at 50.

<sup>244</sup> "1 (5) A person is settled in Hong Kong if- (a) he is ordinarily resident in Hong Kong; and (b) he is not subject to any limit of stay in Hong Kong."

<sup>245</sup> *Prem Singh v Director of Immigration*, (2003) 1 HKLRD 550. See also *Fateh Muhammad v Commissioner of Registration* (2001) 4 HKCFAR 278 at 286-7 where the issue was left open.

## Recommendation 7

**We recommend that the requisite intention for a person of full age and capacity to acquire a domicile should be that the individual intends to make a home in the country<sup>246</sup> concerned for an indefinite period.**

4.106 Under the existing Hong Kong law, declarations as to intention are considered in determining a change of domicile, but they must be weighed in terms of the persons to whom, the purposes for which, and the circumstances in which, they are made.<sup>247</sup> They must further be supported and carried into effect by conduct in line with the declared expressions.<sup>248</sup> Hence, the extent to which the courts have relied on declarations of intention in deciding a person's domicile in reported cases has varied. The courts are usually suspicious of declarations which refer in terms to "domicile" because the declarant is thought unlikely to have understood the concept.<sup>249</sup>

4.107 The South African Law Commission observed that such a declaration would eliminate any difference of opinion as to the intention of the person in question.<sup>250</sup> The Commission concluded, however, that the potential advantages of relying on declarations were outweighed by the potential disadvantages. The Commission was concerned that an individual might use a declaration wrongly to his advantage, while the surrounding circumstances indicated a position contrary to the declaration.

4.108 We share the view that a declaration on domicile should not be conclusive, but should be only one of the factors to be considered. The court should also look at the conduct of the person concerned and all the circumstances, and should not attach undue weight to a declaration. The existing law should be maintained.

### *(d) Whether a presumption as to intention is needed*

4.109 Manitoba is the only jurisdiction which has created a presumption as to intention: a person is presumed to have the intention to reside indefinitely where his principal home is, subject to evidence of a contrary intention.<sup>251</sup> Hong Kong may consider whether or not a similar presumption is needed.

4.110 We note that the English and Scottish Law Commissions initially recommended a presumption based on habitual residence for seven years, but rejected this proposal in their final report. Among the concerns about the presumption which were raised with the English and Scottish Law Commissions

<sup>246</sup> "country" means a "law district" or distinct jurisdiction ie a territory subject under one sovereign to one body of law.

<sup>247</sup> *Ross v Ross* [1930] AC 1, at 6-7.

<sup>248</sup> *Ross v Ross* [1930] AC 1, at 6-7.

<sup>249</sup> *Re Steer* (1858) 3 H & N 594.

<sup>250</sup> *Report on Domicile*, Project 60, March 1990, at para 3.46.

<sup>251</sup> Section 8(2) of the Domicile and Habitual Residence Act 1983, Manitoba.

were the fact that habitual residence was itself an uncertain concept, and doubts as to the appropriateness of a seven-year period. The English and Scottish Law Commissions had earlier rejected a presumption based on the individual's "home" (as in Manitoba) because they considered that a determination of what amounted to the individual's home would be no easier to resolve than a full investigation of where the person was domiciled. While the use of a presumption as to intention would in many cases simplify the task of determining a person's domicile, we share the English and Scottish Law Commissions' reservations. A presumption based on a particular period of residence (whether five, seven or ten years) would be arbitrary, while one based on the individual's "home" would require an evaluation no less onerous than that of establishing his domicile. In our view, a change of domicile, at least so far as an adult is concerned, should be reflected in aspects of that person's life which manifest his change of intention. We think it more appropriate to review and analyse the circumstances of the individual's life than to rely on a presumption, and we therefore reject this option.

(e) *Whether the doctrine of revival of domicile of origin should be replaced by the continuance rule*

4.111 A number of jurisdictions (Australia, Manitoba, India, New Zealand and South Africa) have abolished the doctrine of revival of domicile of origin. In these jurisdictions, a person's domicile continues until he acquires another one. The English and Scottish Law Commissions also recommended abolition and the adoption of the continuance rule. Jurisdictions which have retained the doctrine of revival of domicile of origin include Ireland, Malaysia, Singapore and the United Kingdom. Hong Kong should consider whether the doctrine of revival of domicile of origin should be replaced by the continuance rule.

4.112 We have recommended earlier that the doctrine of domicile of origin should be repealed; the concept of its revival will therefore disappear automatically. The question is whether there should be a replacement concept. All the jurisdictions which have abolished the doctrine of revival have adopted the continuance rule: a person's domicile continues until he acquires another one. The English and Scottish Law Commissions also recommended this rule. We echo the English and Scottish Law Commissions' opinion that the rule has merits which weigh strongly in its favour: (a) it simplifies the law by obviating the need to provide rules for abandonment; (b) it is consistent with other jurisdictions; (c) it ensures that a person is at least domiciled in a place where he has once lived; (d) it is a simpler concept than the doctrine of revival; and (e) it removes the acute artificiality of the doctrine of revival.<sup>252</sup>

4.113 Among the jurisdictions which have adopted the continuance rule, there are some variations in their relevant provisions. Australia<sup>253</sup> and Manitoba<sup>254</sup> have similar provisions: the domicile a person has at any time

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<sup>252</sup> Law Com No 168, Scot Law Com No 107, 1987 at paras 5.24 – 5.25.

<sup>253</sup> Section 7 of the Domicile Act 1982 (Commonwealth).

<sup>254</sup> Section 6 of the Domicile and Habitual Residence Act 1983, Manitoba.

continues until he acquires a different domicile. In India, a new domicile continues until the former one has been resumed or another has been acquired.<sup>255</sup> There are two provisions in New Zealand on this. First, the domicile a person has immediately before becoming capable of having an independent domicile continues until he acquires a new domicile of choice under section 9 of the Domicile Act.<sup>256</sup> Secondly, a new domicile obtained under section 9 continues until a new one is acquired under the same section.<sup>257</sup> The South African version is that no person loses his domicile until he has acquired another domicile, whether by choice or by operation of law.<sup>258</sup> Finally, the draft bill attached to the English and Scottish Law Commissions' report provides that an adult's domicile of choice, or a domicile acquired by a mentally incapable person upon the restoration of capacity, continues until he obtains another domicile.<sup>259</sup> It seems, however, that the continuance rule applies to these two types of domicile only.

4.114 We do not see the need to have two separate provisions, as is the case in New Zealand. In our view, the provisions in Australia, Manitoba and South Africa should have similar effect. We think it useful to include the words "whether by choice or by operation of law", as in the South African provision, so as to make clear that the provision covers an acquisition by operation of law, such as the closest connection test in the case of children.

#### **Recommendation 8**

**We recommend that the domicile a person has at any time should continue until he acquires a different one, whether by choice or by operation of law.**

## **Domicile of married women**

### ***Australia***

4.115 At common law, the domicile of a married woman follows, and changes with, that of her husband until the marriage is dissolved by divorce or death. This is still the case even where the couple is separated informally<sup>260</sup> or according to a court order.<sup>261</sup> The Family Law Act 1975 and the Marriage Act 1961<sup>262</sup> abolished the concept of dependent domicile of married women for the purposes of these Acts, while the Domicile Act 1982 (Commonwealth) discarded this concept for all purposes.<sup>263</sup> A married woman can now acquire

<sup>255</sup> Section 13 of the Indian Succession Act 1925.

<sup>256</sup> Section 8 of the Domicile Act 1976, New Zealand.

<sup>257</sup> Section 11 of the Domicile Act 1976, New Zealand.

<sup>258</sup> Section 3(1) of the Domicile Act 1992, South Africa.

<sup>259</sup> Law Com No 168, Scot Law Com No 107, 1987 at 54.

<sup>260</sup> *Lord Advocate v Jaffrey* [1921] 1 AC 146.

<sup>261</sup> *AG for Alberta v Cook* [1926] AC 444.

<sup>262</sup> Section 4(3)(b) of the former and section 5(4)(b) of the latter; both are Acts of the Commonwealth.

<sup>263</sup> Section 6 of the Domicile Act 1982 (Commonwealth).

a domicile of her choice. Her domicile is determined independently, without relying on any presumption that her domicile coincides with her husband's.<sup>264</sup>

4.116 A person's domicile at any time before the commencement of the Domicile Act 1982 (Commonwealth) will be determined as if the Act had not been enacted.<sup>265</sup> The implication is that the abolition of the married women's domicile of dependency is not retrospective. Thus, a question which arises in proceedings in 2003 as to a married woman's domicile in 1979<sup>266</sup> is determined "as if the Act had not been enacted", and the common law rule of domicile of dependency still applies. At any time after the commencement of the Domicile Act 1982 (Commonwealth), the domicile of a married woman will be determined as if the Act had always been in force.<sup>267</sup>

### **Canada**

4.117 In Manitoba, section 3(b) of the Domicile and Habitual Residence Act 1983 expressly abolished the common law rule which imposed a married women's domicile of dependence, but nothing in the Act affects a person's domicile at any time before its commencement.<sup>268</sup>

### **India**

4.118 The common law rule that a woman by marriage acquires the domicile of her husband, and during the marriage her domicile follows his, is reflected in legislation.<sup>269</sup> There are, however, two exceptions where a wife can obtain her own domicile: if she is separated from her husband under a court decree; or if her husband is undergoing a sentence of transportation.<sup>270</sup> The concept of domicile of dependence of married women has been severely criticised in India:

*"It is very unfortunate that Indian courts have blindly followed the English decisions on the unity of the domicile of husband and wife. The courts of free India were not bound to do so. ... It is very curious that in their zeal to follow English precedent, our judges even ignored the specific provisions of the Indian Succession Act, 1925. Had they looked to the Explanation to s.16 it was possible for them to reach a different conclusion. ... But it seems we want to cling to the foreign fiction even in the face of specific provision in Explanation to s.16 which lays down that wife's domicile does not follow husband's if wife has been judicially separated, or her husband is undergoing a sentence of transportation. Our courts could have easily extended this*

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<sup>264</sup> *Puttick v AG* [1980] Fam 1.

<sup>265</sup> Section 5(1) of the Domicile Act 1982 (Commonwealth).

<sup>266</sup> The commencement date of the Domicile Act 1982 (Commonwealth) was 1 July 1982.

<sup>267</sup> Section 5(2) of the Domicile Act 1982 (Commonwealth).

<sup>268</sup> Section 11(1) of the Domicile and Habitual Residence Act 1983, Manitoba.

<sup>269</sup> Sections 15 and 16 of the Indian Succession Act 1925.

<sup>270</sup> Section 16 of the Indian Succession Act 1925.

*principle at least to those cases where husband and wife are living separate, or the husband has deserted the wife.*"<sup>271</sup>

### **Ireland**

4.119 The common law rule which imposed a married woman's domicile of dependence was abolished on 2 October 1986.<sup>272</sup> A married woman's domicile is now determined by referring to the same factors which apply to any other person capable of acquiring an independent domicile.<sup>273</sup> This applies to every marriage, irrespective of where and under what law the marriage takes place and irrespective of the parties' domicile at the time of the marriage.<sup>274</sup>

4.120 A person's domicile at any time before or after 2 October 1986 is determined respectively as if the Act had not been passed, or had always been in force.<sup>275</sup> The effect is that a woman who married before the commencement date of the Act will not retain her husband's domicile as her domicile of choice after that date unless she fulfils the requirements of residence and intention. This ensures that there is no "hangover" from her previous domicile of dependency when determining her domicile after the commencement date.<sup>276</sup> Instead of simply adopting a wife's previous domicile of dependence as her domicile of choice, her domicile at any time after the commencement date will be determined as if the Act "had always been in force", as in the case of any other independent person.

### **Malaysia**

4.121 The rule on domicile of dependence of married women still applies in Malaysia. Rigby J, a Penang judge, held that the domicile of a married woman was the same as her husband's while the marriage subsisted, even where the parties were living apart.<sup>277</sup>

### **New Zealand**

4.122 The Domicile Act 1976 provides that, on or after 1 January 1981,<sup>278</sup> every married person is capable of having an independent domicile. This is the case regardless of where the marriage was solemnised and regardless of the law under which the marriage was solemnised, and

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<sup>271</sup> Paras Diwan and Peeyushi Diwan, *Private International Law, Indian and English*, 4<sup>th</sup> Ed, 1998, Deep & Deep Publications, at 173.

<sup>272</sup> It was the commencement date of the Domicile and Recognition of Foreign Divorces Act 1986, Ireland. See section 1(1) of the 1986 Act.

<sup>273</sup> Section 1(1) of the Domicile and Recognition of Foreign Divorces Act 1986, Ireland.

<sup>274</sup> Section 1(2) of the Domicile and Recognition of Foreign Divorces Act 1986, Ireland.

<sup>275</sup> Sections 2 and 3 respectively of the Domicile and Recognition of Foreign Divorces Act 1986, Ireland.

<sup>276</sup> William Binchy, *Irish Conflicts of Law*, 1988, Butterworth (Ireland) Ltd, at 79.

<sup>277</sup> *Charnley v Charnley & Betty* [1960] MLJ 29.

<sup>278</sup> The commencement date of the Domicile Act 1976, New Zealand.

whatever the domicile of the parties to the marriage at the time of the marriage.<sup>279</sup> The Act also expressly abolishes the common law rule under which a married woman acquires her husband's domicile and is incapable of having another domicile during the subsistence of the marriage.<sup>280</sup>

4.123 The domicile of any person at any time before 1 January 1981 is to be determined as if the Act had not been passed, while that at any time after that date shall be determined as if the Act had always been in force.<sup>281</sup> The position is therefore similar to that in Australia.

### **Singapore**

4.124 With effect from 1 June 1981, section 47 of the Women's Charter (Cap 353)<sup>282</sup> abolished the concept of the married women's domicile of dependency. It also provided that a married woman's domicile will be determined by reference to the same factors as those applicable to any other independent person. However, where a woman who married before that date had her husband's domicile by dependence, she will retain that as her domicile of choice (if it is not also her domicile of origin) until it is replaced by the acquisition or revival of another domicile on or after that date.<sup>283</sup> Section 47 is almost identical to section 1 of the Domicile and Matrimonial Proceedings Act 1973 in the United Kingdom.

### **South Africa**

4.125 As discussed above under the heading "Domicile of adults", every person who is of or over the age of eighteen years, or who is under that age but otherwise by law has the status of a major, has the ability to acquire a domicile of choice, regardless of the sex or marital status of that person.<sup>284</sup> In other words, a married woman is also capable of acquiring a domicile of her choice, and her domicile does not follow her husband's upon marriage.

4.126 The Domicile Act 1992 does not affect any right, capacity, obligation or liability acquired, accrued or incurred by virtue of the domicile which a person had, and the legality of any act performed at any time prior to the commencement of the Act.<sup>285</sup> Any proceedings pending in a court of law at the commencement of the Act shall be proceeded with and finalised as if the Act had not been passed.<sup>286</sup> This ensures that the Act does not have retrospective effect. The domicile of a married woman at any time before the commencement date of the Act shall be determined as if the Act had not been enacted, and the common law rule of domicile of dependency still applies.

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<sup>279</sup> Section 5 of the Domicile Act 1976, New Zealand.

<sup>280</sup> Section 5 of the Domicile Act 1976, New Zealand.

<sup>281</sup> Sections 3 and 4 respectively of the Domicile Act 1976, New Zealand.

<sup>282</sup> It was introduced by a 1980 amendment.

<sup>283</sup> Section 47(2) of the Women's Charter (Cap 353), Singapore.

<sup>284</sup> Section 1(1) of the Domicile Act 1992, South Africa.

<sup>285</sup> Section 8(2) of the Domicile Act 1992, South Africa.

<sup>286</sup> Section 8(3) of the Domicile Act 1992, South Africa.

## ***The United Kingdom***

4.127 The Domicile and Matrimonial Proceedings Act 1973 provides that at any time after 1 January 1974<sup>287</sup> the domicile of a married woman shall be ascertained by referring to the same factors as in the case of any other person capable of acquiring a domicile of choice.<sup>288</sup> The concept of domicile of dependence of married women is abolished.

4.128 Where a woman was married before 1 January 1974 and had her husband's domicile by dependence, she will retain that domicile (as her domicile of choice if it is not also her domicile of origin) until it is changed by the acquisition or revival of another domicile on or after that date.<sup>289</sup> The effect is that if a married woman had before 1974 resided in a country other than that of her husband's domicile, she would obtain a new domicile of choice on 1 January 1974 automatically, provided that she had the required intention. Where she had not so resided, she would then retain her domicile of dependence which could only be changed if she abandoned it. If she abandons it, she will acquire a domicile of choice, or her domicile of origin will revive.

4.129 The English and Scottish Law Commissions considered that this transitional provision for abolishing the married women's domicile of dependency was unsatisfactory and artificial. They preferred the Australian approach and recommended that that should be followed.<sup>290</sup>

## ***Options and conclusions***

4.130 Only two of the jurisdictions which we have examined retain the common law rule imposing a domicile of dependency on married women: India and Malaysia. All the other jurisdictions have abolished the rule.

4.131 We have considered whether the Sex Discrimination Ordinance (Cap 480) can rectify the anomalies created by the married woman's domicile of dependency. Cap 480 was enacted in 1995 in order to render unlawful certain types of discrimination based on sex, marital status and pregnancy, and to provide for the establishment of the Equal Opportunities Commission. It is modelled on the Sex Discrimination Act 1975 in England.<sup>291</sup> Nevertheless, Cap 480 does not provide blanket protection against discrimination, but only outlaws sexual harassment and certain types of discrimination in specified fields such as employment, partnerships, trade unions, education, facilities, services, barristers, clubs, etc. It would therefore seem that Cap 480 does not apply to the determination of a person's domicile.

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<sup>287</sup> The commencement date of the Domicile and Matrimonial Proceedings Act 1973.

<sup>288</sup> Section 1(1) of the Domicile and Matrimonial Proceedings Act 1973.

<sup>289</sup> Section 1(2) of the Domicile and Matrimonial Proceedings Act 1973.

<sup>290</sup> Law Com No 168, Scot Law Com No 107, 1987 at para 8.7.

<sup>291</sup> It is, however, wider than the corresponding English legislation in some respects, most significantly by making discrimination based on marital status (as opposed to discrimination on the basis of being married) unlawful, and by bringing the Government specifically within its scope. It also contains specific provisions relating to sexual harassment.

4.132 As discussed in Chapter 2, the combined effect of Article 8 (which provides that the laws previously in force in Hong Kong will be maintained except for any that contravene the Basic Law) and Article 25 of the Basic Law (which provides that all Hong Kong residents are equal before the law) may have already impliedly repealed the common law rule on the married woman's domicile of dependency. There are, however, no local cases on the matter, though there is case law in Ireland on the equivalent provision, confirming the unconstitutionality of the common law rule. To put the matter beyond question, we recommend abolishing this common law rule.

4.133 With effect from the commencement of section 11C of the Matrimonial Causes Ordinance (Cap 179) on 24 June 1996, a married woman can have an independent domicile for the purposes of the court's jurisdiction in respect of divorce, nullity, judicial separation, etc. If, in the light of our recommendation, the common law rule on married women's domicile of dependency is now abolished for all purposes, there will be a second cut-off date. To avoid the confusion of having two cut-off dates relating to a single matter, we have considered whether the general abolition of the common law rule should be backdated to 24 June 1996. To do so, however, would have an adverse impact on those who have made their plans in the light of the law in force at the time. With this in mind, we do not think that it would be appropriate to backdate the abolition.

4.134 As the abolition should not have retrospective effect, we have considered the two alternative types of transitional provisions adopted in the jurisdictions which have abolished the rule. The first is that a person's domicile at any time before or after the commencement date of the relevant legislation is determined respectively as if the legislation had not been passed, or had always been in force. This is the case in Australia, Manitoba, Ireland, New Zealand, South Africa and under the English and Scottish Law Commissions' recommendations. The second type (as in Singapore and the United Kingdom) is that where a woman was married before the commencement date of the relevant legislation, she will retain the domicile of dependency until it is changed by the acquisition or revival of another domicile either on or after that date.

4.135 We will generally deal with transitional provisions under a separate heading for this purpose in a latter part of this chapter. As far as the domicile of married women is concerned, we agree with the English and Scottish Law Commissions' view that the second type of transitional provision is unsatisfactory and artificial since a married woman's domicile of dependency would continue as her domicile of choice even after the abolition until she acquires a new domicile. This provision draws a clear distinction between women married before and those married after its commencement date in 1974, with the former category still being affected by the domicile of dependence.<sup>292</sup> We do not think this is a satisfactory solution. The following example illustrates the way in which we believe transitional problems

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<sup>292</sup> *IRC v Duchess of Portland* [1982] Ch 314.

should be resolved (ie adopting the Australian model, as also recommended by the English and Scottish Law Commissions).

### *Illustration*

*Fifteen years ago W, then domiciled in Hong Kong, married H, then domiciled in France. The couple were then living in Hong Kong, but shortly after their marriage they moved to Europe. During the last fifteen years, the couple have lived in several different European countries never staying for more than a few years in any one of them. Currently they are living in France, but they anticipate moving to New York in a year's time.*

On the day the proposed reforms come into operation, W's domicile should be determined without reference to the fact that at common law she acquired her husband's domicile upon marriage. Accordingly, W would be domiciled in Hong Kong, since there is no evidence that she ever was present in a country with the intention of making her home there indefinitely. Under a provision following the style of the Domicile and Matrimonial Proceedings Act 1973, W would be likely to be domiciled in France because, upon the coming into operation of the reforms, her French domicile would be presumed to continue and would not be replaced until she left France and settled in another country.

### **Recommendation 9**

**We recommend that the domicile of dependency of married women should be abolished.**

## **Domicile of the mentally incapacitated<sup>293</sup>**

### ***Australia***

4.136 The Domicile Act 1982 (Commonwealth) expressly states that it does not change the common law relating to the mentally incapable.<sup>294</sup> Any person who does not have the mental capacity to form the required intention to acquire a domicile cannot acquire an independent domicile.<sup>295</sup> Where a person's mental incapacity commences during his infancy, his domicile of dependency continues even after the age of majority is reached.<sup>296</sup> If, on the other hand, his incapacity occurs after reaching the age of majority, the

<sup>293</sup> Although different jurisdictions may use different terminologies, we are essentially referring to the same type of persons, ie those who are unable to exercise their will because of their mental condition. For the jurisdictions which have general legislation on domicile, the terms adopted in their legislation are followed in this Report when discussing these jurisdictions. For the remaining jurisdictions, a more general term ("mental incapacity") is used.

<sup>294</sup> Section 8(2) of the Domicile Act 1982 (Commonwealth).

<sup>295</sup> Section 8(2) of the Domicile Act 1982 (Commonwealth) reflects the common law position: *Kertesz v Kertesz* [1954] VLR 195; and *Re G* [1966] NZLR 1028.

<sup>296</sup> *Re G* [1966] NZLR 1028.

domicile he last had before he became incapable remains unchanged so long as he continues to be mentally incapable.<sup>297</sup> It seems that his domicile cannot be changed by his guardian.<sup>298</sup>

### **Canada**

4.137 A person who is born mentally incompetent, as long as he is mentally incompetent or is a child, has a domicile determined according to the rules on determining children's domicile.<sup>299</sup> In other words, his domicile of dependency persists so long as he is mentally incompetent or is a child. On the other hand, any one who becomes mentally incompetent at any time after birth retains, as long as he is mentally incompetent, the domicile he had immediately before his becoming mentally incompetent.<sup>300</sup>

### **India**

4.138 An insane person cannot acquire a new domicile other than by dependency on another person's domicile.<sup>301</sup> The Indian Succession Act 1925 does not make it clear who "another person" is. It can, however, be argued that the "another person" is (a) the parent on whom he is dependent if the insane person is a minor; and (b) the husband if the insane person is a married woman.<sup>302</sup> Where the insane person is an adult and has a guardian, that guardian is "another person" for the purposes of the Act.<sup>303</sup> It has been argued that Indian courts should not follow the English decision<sup>304</sup> which held that the domicile of an adult insane person froze once he became insane.<sup>305</sup>

### **Ireland**

4.139 If a person's mental incapacity occurs during his infancy, his domicile of dependency continues even after reaching full age.<sup>306</sup> Where his incapacity occurs after reaching full age, however, the domicile he last had before the incapacity commenced applies so long as he remains in that condition.<sup>307</sup>

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<sup>297</sup> *Kertesz v Kertesz* [1954] VLR 195.

<sup>298</sup> *Kertesz v Kertesz* [1954] VLR 195, at 197 per Sholl J.

<sup>299</sup> Section 10(1) of the Domicile and Habitual Residence Act 1983, Manitoba.

<sup>300</sup> Section 10(2) of the Domicile and Habitual Residence Act 1983, Manitoba.

<sup>301</sup> Section 18 of the Indian Succession Act 1925.

<sup>302</sup> Paras Diwan and Peeyushi Diwan, *Private International Law, Indian and English*, 4<sup>th</sup> Ed, 1998, Deep & Deep Publications, at 179-180.

<sup>303</sup> Paras Diwan and Peeyushi Diwan, *Private International Law, Indian and English*, 4<sup>th</sup> Ed, 1998, Deep & Deep Publications, at 180.

<sup>304</sup> *Urquhart v Butterfield* (1887) 37 Ch D 357.

<sup>305</sup> Paras Diwan and Peeyushi Diwan, *Private International Law, Indian and English*, 4<sup>th</sup> Ed, 1998, Deep & Deep Publications, at 180.

<sup>306</sup> *Sharp v Crispin* LR 1 P & D 611 (1869); *Re G* [1966] NZLR 1028.

<sup>307</sup> *Sharp v Crispin* LR 1 P & D 611 (1869).

## **Malaysia and Singapore**

4.140 In Malaysia and Singapore, the domicile of persons suffering from mental incapacity is governed by the common law of England.<sup>308</sup> In other words, where a person's mental incapacity commences before the age of majority, his domicile continues to be determined as if he were a child even after he attains full age.<sup>309</sup> On the other hand, if his incapacity commences after the age of majority, the domicile he last had before the commencement of his incapacity persists, so long as he remains in that condition.<sup>310</sup>

## **New Zealand**

4.141 A person who is not capable of forming the required intention to live indefinitely in a country cannot acquire an independent domicile.<sup>311</sup> It is a question of fact as to whether a person is capable of forming such an intention or not.<sup>312</sup> Where a person becomes incapable of having an independent domicile because of his mental incapacity before sixteen years of age, the domicile he last had before ceasing to be a child persists until he is no longer mentally incapable and acquires a new domicile.<sup>313</sup> This is because of the rule that the domicile a person has immediately before becoming capable of having an independent domicile continues until he becomes so capable and does acquire a new domicile.<sup>314</sup> This rule also applies to a person who has been capable of having an independent domicile but becomes incapable of doing so as a result of mental incapacity. In this case, he will retain the domicile he had immediately before becoming mentally incapable until he becomes capable again and in fact acquires another domicile.<sup>315</sup>

## **South Africa**

4.142 In South Africa, any one who does not have the mental capacity to make a rational choice is not competent to acquire a domicile of choice.<sup>316</sup> Instead, he will be domiciled at the place with which he is most closely connected.<sup>317</sup>

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<sup>308</sup> In Professor Tan's e-mail to the author of this Report dated 6 June 2001.

<sup>309</sup> *Dacey and Morris on the Conflict of Laws*, 13<sup>th</sup> Ed, Sweet and Maxwell, 2000, at para 6E-112; *Sharpe v Crispin* (1869) LR 1 P & D 611; *Re G* [1966] NZLR 1028.

<sup>310</sup> *Dacey and Morris on the Conflict of Laws*, 13<sup>th</sup> Ed, Sweet and Maxwell, 2000, at para 6R-105; *Hepburn v Skirving* (1861) 9 WR 764.

<sup>311</sup> Section 7 of the Domicile Act 1976, New Zealand; *The Laws of New Zealand*, Vol 7, at para 93.

<sup>312</sup> *The Laws of New Zealand*, Vol 7, at para 93.

<sup>313</sup> Sections 8 and 9 of the Domicile Act 1976, New Zealand; *The Laws of New Zealand*, Vol 7, at para 93.

<sup>314</sup> Section 8 of the Domicile Act 1976, New Zealand.

<sup>315</sup> Sections 8 and 9 of the Domicile Act 1976, New Zealand; *The Laws of New Zealand*, Vol 7, at para 93.

<sup>316</sup> Section 1(1) of the Domicile Act 1992, South Africa.

<sup>317</sup> Section 2(1) of the Domicile Act 1992, South Africa.

## **United Kingdom**

4.143 A mentally disordered<sup>318</sup> person cannot acquire or abandon a domicile of choice since he is unable to exercise his will.<sup>319</sup> If his mental disorder occurs before he is sixteen years of age, his domicile continues to be determined as if he were an unmarried person under sixteen, even in his adulthood.<sup>320</sup> However, if the disorder occurs after his sixteenth birthday, or after his marriage under that age, he retains, while remaining mentally disordered, the domicile which he had immediately before the beginning of his disorder.<sup>321</sup>

4.144 In Scotland, there is little authority but it seems that a mentally disordered person retains the domicile which he had when he became disordered.<sup>322</sup> If he becomes mentally disordered before attaining majority, his domicile may be changed by his parents or other natural guardian.<sup>323</sup>

4.145 The English and Scottish Law Commissions made a number of proposals for reforming the rules for determining a mentally incapable person's domicile. Their proposals are as follows:

- (a) a person who has reached the age of sixteen but who lacks the mental capacity to obtain a domicile of choice should be domiciled in the country with which he is most closely connected;<sup>324</sup>
- (b) it is a question of fact as to whether or not a person has the mental capacity to acquire a domicile of choice,<sup>325</sup>
- (c) an adult who lacked mental capacity should, on regaining that capacity, retain the domicile he had before his capacity was regained.<sup>326</sup>

## **Options**

4.146 The rules for determining the domicile of persons suffering from mental incapacity are the same in Australia, Ireland, Malaysia, Singapore, the United Kingdom and Hong Kong. The dividing line is whether a person's mental incapacity commences before or after the age of majority. If the

<sup>318</sup> The terminology used in *Dicey and Morris on the Conflict of Laws*, 13<sup>th</sup> Ed, Sweet and Maxwell, 2000, at Rule 16.

<sup>319</sup> *Urquhart v Butterfield* (1887) 37 Ch D 357, at 382 (CA).

<sup>320</sup> *Dicey and Morris on the Conflict of Laws*, 13<sup>th</sup> Ed, Sweet and Maxwell, 2000, at para 6E-112; *Sharpe v Crispin* (1869) LR 1 P & D 611; *Re G* [1966] NZLR 1028.

<sup>321</sup> *Dicey and Morris on the Conflict of Laws*, 13<sup>th</sup> Ed, Sweet and Maxwell, 2000, at para 6R-105; *Hepburn v Skirving* (1861) 9 WR 764.

<sup>322</sup> Elizabeth Crawford, *International Private Law in Scotland*, W Green/ Sweet & Maxwell 1998, at 92.

<sup>323</sup> Elizabeth Crawford, *International Private Law in Scotland*, W Green/ Sweet & Maxwell 1998, at 92.

<sup>324</sup> Law Com No 168, Scot Law Com No 107, 1987, at para 6.6.

<sup>325</sup> Law Com No 168, Scot Law Com No 107, 1987, at para 6.9.

<sup>326</sup> Law Com No 168, Scot Law Com No 107, 1987, at para 6.7.

mental incapacity occurs before the age of majority, his domicile of dependency persists even after that age. Where his incapacity occurs after attaining majority, the domicile he last had before the occurrence of his incapacity freezes so long as he remains in that condition.

4.147 The rules vary in the remaining jurisdictions we have examined. In Manitoba, the dividing line is whether the person in question becomes mentally incompetent at birth or at any time after birth. In the former case, his domicile of dependency persists so long as he remains mentally incompetent. In the latter case, he retains the domicile he had immediately before becoming mentally incompetent for so long as he remains in that condition.

4.148 In New Zealand, the domicile a person has immediately before becoming capable of having an independent domicile continues until he acquires an independent domicile.<sup>327</sup> This rule applies to a person whether he becomes mentally incapable before or after reaching the age of majority.

4.149 The position in South Africa is relatively simpler. A mentally incapable person is domiciled at the place with which he is most closely connected. The English and Scottish Law Commissions also proposed a change to this effect. Finally, in India, the domicile of an insane person follows another person's domicile, but it is not always clear who "another person" is.

## **Conclusions**

4.150 The Hong Kong law of domicile of the mentally incapacitated is the same as that in Australia, Ireland, Malaysia, Singapore and the United Kingdom. There are two aspects of the law which lead to artificiality. The first is the freezing of the domicile of a mentally incapacitated person at the onset of his incapacity. The second, if his incapacity commences before the age of majority, is that his domicile will be determined as if he were a child as long as he remains incapacitated.

4.151 Essentially, children and the mentally incapacitated are in a comparable position insofar as domicile is concerned: neither have the capacity to form the intention necessary to acquire an independent domicile. In our view, the closest connection test which we have recommended for the domicile of children should also apply to the case of a mentally incapacitated person. This would avoid the artificiality mentioned above and provide flexibility to the courts to reach the appropriate conclusion. In other words, a consistent approach should be adopted for determining the domicile of children, regardless of their mental capacity, namely the closest connection test combined with the presumptions as proposed in Recommendation 4. On reaching the age of majority, the domicile of a mentally incapacitated person should still be determined by the closest connection test, but without the need to invoke the presumptions applicable to children. The domicile of an adult mentally

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<sup>327</sup> Section 8 of the Domicile Act 1976, New Zealand.

incapacitated person would be decided after consideration of all the circumstances. This approach, in the English and Scottish Law Commissions' opinion, would prevent the domicile of a mentally incapable person from being fixed immutably and would allow it to be changed with his changing circumstances.<sup>328</sup> It has also been commended in South Africa as a sensible move in the right direction.<sup>329</sup>

4.152 We have also considered whether the closest connection test could be subject to manipulation for the benefit of another person. It is possible that a third party might seek to manipulate the circumstances relative to a mentally incapacitated person so as to trigger the application of a system of law more favourable to the third party's own interests in, for instance, the devolution of property. We agree with the English and Scottish Law Commissions<sup>330</sup> that in such a case, the test itself should provide enough flexibility for the courts to take the manipulation into account and to reach the most appropriate decision. We therefore do not consider there is a need to have special provisions to guard against possible manipulation.

4.153 A mentally incapacitated person may at any time during his adulthood recover from his incapacity. The question is how to determine his domicile after his recovery. One possibility would be for him to regain automatically the domicile that he held before losing his capacity. Another possibility would be for him to retain the domicile which he last had by applying the closest connection test during the period of his incapacity. The former approach may link him to a country which he has long left and with which he has only a tenuous connection. The second approach would at least connect him to the country with which he was last regarded as most closely connected before his recovery. Of course, upon the restoration of his capacity, he is in a position to acquire a new independent domicile, and the Hong Kong Bar Association suggested that the Recommended Legislation should expressly provide for this. In our opinion, it goes without saying that once an adult mentally incapacitated person has recovered his capacity, the rules on the domicile of adults will apply since he is now an "ordinary" adult. We nonetheless agree with the Bar Association that the Recommended Legislation should put this beyond doubt. We therefore recommend that a mentally incapacitated adult, on recovery of his capacity, should retain the domicile which he last held before his recovery, and may acquire a domicile of his choice.

4.154 Although no authority can be found, it is submitted that it is a question of fact as to whether or not the extent of a person's mental incapacity is such as to render him incapable of forming the intention necessary to change his domicile.<sup>331</sup> The question is whether he has the ability to form the necessary intention to make his home in a country indefinitely. We do not think that it is appropriate for the purposes of that inquiry to assume that, for instance, compulsory detention or guardianship automatically imply an

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<sup>328</sup> Law Com No 168, Scot Law Com No 107, 1987, at para 6.6.

<sup>329</sup> CF Forsyth. *Private International Law*, 3rd Edition 1996, Juta & Co Ltd, at 146.

<sup>330</sup> Law Com No 168, Scot Law Com No 107, 1987, at para 6.10.

<sup>331</sup> No authority can be found on this point. See *Dicey and Morris on the Conflict of Laws*, 13<sup>th</sup> Ed, Sweet and Maxwell, 2000 at para 6-107 for this submission.

inability to form an intention for the purposes of domicile. Such procedures have more to do with the individual's immediate circumstances and willingness to co-operate than to factors relevant to the law of domicile.<sup>332</sup> We therefore think that the degree or type of mental incapacity which would render an adult incapable of obtaining a domicile should be a matter of fact.

4.155 The South African Law Commission considered that persons in a protracted comatose state would not have the ability to form the requisite intention. The Commission recommended that the relevant provision on domicile of the mentally incapable should be so worded as to cover persons in a comatose state. We agree that the relevant provision should cover not only the mentally incapacitated, but also persons in a comatose, vegetative or semi-vegetative state, and, indeed, any other person who for one reason or another is not able to form the required intention. We are of the opinion that the domicile of all these people should be determined in the way we have recommended above, and the Recommended Legislation should be phrased in such a way as to provide for this.

4.156 We received comments from a number of respondents on this issue. The Health, Welfare and Food Bureau supported the recommendation. The Hong Kong Bar Association proposed that for the purposes of defining "mental incapacity" in the Recommended Legislation, references should be made to the relevant definitions in the Mental Health Ordinance (Cap 136),<sup>333</sup> while the Judiciary stressed that the definition of "mental incapacity" in the Recommended Legislation should not prejudice the existing Cap 136 definitions. The Legal Aid Department suggested that account should be taken of amendments proposed to the Cap 136 definitions in the Hong Kong Law Reform Commission's July 2004 consultation paper on *Substitute Decision-making and Advance Directives in relation to Medical Treatment*. Cap 136, like other statutes, is subject to amendment, and we do not therefore think it advisable to link the definition of "mental incapacity" in the Recommended Legislation to the existing definitions in Cap 136, or to link that definition to other reforms which may or may not be implemented. We should set out our intended policy clearly, but leave the actual wording of the definition of "mental incapacity" to the law draftsman. This would not, of course, prejudice the existing definitions in Cap 136.

#### **Recommendation 10**

##### **We recommend that:**

- (a) a mentally incapacitated adult should be domiciled in the country<sup>334</sup> with which he is most closely connected;**

<sup>332</sup> See *Dicey and Morris on the Conflict of Laws*, 13<sup>th</sup> Ed, Sweet and Maxwell, 2000 at para 6-107 for this submission.

<sup>333</sup> Terms such as "mental incapacity", "mental disorder" and "mental handicap" are defined in Cap 136.

<sup>334</sup> "country" means a "law district" or distinct jurisdiction ie a territory subject under one sovereign to one body of law.

- (b) a mentally incapacitated adult, on recovery of his capacity, should retain the domicile which he last held before his recovery, and he may then acquire a domicile of his choice;
- (c) the relevant provision should be phrased so as to cover not only the mentally incapacitated, but also persons in a comatose, vegetative or semi-vegetative state, and any other person who for one reason or another is not able to form the required intention.

4.157 A number of other issues were discussed by the English and Scottish Law Commissions. Firstly, the Commissions considered whether a special provision was needed for the case where a mentally incapable adult is the parent of a child under the age of majority. We agree with the English and Scottish Law Commissions that there is nothing inappropriate in the domicile of both the parent and his child being determined by the closest connection test, and if the child has his home with the parent, the presumption will apply.<sup>335</sup> Secondly, the English and Scottish Law Commissions rejected the suggestion that the domicile of a mentally incapable person should only be changed with the consent of a competent authority.<sup>336</sup> We accept the English and Scottish Law Commissions' conclusion that this would only add artificiality to the law. Finally, we also endorse the English and Scottish Law Commissions' rejection of the suggestion that the place where a mentally incapable person is ordered by a court to reside should be conclusive as to his closest connection.<sup>337</sup> This suggestion could lead to absurd results where the individual has only minimal connections to the place of residence ordered by the court. We accordingly conclude that there is no need to make special provision for any of the above matters.

## Standard of proof

### *Australia*

4.158 It is generally accepted that the standard of proof for determining a person's domicile is the balance of probabilities.<sup>338</sup> In *Fremlin v Fremlin*, however, a higher standard of proof was imposed on a party seeking to prove the displacement of a domicile of origin.<sup>339</sup> This has now been modified by the Domicile Act 1982 (Commonwealth) however, where the domicile to be determined is as at a date on or after the Act's commencement

<sup>335</sup> Law Com No 168, Scot Law Com No 107, 1987, at para 6.8.

<sup>336</sup> Law Com No 168, Scot Law Com No 107, 1987, at para 6.11.

<sup>337</sup> Law Com No 168, Scot Law Com No 107, 1987, at para 6.12.

<sup>338</sup> P E Nygh, *Conflict of Laws in Australia*, Butterworths, 6<sup>th</sup> Ed, 1995, at 210.

<sup>339</sup> *Fremlin v Fremlin* (1913) 16 CLR 212, at 232 per Isaacs J; *Hyland v Hyland* (1971) 18 FLR 461, at 466 per Asprey JA.

date.<sup>340</sup> In other words, there is now no difference in the standard of proof whether the domicile to be displaced is a domicile of origin or not.

### ***New Zealand***

4.159 In New Zealand, the ordinary civil standard of proof (ie balance of probabilities) is sufficient to show the acquisition of a new domicile under the Domicile Act 1976.<sup>341</sup> The effect is that the standard is the same for a change of domicile, irrespective of the circumstances.

### ***South Africa***

4.160 Section 5 of the Domicile Act 1992 makes it clear that the acquisition and loss of a person's domicile will be determined by a court on a balance of probabilities. This is the case irrespective of the domicile to be abandoned.

### ***Other jurisdictions***

4.161 There is no specific statutory provision on the standard of proof in Manitoba, India, Ireland, Malaysia, Singapore or the United Kingdom. It is likely that the common law rules still apply in these jurisdictions. The standard of proof for civil cases is a balance of probabilities, but where the change is from a domicile of origin to a domicile of choice, the older case law indicates that the standard of proof is more onerous than the balance of probabilities.<sup>342</sup> The elements of "residence" and "intention" must be shown with "perfect clearness and satisfaction"<sup>343</sup> or "beyond a mere balance of probabilities".<sup>344</sup> It appears, however, that a balance of probabilities is the preferred standard of proof in more recent cases,<sup>345</sup> but this remains an area of uncertainty.

4.162 The English and Scottish Commissions, after reviewing the current position, proposed that the normal civil standard of proof on a balance of probabilities should apply in all disputes about domicile. The implication is that the more onerous standard of proof will no longer be required.

### ***Options and conclusions***

4.163 Hong Kong's existing position is that the standard of proof may be higher than a mere balance of probabilities where the domicile to be

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<sup>340</sup> Section 12 of the Domicile Act 1982 (Commonwealth).

<sup>341</sup> Section 12 of the Domicile Act 1976, New Zealand.

<sup>342</sup> *Winans v Att-Gen* [1904] AC 287; *Ramsay v Liverpool Royal Infirmary* [1930] AC 588.

<sup>343</sup> *Bell v Kennedy* (1868) LR 1 Sc & Div 307, at 321 per Lord Westbury; *Winans v Att-Gen* [1904] AC 287, at 292 per Lord Macnaghten.

<sup>344</sup> *Henderson v Henderson* [1967] P 77 at 80 per Sir Jocelyn Simon P.

<sup>345</sup> *In the Estate Fuld* (No 3) [1968] P 675, at 685-6; *Buswell v IRC* [1974] 1 WLR 1631, at 1637.

displaced is a domicile of origin. We have already, recommended, however, that the concept of domicile of origin should be abolished, and we see no justification for imposing a different standard of proof for different types of domicile. We consider that the position in Hong Kong should be put beyond doubt by providing that in all disputes about domicile, the standard of proof should be the same (ie a balance of probabilities).

#### **Recommendation 11**

**We recommend that the normal civil standard of proof on a balance of probabilities should apply in all disputes about domicile.**

### **Domicile in federal or composite states**

#### ***Australia***

4.164 The Domicile Act 1982 (Commonwealth) makes specific provision for the determination of a person's domicile in a federal or composite state. A person who is, according to the common law rules on domicile as modified by the Domicile Act, domiciled in a union, but is not, apart from this provision, domiciled in any particular country of the union, is domiciled in the country with which he has the closest connection.<sup>346</sup> The term "union" is widely defined to mean any country that is a union or federation or other aggregation of two or more countries, and includes Australia.<sup>347</sup> The term "country" includes any state, province or other territory that is one of the two or more territories that together form a country.<sup>348</sup> Hence, this provision covers federations such as Canada and Australia, and unitary states with more than one legal system such as the United Kingdom. The People's Republic of China, with its four law districts, would presumably also be included.

4.165 The effect is that a person who has acquired a domicile in a union as a whole will be allocated a domicile in a particular country (a state, province or territory) within the union with which he has the closest connection.

#### ***New Zealand***

4.166 A person who is domiciled in a country forming part of a union is also domiciled in that union.<sup>349</sup> A "country" is defined to mean a territory of a type in which, immediately before the commencement of the Domicile Act

<sup>346</sup> Section 11 of the Domicile Act 1982 (Commonwealth).

<sup>347</sup> Section 4(1) of the Domicile Act 1982 (Commonwealth).

<sup>348</sup> Section 4(1) of the Domicile Act 1982 (Commonwealth).

<sup>349</sup> Section 13 of the Domicile Act 1976, New Zealand.

1976, a person could have been domiciled.<sup>350</sup> A "union" is defined to mean a nation comprising two or more countries.<sup>351</sup>

4.167 In addition, a person who ordinarily resides and intends to live indefinitely in a union but has not formed an intention to live indefinitely in any of the countries forming part of the union is deemed to intend to live indefinitely:

- (a) in the country forming part of the union where he ordinarily resides;
- (b) if he does not ordinarily reside in any such country, in the country in which he is; or
- (c) if he neither ordinarily resides nor is in any such country, in the country in which he was last.<sup>352</sup>

### **Other jurisdictions**

4.168 The other jurisdictions we have examined (Manitoba, India, Ireland, Malaysia, Singapore, South Africa and the United Kingdom) have no specific provision on the determination of a person's domicile in a federal or composite state. In these jurisdictions, where a person wishes to abandon his existing domicile by living in a federal or composite state, but without deciding in which country of that state to settle permanently or indefinitely, he will not acquire a new domicile in any country of that state under the existing law. Instead, his existing domicile persists, or his domicile of origin revives, depending on whether or not the concept of revival subsists under the existing law.

4.169 After discussing the problems of the existing law and considering the law in Australia and New Zealand, the English and Scottish Law Commissions made the following proposal for reform, which was modelled on the Australian provision:

*"a person who is present in a federal or composite state with the intention to settle in that state for an indefinite period should, if he is not held under the general rules to be domiciled in any country within that state, be domiciled in the country therein with which he is for the time being most closely connected."*<sup>353</sup>

### **Options and conclusions**

4.170 The possible options for Hong Kong are to consider the relevant provisions in Australia and New Zealand, as well as the English and Scottish

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<sup>350</sup> Section 2 of the Domicile Act 1976, New Zealand.

<sup>351</sup> Section 2 of the Domicile Act 1976, New Zealand.

<sup>352</sup> Section 10 of the Domicile Act 1976, New Zealand.

<sup>353</sup> Law Com No 168, Scot Law Com No 107, 1987 at para 7.8.

Law Commissions' proposal for reform. Maintaining the existing position is a further option.

4.171 Under the existing Hong Kong law, where a person lives in a federal or composite state without deciding in which country of that state to settle permanently or indefinitely, his domicile of origin will revive and he will not acquire a new domicile in any country of that state. If our recommendation to abolish the domicile of origin were adopted, this anomaly would disappear. The continuance rule which replaces the revival doctrine will, however, link a person to a country which he wishes to abandon, if he goes to a federal state but remains undecided in which country in that state to settle down. We think it desirable to avoid this anomaly by adopting a specific provision on domicile in federal or composite states.

4.172 The New Zealand provision is more elaborate than that in other jurisdictions in that it specifies three possibilities and determines a person's domicile by employing the concept of ordinary residence. We consider there are a number of difficulties with this approach. First, having an ordinary residence in a country does not necessarily mean that a person intends to establish his permanent home there. Secondly, if a person does not ordinarily reside in any country, he will be domiciled, according to section 10(b) of the Domicile Act, in the country in which he is at the material time, regardless of the degree of his connection with that country. Thirdly, the same difficulty applies to the rule that if a person neither ordinarily resides nor is in any country at the material time, he will be domiciled in the country in which he was last. The root of the problem is that insufficient account is taken of the individual's intention. In the English and Scottish Law Commissions' opinion, the New Zealand provision "seems to purchase simplicity at the cost of an extreme degree of artificiality in some cases".<sup>354</sup>

4.173 In contrast, by adopting the closest connection test, the Australian version enables the court to consider all the circumstances (including the intention of the person in question) before determining his domicile. The closest connection test was supported by, *inter alios*, the Hong Kong Bar Association. This is, in our opinion, more likely to reach an appropriate conclusion. We therefore recommend that the closest connection test should be adopted. We also recommend the adoption of a neutral term such as "composite state" instead of "union"<sup>355</sup> to include the People's Republic of China, which comprises a number of law districts. The Hong Kong Bar Association commented that the meaning of "general rules" in the recommendation in the Consultation Paper was unclear. The recommendation read as follows:

*"a person who is present in a federal or composite state and intends to make his home there indefinitely should, if not held to be domiciled in any law district within that state under the*

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<sup>354</sup> Law Com No 168, Scot Law Com No 107, 1987 at para 7.7.

<sup>355</sup> As adopted in the provisions in Australia and New Zealand.

*general rules, have his domicile in the law district with which he is for the time being most closely connected."*

The term "general rules" is intended to mean the preceding rules recommended in the Consultation Paper on how to determine a person's domicile. For the avoidance of doubt, "recommended in the preceding recommendations" could be added after "the general rules". The following example illustrates the effect of our recommendation.

#### *Illustration*

*D was born domiciled in Mainland PRC. Aged twenty, D left and settled permanently in New York. D lived in New York for twenty years and raised a family there. Three years ago D left New York for good and decided to return to China permanently. D has homes in both Shanghai and Hong Kong and divides his time more or less equally between the two cities. D, however, has not decided in which city he wants to settle.*

*The most closely connected test would be applied in such circumstances to determine if D has a domicile in Hong Kong or in Shanghai. D's New York domicile, however, would not continue (as it might well do under the existing common law rules).*

#### **Recommendation 12**

**We recommend that a person who is present in a federal or composite state and intends to make his home there indefinitely should, if not held to be domiciled in any law district within that state under the general rules recommended in this Report, have his domicile in the law district with which he is for the time being most closely connected.**

## **Transitional provisions**

### ***Australia***

4.174 The Domicile Act 1982 (Commonwealth) came into effect on 1 July 1982. The domicile of a person at any time before the commencement of the Act is to be determined as if the Act had not been enacted.<sup>356</sup> His domicile will then be determined according to the common law rules. At any time after the commencement of the Domicile Act, the domicile of a person shall be determined as if the Act had always been in force.<sup>357</sup> Furthermore, nothing in

<sup>356</sup> Section 5(1) of the Domicile Act 1982 (Commonwealth).

<sup>357</sup> Section 5(2) of the Domicile Act 1982 (Commonwealth).

the Act affects the jurisdiction of any court in any proceedings commenced before the commencement of the Act.<sup>358</sup> The purpose of all these provisions is to make sure that the Domicile Act has no retrospective effect.

### **Canada**

4.175 There are similar provisions in Manitoba. Nothing in the Domicile and Habitual Residence Act 1983 affects a person's domicile at any time before its commencement,<sup>359</sup> nor does it affect the jurisdiction of any court in any proceedings commenced before the commencement of the Act.<sup>360</sup>

### **New Zealand**

4.176 The transitional provisions are more or less the same in the Domicile Act 1976 in New Zealand. A person's domicile at any time before the commencement of the Act shall be determined as if the Act had not been passed, while that at any time after that date shall be determined as if the Act had always been in force.<sup>361</sup>

### **South Africa**

4.177 The transitional provisions in the Domicile Act 1992 in South Africa are worded differently. The 1992 Act does not affect any right, capacity, obligation or liability acquired, accrued or incurred by virtue of the domicile which a person had, nor the legality of any act performed, at any time prior to the commencement of the Act.<sup>362</sup> Any proceedings pending in a court of law at the commencement of the Act shall proceed and be adjudicated as if the Act had not been passed.<sup>363</sup>

### **Other jurisdictions**

4.178 Of the remaining jurisdictions which we have examined, India, Ireland, Malaysia and Singapore do not have transitional provisions. The English and Scottish Law Commissions, however, proposed the adoption of the following transitional provisions:

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<sup>358</sup> Section 5(3) of the Domicile Act 1982 (Commonwealth).

<sup>359</sup> Section 11(1) of the Domicile and Habitual Residence Act 1983, Manitoba. The commencement date of the Act was 1 October 1983.

<sup>360</sup> Section 11(2) of the Domicile and Habitual Residence Act 1983, Manitoba.

<sup>361</sup> Sections 3 and 4 respectively of the Domicile Act 1976, New Zealand. The commencement date of the Act was 1 January 1981.

<sup>362</sup> Section 8(2) of the Domicile Act 1992, South Africa. The commencement date of the Act was 1 August 1992.

<sup>363</sup> Section 8(3) of the Domicile Act 1992, South Africa.

- (a) the new legislation on domicile should not have retrospective effect and should apply to the determination of a person's domicile at any time after the legislation came into force; and
- (b) such legislation should also apply to any time before it came into force, but only for the purpose of determining where, at any time after it came into force, a person was domiciled.<sup>364</sup>

### ***Options and conclusions***

4.179 If the rules for the determination of domicile are reformed, it is likely that the existing domicile of some persons may be affected. It is therefore necessary to consider the transition from the existing rules to the new rules. How should the new rules operate in relation to a person's domicile before and after such rules come into effect? The question is whether or not the new rules should have retrospective effect.

4.180 If the new rules do not have retrospective effect, there is one further question. How should the transitional provisions be phrased? Four alternative approaches have been adopted overseas, which provide possible models for Hong Kong. One is that followed in Australia and New Zealand; a second is the approach taken in South Africa; while the third is that proposed by the English and Scottish Law Commissions and the final option is the provision in Manitoba.

4.181 It would be undesirable for the prospective legislation to have retrospective effect. The major concern is the adverse impact this would have on people who have made plans in the light of the prevailing law. A transitional provision is therefore needed. We find the South African version too elaborate, and prefer an approach that is general and straightforward. We agree with the English and Scottish Law Commissions that there is no need to have a separate provision for pending judicial proceedings for two reasons.<sup>365</sup> Firstly, the jurisdiction of the court is always determined at the beginning of the proceedings, and the new legislation should not therefore affect pending proceedings in respect of jurisdiction. Secondly, because other matters in these proceedings relate to past events and the domicile to be determined is as at a date before the commencement of the proceedings (ie before the commencement date of the new legislation), the new legislation will therefore not be applicable.

4.182 Hence, we are of the view that a simple provision such as those in the Australian and New Zealand legislation will suffice: a person's domicile at any time before the commencement of the legislation will be determined as if the legislation had not been passed, while that at any time after that date will be determined as if the legislation had always been in force. In view of the significant impact of the legislation on people who have made plans in the light of the prevailing law, we consider that there should be a reasonable

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<sup>364</sup> Law Com No 168, Scot Law Com No 107, 1987 at para 8.7.

<sup>365</sup> Law Com No 168, Scot Law Com No 107, 1987 at para 8.9.

period between the enactment and commencement of the legislation so as to give people enough time to rearrange their affairs.

4.183 With this recommended transitional provision, a married woman's domicile at any time after the commencement of the Recommended Legislation would be determined on the basis that she has never acquired a domicile of dependency from her husband (even before the commencement) because the legislation would be regarded as being always in force. This will ensure that she will not be treated as retaining her husband's domicile until she acquires her own independent one.

### **Recommendation 13**

**We recommend that:**

- (a) the Recommended Legislation should not have retrospective effect;**
- (b) a person's domicile at any time before the commencement date of the Recommended Legislation should be determined as if the legislation had not been passed;**
- (c) his domicile at any time after that date should be determined as if the Recommended Legislation had always been in force.**

## **Codification**

4.184 One further question is whether the reform of the rules for determining a person's domicile we have recommended should take the form of a complete code or not. A code is a complete system of law on a subject, carefully arranged and officially promulgated, and it is not only a collection of the existing statutory law on a subject, but also the relevant unwritten law such as cases and customs. A codification of the entire body of law on a subject involves some modifications of, and additions to, pre-existing law. The advantages<sup>366</sup> of codification are that it can introduce order and system into the mass of legal concepts and eradicate contradictions and uncertainty in the law by bringing the law into one place. Thus the law is made more accessible to the general public. On the other hand, codification has its own limitations.<sup>367</sup> It is unreasonable to expect a code to be simple and fully comprehensible to the layman. A code cannot foresee every eventuality. Nor can it eliminate inconsistency or ambiguity. We will first examine the law in other jurisdictions and discuss some relevant issues before presenting our

<sup>366</sup> Codification and Law Reform: Some Lessons from the Canadian Experience, G Letourneau and S A Cohen, [1989] Stat LR 183, at 185.

<sup>367</sup> The Codification of Commercial Law, R Goode, (1988) 14 Monash LR 135, at 157.

conclusions.

### **Law in other jurisdictions**

4.185 Of the jurisdictions considered in this Report, only Australia, Manitoba, New Zealand and South Africa have a general statute on domicile. Of these, only the legislation in Manitoba is intended to codify the law of domicile for all purposes of the law of Manitoba. According to section 3 of the Domicile and Habitual Residence Act 1983,<sup>368</sup> the common law rules respecting domicile are no longer law in Manitoba. The Act codifies the law of domicile for all purposes of the law of Manitoba.<sup>369</sup>

4.186 The legislation in Australia, New Zealand and South Africa does not completely replace all the common law rules. In Australia, Domicile Acts in almost identical terms were enacted by all the States, the Northern Territory and the Commonwealth. Cited collectively as the Domicile Acts, they have changed the common law significantly, but do not constitute a complete code.<sup>370</sup> Domicile was originally a common law concept in New Zealand. Subsequently, the Domicile Act 1976 substantially modified, though did not completely replace, the common law rules for determining a person's domicile.<sup>371</sup> In South Africa, the Domicile Act 1992 sets out the rules on domicile. The Act does not provide a comprehensive code, but only serves as a statement of the main rules for determining the domicile of natural persons.<sup>372</sup> The common law, not amended by the Act, is still a source of law.<sup>373</sup>

4.187 The English and Scottish Law Commissions also considered the matter and concluded that reform should take the form of a statutory amendment or restatement of the major rules.<sup>374</sup> The legislation should not seek to provide a fully comprehensive code, or to redefine all terms or concepts currently in use. There was no dissenting view expressed to this recommendation during consultation.

### **Conclusions**

4.188 We take the view that it would be undesirable to entirely replace the common law with statutory provisions. We have reservations as to the desirability of a provision equivalent to section 3 of the Domicile and Habitual

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<sup>368</sup> "The common law rules respecting domicile, including, without limiting the generality of the foregoing,

(a) the rule known as the revival of domicile of origin ... and  
(b) the rule of law whereby a married woman has the domicile of her husband;  
are no longer law in Manitoba."

<sup>369</sup> J G Castel, *Canadian Conflict of Laws*, Butterworths, 3<sup>rd</sup> Edition 1994, at 104.

<sup>370</sup> Sykes and Pryles, *Australian Private International Law*, The Law Book Co Ltd, 3<sup>rd</sup> Edition 1991, at 347. P E Nygh, *Conflict of Laws in Australia*, Butterworths, 6<sup>th</sup> Edition 1995, at 199. Halsbury's Laws of Australia, Butterworths, Vol 4, para 85-125.

<sup>371</sup> The Laws of New Zealand, Vol 7, para 84.

<sup>372</sup> *The Law of South Africa*, Butterworths, Vol 2, para 428. C F Forsyth, *Private International Law*, Juta & Co Ltd, 3<sup>rd</sup> Edition, at 112.

<sup>373</sup> See above.

<sup>374</sup> Law Com No 168, Scot Law Com No 107, 1987 at para 3.17.

Residence Act 1983 in Manitoba which repealed all the common law rules. Nonetheless, our consensus is that as far as the rules for determining natural persons' domicile are concerned, the legislation should be as comprehensive as possible.

4.189 We suggest a middle-of-the-road approach in which the following general principles governing domicile (discussed in Chapter 1<sup>375</sup>) are set out in the Recommended Legislation before turning in the main body of the legislation to the detailed rules for determining domicile:

- (a) No person can be without a domicile.<sup>376</sup>
- (b) No person can at the same time for the same purpose have more than one domicile.<sup>377</sup>
- (c) For the purposes of a Hong Kong rule of the conflict of laws, the question where a person is domiciled is determined according to Hong Kong law.<sup>378</sup>

4.190 The principle in paragraph (b) above requires some explanation. The general rule is that a person can only have one domicile.<sup>379</sup> There have been suggestions that a person may have different domiciles for different purposes.<sup>380</sup> A less controversial situation is where a person may, by virtue of a statutory provision for a particular purpose, be domiciled in a federal or composite state itself, as opposed to one of the particular jurisdictions within the state. For example, the Family Law Act 1975 in Australia provides that divorce proceedings may be instituted if either party to the marriage "is domiciled in Australia". For the purpose of divorce jurisdiction, a party to the marriage is domiciled in the state, Australia, but for other purposes, he is domiciled in one of the jurisdictions constituting Australia, such as Queensland or New South Wales. Similarly, the phrase "domiciled in the United Kingdom" also appears in a number of Acts in the United Kingdom.<sup>381</sup> It is believed that English courts may hold that, for the purposes of such Acts, a person could be domiciled in the United Kingdom, as opposed to England or Scotland.<sup>382</sup> According to *Dicey and Morris on Conflict of Laws*, this would be a welcome relaxation of the old idea that a person can only have one domicile for all purposes, "*but it would also raise many problems which are as yet unresolved*".<sup>383</sup> Apart from having two different domiciles within the same federal or composite state (as in the above example, one in Australia and one in Queensland), a person may also be

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<sup>375</sup> These general rules were discussed under the heading "General rules in respect of domicile" in Chapter 1.

<sup>376</sup> *Dicey and Morris on the Conflict of Laws*, 13<sup>th</sup> Ed, Sweet and Maxwell, 2000 at para 6R-011.

<sup>377</sup> See above, at para 6R-013.

<sup>378</sup> See above, at para 6R-021.

<sup>379</sup> *Dicey and Morris on the Conflict of Laws*, 13<sup>th</sup> Ed, Sweet and Maxwell, 2000 at para 6-014. *Udny v Udny* (1869) LR 1 Sc & Div 441, at 448.

<sup>380</sup> *Dicey and Morris on the Conflict of Laws*, 13<sup>th</sup> Ed, Sweet and Maxwell, 2000 at para 6-015. *Att Gen v Rowe* (1862) 1 H & C 31, at 45.

<sup>381</sup> For example, sections 65(4) and 192(1) of the Income and Corporation Taxes Act 1988; and sections 18 and 48 of the Inheritance Tax Act 1984.

<sup>382</sup> *Dicey and Morris on the Conflict of Laws*, 13<sup>th</sup> Ed, Sweet and Maxwell, 2000 at para 6-015.

<sup>383</sup> *Dicey and Morris on the Conflict of Laws*, 13<sup>th</sup> Ed, Sweet and Maxwell, 2000 at para 6-015.

domiciled in the countries of two different states (for example, in England and in Australia) for different purposes as in the following example:

*"If an immigrant husband with an English domicile of origin were to die shortly after obtaining an Australian divorce and before he had decided in which Australian state to settle, there can be no doubt that the English court would hold that he died domiciled in England; but there can equally be little doubt that the divorce would be recognised on the basis that he was domiciled in Australia. The Australian legislation would be taken into account by the English court not to determine the issue of domicile but simply to define the law district or 'country' within which a person must be domiciled in the context of the divorce jurisdiction. To this extent, therefore, a person can be domicile in two different countries for different purposes at the same time."<sup>384</sup>*

Similarly, Hong Kong courts may be called upon to determine the domicile of people from diverse geographical backgrounds as in the above examples.<sup>385</sup> This is especially the case where section 56 of the Matrimonial Causes Ordinance (Cap 179) recognises a foreign divorce or legal separation if either spouse was domiciled in that foreign country when instituting the proceedings there. Thus, it would be desirable for the Recommended Legislation to allow a person to be domiciled in different jurisdictions for different purposes at the same time so as to cater for these situations.

4.191 To put matters beyond doubt, the Consultation Paper also recommended the inclusion in the legislation of a saving provision for the existing common law rules which were not inconsistent with the new statutory rules. The British Chamber of Commerce expressed reservations that a saving provision might lead to uncertainties. We believe that it is prudent to preserve those common law rules which are not inconsistent with the Recommended Legislation, especially when the legislation is not intended to codify the law on domicile.

4.192 The legislation on domicile in both Manitoba and South Africa excludes the doctrine of *renvoi*.<sup>386</sup> The effect is that if a particular issue should be determined in terms of foreign law because the person in question is domiciled in that foreign country, only the law of that country, excluding any rule remitting the issue to the law of Manitoba (or South Africa, as the case may be) or any other law, should be considered. After considering the matter, the South African Law Commission recommended

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<sup>384</sup> *Dicey and Morris on the Conflict of Laws*, 13<sup>th</sup> Ed, Sweet and Maxwell, 2000 at para 6-016.

<sup>385</sup> The difference is that with the Recommended Legislation, the immigrant husband in the second example would die domiciled in a state or territory of Australia with which he was most closely connected (abolition of domicile of origin (Recommendation 2); and domicile in a federal or composite state (Recommendation 12)). The divorce would still be recognised on the basis that he was domiciled in Australia.

<sup>386</sup> Section 12 of the Domicile and Habitual Residence Act 1983 in Manitoba; Section 4 of the Domicile Act 1992 in South Africa. Under the *renvoi* doctrine, a court in resorting to foreign law refers to the foreign law's conflict-of-laws principles as well, which may in turn refer the court back to the law of the first state or that of a third state.

that the *renvoi* doctrine should be expressly excluded in the legislation. It appears that the common law *renvoi* doctrine also applies to Hong Kong. As this doctrine concerns other issues but not the rules for determining a person's domicile, it should be dealt with more thoroughly in another forum since it may have broader implications.

#### **Recommendation 14**

**We recommend:**

- (a) that the Recommended Legislation on the rules for determining natural persons' domicile should be as comprehensive as possible;**
- (b) that the Recommended Legislation should set out the following general rules on domicile:**
  - no person can be without a domicile;**
  - no person can at the same time for the same purpose have more than one domicile;**
  - for the purposes of a Hong Kong rule of the conflict of laws, the question of where a person is domiciled is determined according to Hong Kong law;**
- (c) that the Recommended Legislation should include a saving provision for the existing common law rules which are not inconsistent with the new statutory rules.**

4.193 There is one final issue. David McKellar, a respondent to the Consultation Paper, wondered whether in view of the wording in article 24(4) of the Basic Law ("persons...who...have taken Hong Kong as their place of permanent residence"), there was a conscious decision to maintain consistency between the Basic Law and the law of domicile when the Basic Law was drafted. If that is the case, reforming the law of domicile may upset its consistency with the Basic Law as initially intended. In our opinion, article 24 (4) talks about a person who has *in fact* taken *Hong Kong* as his place of permanent residence, as opposed to the concept of domicile which requires a person to have the *intention* to reside (or to make a home) indefinitely or permanently *in the country concerned (not necessarily Hong Kong)*. Furthermore, as pointed out in Chapter 3, permanent residency (or right of abode) is used to determine a person's status in public law whereas domicile is used to determine a person's private or personal law. Hence, in our view the similarity in the wording is not of significance.

## Chapter 5

### Summary and practical effects of recommendations

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#### Summary of recommendations

#### Chapter 3 - Should domicile be retained as a general connecting factor?

5.1 Domicile should be retained as a general connecting factor, but the existing rules for determining a person's domicile should be modified as recommended in this Report. (*Recommendation 1*)

#### Chapter 4 - The law in other jurisdictions, options for reform and recommendations

5.2 We recommend that the concept of domicile of origin and that of domicile of dependency should be discarded. (*Recommendation 2*)

5.3 We recommend that there should be no differentiation between legitimate and illegitimate children in determining their domicile. (*Recommendation 3*)

5.4 We recommend the following rules for determining a child's domicile:

- (a) a child's domicile should be in the country with which he is most closely connected;
- (b) where a child's parents have their domicile in the same country and the child has his home with either or both of them, he is presumed to be domiciled in that country, unless he is proved to be most closely connected with another country; and
- (c) where a child's parents are not domiciled in the same country and the child has his home with only one of them, he is presumed to be domiciled in the country where the parent with whom he has his home is domiciled, unless he is proved to be most closely connected with another country.

In this context, "parents" includes adoptive parents of a child. In applying the

closest connection test, the courts should take account of all relevant factors, including the child's intention. (*Recommendation 4*)

5.5 We recommend that any person who is not mentally incapacitated may acquire a domicile of his choice once he attains the age of 18. (*Recommendation 5*)

5.6 We recommend that :

- (a) the act necessary for a person of full age and capacity to acquire a domicile should be presence in the country concerned;
- (b) as a general rule, lawful presence in Hong Kong should be required to acquire a domicile in Hong Kong, but in exceptional circumstances, where strict adherence to the rule would lead to injustice, the court should have discretion to depart from the rule; and a person's presence should be presumed to be lawful, unless and until the contrary is established; and
- (c) in deciding whether an individual has acquired a domicile in a country other than Hong Kong, one of the factors to be considered by the Hong Kong courts should be whether or not the presence in that country is lawful by the laws of that country. (*Recommendation 6*)

5.7 We recommend that the requisite intention for a person of full age and capacity to acquire a domicile should be that the individual intends to make a home in the country concerned for an indefinite period. (*Recommendation 7*)

5.8 We recommend that the domicile a person has at any time should continue until he acquires a different one, whether by choice or by operation of law. (*Recommendation 8*)

5.9 We recommend that the domicile of dependency of married women should be abolished. (*Recommendation 9*)

5.10 We recommend that:

- (a) a mentally incapacitated adult should be domiciled in the country with which he is most closely connected;
- (b) a mentally incapacitated adult, on recovery of his capacity, should retain the domicile which he last held before his recovery, and he may then acquire a domicile of his choice;
- (c) the relevant provision should be phrased so as to cover not only the mentally incapacitated, but also persons in a comatose, vegetative or semi-vegetative state, and any other person who for one reason or another is not able to form the required intention. (*Recommendation 10*)

5.11 We recommend that the normal civil standard of proof on a balance of probabilities should apply in all disputes about domicile. *(Recommendation 11)*

5.12 We recommend that a person who is present in a federal or composite state and intends to make his home there indefinitely should, if not held to be domiciled in any law district within that state under the general rules recommended in this Report, have his domicile in the law district with which he is for the time being most closely connected. *(Recommendation 12)*

5.13 We recommend that:

- (a) the Recommended Legislation should not have retrospective effect;
- (b) a person's domicile at any time before the commencement date of the Recommended Legislation should be determined as if the legislation had not been passed;
- (c) his domicile at any time after that date should be determined as if the Recommended Legislation had always been in force. *(Recommendation 13)*

5.14 We recommend:

- (a) that the Recommended Legislation on the rules for determining natural persons' domicile should be as comprehensive as possible;
- (b) that the Recommended Legislation should set out the following general rules on domicile:
  - no person can be without a domicile;
  - no person can at the same time for the same purpose have more than one domicile;
  - for the purposes of a Hong Kong rule of the conflict of laws, the question of where a person is domiciled is determined according to Hong Kong law;
- (c) that the Recommended Legislation should include a saving provision for the existing common law rules which are not inconsistent with the new statutory rules. *(Recommendation 14)*

## **Practical effects of recommendations**

5.15 We hope that the recommendations in this Report will improve this complex and confusing area of common law by simplifying the concept of domicile and making the ascertainment of a person's domicile easier.

Annex 3 tabulates the current rules and the proposed rules for comparison. In practical terms, we do not think that the recommendations would change the domicile of many people, with the exception of the proposed abolition of the married women's domicile, which would change the domicile of some married or recently divorced women. Those changes may have already taken effect as a consequence of Article 8 of the Basic Law., but we feel it is important to resolve this matter clearly, to remove any uncertainty, to deal with transitional problems expressly, and to eliminate a discriminatory rule from Hong Kong law once and for all.

5.16 Another major change is that relating to the domicile of children. The existing rules are essentially based on the Victorian idea of the father being the *pater familias*, and we believe that our proposals would more closely reflect modern realities. Lastly, the abolition of the concept of domicile of origin may also impact on some people's domicile. It is worth mentioning that the formation of the concept and its special tenacity were influenced by the desire of those resident in colonies overseas at the height of the British Empire more than a century ago to have their private and family life governed by the law of their homeland. In a different age, we question the validity of this special bias in favour of a person's first domicile, especially in the light of greatly increased mobility. We believe that the abolition of domicile of origin would make the domiciliary rules more in tune with the modern world.

### LIST OF RESPONDENTS TO THE CONSULTATION PAPER

1. British Chamber of Commerce
2. The Chartered Institute of Arbitrators (East Asia Branch)
3. Chau Shun Yung
4. Cheung Kam Chuen
5. Chief Secretary for Administration's Office
6. Chinese General Chamber of Commerce
7. David McKellar of Johnson, Stokes and Master
8. Duty Lawyer Service
9. The European Chamber of Commerce in Hong Kong
10. The French Chamber of Commerce and Industry in Hong Kong
11. Health, Welfare and Food Bureau
12. Home Affairs Bureau
13. Hong Kong Bar Association
14. Hong Kong Federation of Women Lawyers
15. Hong Kong General Chamber of Commerce
16. Judiciary
17. Department of Justice, Legal Policy Division
18. The Korean Chamber of Commerce
19. The Law Society of Hong Kong
20. Legal Aid Department
21. Norwegian Chamber of Commerce, Hong Kong
22. Society of Trust and Estate Practitioners

## COMPARISON TABLE OF THE RULES FOR DETERMINING A PERSON'S DOMICILE

(This table tabulates the current rules for determining a person's domicile in Hong Kong, Australia, Canada, India, Ireland, Malaysia, New Zealand, Singapore, South Africa and the United Kingdom.)

	<i>Domicile of children</i>	<i>Domicile of adults</i>	<i>Married women's Domicile</i>	<i>Domicile of the mentally incapacitated</i>	<i>Standard of proof</i>	<i>Domicile in a federal or composite state</i>	<i>Transitional provisions</i>
<b>Hong Kong</b>	<p><b><u>Domicile ("D") of origin</u></b></p> <ul style="list-style-type: none"> <li>● legitimate: father; illegitimate: mother</li> <li>● adopted child: uncertain<sup>1</sup></li> <li>● foundling: D in the country in which it was found<sup>2</sup></li> </ul> <p><b><u>D of dependency</u></b></p> <ul style="list-style-type: none"> <li>● legitimate: father; illegitimate: mother</li> <li>● adopted child: uncertain (see above)</li> <li>● legitimated child: D of father<sup>3</sup></li> </ul>	<ul style="list-style-type: none"> <li>● at 18: capable of acquiring D of choice</li> <li>● D of choice: residence + intention to reside permanently or indefinitely</li> <li>● abandon D of choice by ceasing to reside + ceasing to intend to reside there permanently or indefinitely</li> <li>● revival of D of origin</li> </ul>	<ul style="list-style-type: none"> <li>● married women's dependent D still applies</li> </ul>	<ul style="list-style-type: none"> <li>● incapacity occurs during infancy: D of dependency continues even after the age of majority</li> <li>● incapacity occurs after the age of majority: D last had before incapacity continues so long as he remains in that condition</li> </ul>	higher standard for displacing D of origin	no specific provision	no specific provision

<sup>1</sup> It is uncertain whether section 13 of the Adoption Ordinance (Cap 290) would cover the issue of an adopted child's domicile. But it has been suggested that it would be reasonable in principle to say that during the life-time of an adoptive parent the adopted child's domicile was the same as and changed with that parent's domicile.

<sup>2</sup> This rule is generally accepted, though there is no direct authority to support it. *Dacey and Morris on the Conflict of Laws*, 13<sup>th</sup> Ed (Sweet and Maxwell, 2000) at para 6-029.

<sup>3</sup> No authority can be found on this point. But see *Dacey and Morris on the Conflict of Laws* (13<sup>th</sup> Ed, Sweet and Maxwell, 2000) at para 6-092.

	<b>Domicile of children</b>	<b>Domicile of adults</b>	<b>Married women's Domicile</b>	<b>Domicile of the mentally incapacitated</b>	<b>Standard of proof</b>	<b>Domicile in a federal or composite state</b>	<b>Transitional provisions</b>
<b>Australia<sup>4</sup></b>	<p><b><u>D of origin</u></b></p> <ul style="list-style-type: none"> <li>● legitimate: father; illegitimate: mother;<sup>5</sup> foundling: D in the country in which it was found<sup>6</sup></li> <li>● parents live separately/one of them dies: D of the parent with whom the child has home<sup>7</sup></li> <li>● adopted children: see below</li> </ul> <p><b><u>D of dependency</u></b></p> <ul style="list-style-type: none"> <li>● legitimate: father; illegitimate: mother;<sup>8</sup></li> </ul>	<ul style="list-style-type: none"> <li>● at 18 or married: capable of acquiring D of choice<sup>13</sup></li> <li>● D of choice: lawful presence + intention to make his home indefinitely<sup>14</sup></li> <li>● abandon by leaving the country + ceasing to intend to reside there indefinitely</li> <li>● no revival of D of</li> </ul>	<ul style="list-style-type: none"> <li>● married women's dependent D abolished<sup>16</sup></li> </ul>	<ul style="list-style-type: none"> <li>● the mentally incapable cannot acquire D of choice<sup>17</sup></li> <li>● incapacity occurs during infancy: D of dependency continues even after the age of majority</li> <li>● incapacity occurs after the age of majority: D last had before incapacity continues so long as he remains incapable</li> </ul>	<p>same standard whether the D to be displaced is a D of origin or D of choice: balance of probabilities<sup>18</sup></p>	<p>D in a union: also D in the country therein with which he has the closest connection<sup>19</sup></p>	<ul style="list-style-type: none"> <li>● D at any time before the commencement of the Act determined as if the Act had not been enacted<sup>20</sup></li> <li>● D at any time after the commencement of the Act</li> </ul>

<sup>4</sup> In Australia, there is an (almost) uniform Domicile Act. Domicile Acts in almost identical terms have been passed in each State, the Northern Territory and the Commonwealth. They are cited collectively as the Domicile Acts and reference is usually made to the provisions of the Commonwealth Act. The Domicile Acts have changed the common law significantly, but have not completely replaced it.

<sup>5</sup> Note the possible effect of the broadly similar legislation on the status of children: *"the relationship between every person and his father and mother shall be determined irrespective of whether the father and mother are, or have been, married to each other"*. It may be that an ex-nuptial child, like a nuptial child, takes the domicile of its father at birth regardless of marital status.

<sup>6</sup> *Re McKenzie* (1951) 51 SRNSW 293.

<sup>7</sup> Section 9(1) of the Domicile Act 1982, Australia (Commonwealth) ("the 1982 Act").

<sup>8</sup> Note the possible effect of the broadly similar legislation on the status of children: *"the relationship between every person and his father and mother shall be determined irrespective of whether the father and mother are, or have been, married to each other"*. It may be that an ex-nuptial child, like a nuptial child, takes the domicile of its father at birth regardless of marital status.

<sup>9</sup> Section 9(1) of the 1982 Act.

<sup>10</sup> Section 9(3) of the 1982 Act.

<sup>11</sup> Section 9(2)(a) of the 1982 Act.

<sup>12</sup> Section 9(2)(b) of the 1982 Act.

<sup>13</sup> Section 8 of the 1982 Act.

<sup>14</sup> Section 10 of the 1982 Act.

<sup>15</sup> Section 7 of the 1982 Act.

<sup>16</sup> Section 6 of the 1982 Act.

<sup>17</sup> Section 8(2) of the 1982 Act.

<sup>18</sup> Section 12 of the 1982 Act.

<sup>19</sup> Section 11 of the 1982 Act.

<sup>20</sup> Section 5(1) of the 1982 Act.

<sup>21</sup> Section 5(2) of the 1982 Act.

	<i>Domicile of children</i>	<i>Domicile of adults</i>	<i>Married women's Domicile</i>	<i>Domicile of the mentally incapacitated</i>	<i>Standard of proof</i>	<i>Domicile in a federal or composite state</i>	<i>Transitional provisions</i>
	<ul style="list-style-type: none"> <li>● parents live separately/one of them dies: D of the parent with whom the child has home and changes with it<sup>9</sup></li> <li>- until the child begins to have his principal home with the other parent, or his parents resume or start living together<sup>10</sup></li> <li>● adopted by 2 parents: as if he were born in wedlock of those parents<sup>11</sup></li> <li>● adopted by 1 parent: D of that parent<sup>12</sup></li> </ul>	<p>origin: existing D (D by choice or dependency) continues until a new D is acquired<sup>15</sup></p>					determined as if the Act had always been in force <sup>21</sup>
<b>Canada</b> (Manitoba <sup>22</sup> )	<ul style="list-style-type: none"> <li>● parents with common D: D of the parents<sup>23</sup></li> <li>● parents w/o common D: D of the parent with whom the child resides<sup>24</sup></li> <li>● other cases: D of the place where the child normally &amp; usually resides<sup>25</sup></li> </ul>	<ul style="list-style-type: none"> <li>● anyone except children and the mentally incompetent: capable of acquiring D of choice<sup>26</sup></li> <li>● D of choice: principal home + intention to reside<sup>27</sup></li> <li>● presumption as to intention to reside indefinitely where</li> </ul>	<ul style="list-style-type: none"> <li>● married women's dependent D abolished<sup>30</sup></li> </ul>	<ul style="list-style-type: none"> <li>● born mentally incompetent, and is still so or is a child: D determined according to the rules on determining children's D<sup>31</sup></li> <li>● becomes mentally incompetent after birth: as long as remaining incompetent, retains D he had prior to his becoming so<sup>32</sup></li> </ul>	no specific provision	no specific provision	<ul style="list-style-type: none"> <li>● nothing in the Act affects a person's D at any time before the Act's commencement<sup>33</sup></li> <li>● nothing in the Act affects jurisdiction of</li> </ul>

<sup>22</sup> Only Manitoba has comprehensive legislation on domicile. In other Canadian provinces and territories, it is still a combination of the common law and some scattered legislation which together lay down the rules for determining a person's domicile.

<sup>23</sup> Section 9(1)(a) of the Domicile and Habitual Residence Act 1983, Manitoba ("the 1983 Act"). This Act is substantially similar to the Draft Model Act to Reform and Codify the Law of Domicile adopted by the Uniform Law Conference in 1961.

<sup>24</sup> Section 9(1)(b) of the 1983 Act.

<sup>25</sup> Section 9(1)(c) of the 1983 Act.

<sup>26</sup> Section 7 of the 1983 Act.

<sup>27</sup> Section 8(1) of the 1983 Act.

	<i>Domicile of children</i>	<i>Domicile of adults</i>	<i>Married women's Domicile</i>	<i>Domicile of the mentally incapacitated</i>	<i>Standard of proof</i>	<i>Domicile in a federal or composite state</i>	<i>Transitional provisions</i>
		<p>the principal home is<sup>28</sup></p> <ul style="list-style-type: none"> <li>no revival of D of origin: existing D (D by choice or dependency) continues until a new one is acquired<sup>29</sup></li> </ul>					any court in any proceedings commenced before the commencement of the Act <sup>34</sup>
<b>India</b>	<p><b><u>D of origin</u></b></p> <ul style="list-style-type: none"> <li>legitimate: father<sup>35</sup>; illegitimate: mother<sup>36</sup>;</li> <li>posthumous: father's D at his death<sup>37</sup>;</li> <li>foundling: submitted that D in the country in which it was found<sup>38</sup></li> </ul> <p><b><u>D of dependency</u></b></p> <ul style="list-style-type: none"> <li>follows D of the parent from whom the D of origin is derived (with 3 exceptions)<sup>39</sup></li> </ul>	<ul style="list-style-type: none"> <li>at 18: capable of acquiring D of choice<sup>42</sup></li> <li>D of choice: residence + intention to reside permanently or indefinitely<sup>43</sup></li> <li>abandon by ceasing to reside + ceasing to intend to reside there indefinitely</li> <li>no revival of D of</li> </ul>	<ul style="list-style-type: none"> <li>married women's dependant D still applies<sup>45</sup></li> <li>2 exceptions: (1) separated from her husband under a court decree; (2) her husband is undergoing a sentence of transportation<sup>46</sup></li> </ul>	<ul style="list-style-type: none"> <li>cannot acquire a new D except D of dependence on another person<sup>47</sup></li> <li>"another person" is not defined</li> </ul>	no specific provision; (higher standard for displacing D of origin at common law may still apply)	no specific provision	no specific provision

28

Section 8(2) of the 1983 Act.

29

Sections 3(a) and 6 of the 1983 Act.

30

Section 3(b) of the 1983 Act.

31

Section 10(1) of the 1983 Act.

32

Section 10(2) of the 1983 Act.

33

Section 11(1) of the 1983 Act.

34

Section 11(2) of the 1983 Act.

35

Section 7 of the Indian Succession Act 1925 ("the 1925 Act").

36

Section 8 of the 1925 Act.

37

Section 7 of the 1925 Act.

38

Paras Diwan and Peeyushi Diwan, *Private International Law, Indian and English*, 4<sup>th</sup> Ed, 1998, Deep & Deep Publications, at 155-156.

39

Sections 14 and 17 of the 1925 Act.

	<b>Domicile of children</b>	<b>Domicile of adults</b>	<b>Married women's Domicile</b>	<b>Domicile of the mentally incapacitated</b>	<b>Standard of proof</b>	<b>Domicile in a federal or composite state</b>	<b>Transitional provisions</b>
	<ul style="list-style-type: none"> <li>● D of child with parents separated: no authority<sup>40</sup></li> <li>● adopted child: probably D of adoptive parent<sup>41</sup></li> </ul>	origin <sup>44</sup>					
<b><u>Ireland</u></b>	<p><b><u>D of origin</u></b></p> <ul style="list-style-type: none"> <li>● legitimate: father; illegitimate: mother;</li> <li>● foundling: uncertain but generally accepted that D in the country it is found</li> </ul> <p><b><u>D of dependency</u></b></p> <ul style="list-style-type: none"> <li>● legitimate: father; illegitimate: mother</li> <li>● legitimated child: no authority</li> <li>● adopted child: uncertain</li> <li>● legitimate child who has parents living apart and who has home with mother but not father: D of mother<sup>48</sup></li> </ul>	<ul style="list-style-type: none"> <li>● at 18 or married: capable of acquiring D of choice<sup>49</sup></li> <li>● D of choice: residence + intention to reside permanently or indefinitely</li> <li>● abandon by ceasing to reside + ceasing to intend to reside there indefinitely</li> <li>● revival of D of origin</li> </ul>	<ul style="list-style-type: none"> <li>● married women's dependent D abolished<sup>50</sup></li> <li>● D at any time before or after the commencement of the Act determined as if the Act had not been passed or had always been in force respectively<sup>51</sup></li> </ul>	<ul style="list-style-type: none"> <li>● incapacity occurs during infancy: D of dependency continues even after reaching full age</li> <li>● incapacity occurs after reaching full age: the D last had before incapacity continues so long as he remains incapable</li> </ul>	no specific provision; (higher standard for displacing D of origin at common law may still apply)	no specific provision	no specific provision

<sup>40</sup> It is submitted that the child's domicile should be that of the parent who lives with the child under a court order or *de facto*. Paras Diwan and Peeyushi Diwan, *Private International Law, Indian and English*, 4<sup>th</sup> Ed, 1998, Deep & Deep Publications, at 178.

<sup>41</sup> Paras Diwan and Peeyushi Diwan, *Private International Law, Indian and English*, 4<sup>th</sup> Ed, 1998, Deep & Deep Publications, at 176. See section 12 of the Hindu Adoptions and Maintenance Act 1956.

<sup>42</sup> Section 2(e) of the 1925 Act.

<sup>43</sup> Section 10 of the 1925 Act.

<sup>44</sup> Sections 9 and 13 of the 1925 Act.

<sup>45</sup> Sections 15 and 16 of the 1925 Act.

<sup>46</sup> Explanation to section 16 of the 1925 Act.

<sup>47</sup> Section 18 of the 1925 Act.

<sup>48</sup> Section 4(1) of the Domicile and Recognition of Foreign Divorces Act 1986, Ireland. If a child's domicile follows that of his mother by virtue of section 4(1), it will continue to do so even after the child has ceased to have his home with her. It will not change until the child makes his home with his father or the parents cease to live apart. Section 4(2) provides that on the death of a mother of a child whose domicile follows hers by virtue of section 4(1), the child's domicile will be frozen as at the time of her death until the child has his home with his father.

<sup>49</sup> Section 2 of the Age of Majority Act 1985, Ireland.

<sup>50</sup> Section 1 of the Domicile and Recognition of Foreign Divorces Act 1986, Ireland.

	<i>Domicile of children</i>	<i>Domicile of adults</i>	<i>Married women's Domicile</i>	<i>Domicile of the mentally incapacitated</i>	<i>Standard of proof</i>	<i>Domicile in a federal or composite state</i>	<i>Transitional provisions</i>
<b>Malaysia</b>	<p><b><u>D of origin</u></b></p> <ul style="list-style-type: none"> <li>● legitimate: father; illegitimate: mother</li> <li>● adopted child: uncertain<sup>52</sup></li> <li>● foundling: D in the country in which it was found</li> </ul> <p><b><u>D of dependency</u></b></p> <ul style="list-style-type: none"> <li>● legitimate: father; illegitimate: mother</li> <li>● adopted child: uncertain (see above)</li> </ul>	<ul style="list-style-type: none"> <li>● at 18 : capable of acquiring D of choice<sup>53</sup></li> <li>● D of choice: residence + intention to reside permanently or indefinitely</li> <li>● abandon by ceasing to reside + ceasing to intend to reside there indefinitely</li> <li>● revival of D of origin</li> </ul>	married women's dependent D still applies	<ul style="list-style-type: none"> <li>● incapacity occurs during infancy: D of dependency continues even after the age of majority</li> <li>● incapacity occurs after the age of majority: D last had before incapacity continues so long as he remains incapable</li> </ul>	no specific provision; (higher standard for displacing D of origin at common law may still apply)	no specific provision	no specific provision
<b>New Zealand</b>	<ul style="list-style-type: none"> <li>● child = under 16 and unmarried<sup>54</sup></li> <li>● parents living together: D of father<sup>55</sup></li> <li>● parents not living together but child lives with father: D of father<sup>56</sup></li> <li>● parents not living together and child does not live with father: D of mother<sup>57</sup></li> <li>● adopted child: D of adoptive</li> </ul>	<ul style="list-style-type: none"> <li>● 16 or sooner marrying: capable of acquiring independent D<sup>60</sup></li> <li>● new D: in a country and intends to live indefinitely there<sup>61</sup></li> <li>● existing D continues until acquiring another one by virtue of section 9<sup>62</sup></li> <li>● no revival of D of</li> </ul>	● married women's dependent D abolished <sup>64</sup>	<ul style="list-style-type: none"> <li>● not capable of forming the required intention to live indefinitely in a country: cannot acquire an independent D<sup>65</sup></li> <li>● becomes incapable of having an independent D because of his mental incapacity before 16: the D he last had before ceasing to be a child continues until he is no longer mentally incapable and acquires a</li> </ul>	same standard in all disputes about D: balance of probabilities <sup>68</sup>	<ul style="list-style-type: none"> <li>● ordinarily resides + intends to live indefinitely in a union without forming an intention to live indefinitely in any of the</li> </ul>	<ul style="list-style-type: none"> <li>● D at any time before the commencement determined as if the Act had not been passed<sup>71</sup></li> <li>● D at any time after the commencement determined</li> </ul>

<sup>51</sup> Sections 2 and 3 of the Domicile and Recognition of Foreign Divorces Act 1986 respectively.

<sup>52</sup> It is uncertain whether section 9 of the Adoption Ordinance 1952 in Malaysia (not applicable to Muslims) would cover the issue of an adopted child's domicile. But it was argued that during the life-time of an adoptive parent the adopted child's domicile was the same as, and changed with, that parent's domicile.

<sup>53</sup> Section 2 of the Age of Majority Act 1971, Malaysia.

<sup>54</sup> Section 6(2) of the Domicile Act 1976, New Zealand ("the 1976 Act").

<sup>55</sup> Section 6(3) of the 1976 Act.

<sup>56</sup> Section 6(4) of the 1976 Act.

<sup>57</sup> Section 6(5) of the 1976 Act.

	<i>Domicile of children</i>	<i>Domicile of adults</i>	<i>Married women's Domicile</i>	<i>Domicile of the mentally incapacitated</i>	<i>Standard of proof</i>	<i>Domicile in a federal or composite state</i>	<i>Transitional provisions</i>
	parent(s) & thereafter as if born to the adoptive parents <sup>58</sup> <ul style="list-style-type: none"> <li>• foundling: parents deemed to be alive and domiciled in the country in which it was found<sup>59</sup></li> </ul>	origin <sup>63</sup>		new D <sup>66</sup> <ul style="list-style-type: none"> <li>• has been capable of having an independent D but becomes incapable of doing so as a result of mental incapacity: retaining the D he had immediately before becoming mentally incapable until he becomes so capable again and in fact acquires another D<sup>67</sup></li> </ul>		countries therein: deemed to have intention to live indefinitely in <sup>69</sup> <ul style="list-style-type: none"> <li>• D in a country forming part of a union: also D in the union<sup>70</sup></li> </ul>	as if the Act had always been in force <sup>72</sup>

<sup>58</sup> Section 16(2)(f) of the Adoption Act 1955, New Zealand.

<sup>59</sup> Section 6(6) of the 1976 Act.

<sup>60</sup> Section 7 of the 1976 Act.

<sup>61</sup> Section 9 of the 1976 Act.

<sup>62</sup> Sections 8 and 11 of the 1976 Act.

<sup>63</sup> Section 11 of the 1976 Act.

<sup>64</sup> Section 5 of the 1976 Act.

<sup>65</sup> Section 7 of the 1976 Act.

<sup>66</sup> Sections 8 and 9 of the 1976 Act.

<sup>67</sup> Sections 8 and 9 of the 1976 Act.

<sup>68</sup> Section 12 of the 1976 Act.

<sup>69</sup> (a) the country forming part of the union where he ordinarily resides; (b) if he does not ordinarily reside in any such country, the country where he is in; (c) if he neither ordinarily resides nor is in any such country, the country where he was last in: section 10 of the 1976 Act.

<sup>70</sup> Section 13 of the 1976 Act.

<sup>71</sup> Section 3 of the 1976 Act.

<sup>72</sup> Section 4 of the 1976 Act.

	<b>Domicile of children</b>	<b>Domicile of adults</b>	<b>Married women's Domicile</b>	<b>Domicile of the mentally incapacitated</b>	<b>Standard of proof</b>	<b>Domicile in a federal or composite state</b>	<b>Transitional provisions</b>
<b>Singapore</b>	<p><b><u>D of origin</u></b></p> <ul style="list-style-type: none"> <li>● legitimate: father; illegitimate: mother</li> <li>● foundling: D in the country in which it was found</li> </ul> <p><b><u>D of dependency</u></b></p> <ul style="list-style-type: none"> <li>● legitimate: father; illegitimate: mother</li> <li>● adopted children: D of adoptive parent(s)<sup>73</sup></li> </ul>	<ul style="list-style-type: none"> <li>● at 21: capable of acquiring D of choice<sup>74</sup></li> <li>● D of choice: residence + intention to reside permanently or indefinitely</li> <li>● abandon by ceasing to reside + ceasing to intend to reside there indefinitely</li> <li>● revival of D of origin</li> </ul>	<ul style="list-style-type: none"> <li>● married women's dependent D abolished<sup>75</sup></li> <li>● women married before the commencement of the Act retain D of dependency until it is changed by acquisition or revival of another D either on or after that date<sup>76</sup></li> </ul>	<ul style="list-style-type: none"> <li>● incapacity occurs during infancy: D of dependency continues even after the age of majority</li> <li>● incapacity occurs after the age of majority: D last had before incapacity continues so long as he remains incapable</li> </ul>	no specific provision; (higher standard for displacing D of origin at common law may still apply)	no specific provision	no specific provision
<b>S Africa</b>	<ul style="list-style-type: none"> <li>● D at the place with which he is most closely connected<sup>77</sup></li> <li>● but if has his home with parents/one of them: D is the parental home<sup>78</sup></li> <li>● "child": under 18<sup>79</sup></li> <li>● "parents" includes adoptive parents and parents who are not married to each other<sup>80</sup></li> </ul>	<ul style="list-style-type: none"> <li>● at 18: capable of acquiring D of choice regardless of sex or marital status<sup>81</sup></li> <li>● D of choice: lawful presence + intention to settle there for an indefinite period<sup>82</sup></li> </ul>	<ul style="list-style-type: none"> <li>● ability to acquire D of choice regardless of the sex or marital status of a person<sup>85</sup></li> </ul>	<ul style="list-style-type: none"> <li>● not having the mental capacity to make a rational choice: not competent to acquire a D of choice<sup>86</sup></li> <li>● D at the place with which he is most closely connected<sup>87</sup></li> </ul>	same standard in all disputes about D: balance of probabilities <sup>88</sup>	no specific provision	● the 1992 Act does not affect any right, capacity, etc acquired by virtue of the D which a person had and the

<sup>73</sup> Tan Yock Lin, *Conflicts Issues in Family and Succession Law*, 1993, Butterworths Asia, at 153. This is because the Adoption of Children Act in Singapore "makes provisions for all matters in which domicile is controlling and in all such matters, declares in effect the severance of the former parent-child relationship and its replacement by a new" (in Professor Tan's e-mail to the author of this Paper dated 6 June 2001)

<sup>74</sup> Tan Yock Lin, *Conflicts Issues in Family and Succession Law*, 1993, Butterworths Asia, at 142.

<sup>75</sup> Section 47(1) of the Women's Charter (Cap 353), Singapore.

<sup>76</sup> Section 47(2) of the Women's Charter (Cap 353), Singapore.

<sup>77</sup> Section 2(1) of the Domicile Act 1992, South Africa ("the 1992 Act").

<sup>78</sup> Section 2(2) of the 1992 Act.

<sup>79</sup> Section 2(3) of the 1992 Act.

<sup>80</sup> Section 2(3) of the 1992 Act.

<sup>81</sup> Section 1(1) of the 1992 Act.

	<i>Domicile of children</i>	<i>Domicile of adults</i>	<i>Married women's Domicile</i>	<i>Domicile of the mentally incapacitated</i>	<i>Standard of proof</i>	<i>Domicile in a federal or composite state</i>	<i>Transitional provisions</i>
		<ul style="list-style-type: none"> <li>• existing D continues until acquiring another one by choice or by operation of law<sup>83</sup></li> <li>• no revival of D of origin<sup>84</sup></li> </ul>					<p>legality of any act performed at any time prior to the commencement of the Act<sup>89</sup></p> <ul style="list-style-type: none"> <li>• proceedings pending in a court at the commencement of the Act to continue as if the Act had not been passed<sup>90</sup></li> </ul>

82 Section 1(2) of the 1992 Act.  
83 Section 3(1) of the 1992 Act.  
84 Section 3(2) of the 1992 Act.  
85 Section 1(1) of the 1992 Act.  
86 Section 1(1) of the 1992 Act.  
87 Section 2(1) of the 1992 Act.  
88 Section 5 of the 1992 Act.  
89 Section 8(2) of the 1992 Act.  
90 Section 8(3) of the 1992 Act.

	<b>Domicile of children</b>	<b>Domicile of adults</b>	<b>Married women's Domicile</b>	<b>Domicile of the mentally incapacitated</b>	<b>Standard of proof</b>	<b>Domicile in a federal or composite state</b>	<b>Transitional provisions</b>
<b>U.K.</b> <i>(existing position)</i>	<p><b>D of origin</b></p> <ul style="list-style-type: none"> <li>● legitimate: father; illegitimate: mother</li> <li>● adopted child: D of adoptive parent<sup>91</sup></li> <li>● foundling: D in the country in which it was found<sup>92</sup></li> </ul> <p><b>D of dependency</b></p> <ul style="list-style-type: none"> <li>● legitimate: father; illegitimate: mother</li> <li>● adopted child: D of adoptive parent<sup>93</sup></li> <li>● legitimate/legitimated child with parents living apart and has home with mother but not father: D of mother<sup>94</sup></li> <li>● legitimated child: D of father<sup>95</sup></li> </ul>	<ul style="list-style-type: none"> <li>● at 16 or married thereunder<sup>96</sup>: capable of acquiring D of choice</li> <li>● D of choice: residence + intention to reside permanently or indefinitely</li> <li>● abandon by ceasing to reside + ceasing to intend to reside there permanently or indefinitely</li> <li>● revival of D of origin</li> </ul>	<ul style="list-style-type: none"> <li>● married women's dependent D abolished<sup>97</sup></li> <li>● women married before the commencement of the Act retain D of dependency until it is changed by acquisition or revival of another D either on or after that date<sup>98</sup></li> </ul>	<ul style="list-style-type: none"> <li>● disorder pre-dates 16: D to be determined as if under 16 and unmarried (even in his adulthood)</li> <li>● disorder post-dates 16 or marriage under that age: retains, while remaining in that condition, the D he had immediately before disorder</li> <li>● in Scotland, there is little authority<sup>99</sup></li> </ul>	higher standard for displacing D of origin	no specific provision	no specific provision

91

Sections 39(1) and (5) of the Adoption Act 1976, with effect from the date of adoption or 1 January 1976, whichever is the later.

92

This rule is generally accepted, though there is no direct authority to support it. *Dicey and Morris on the Conflict of Laws*, 13<sup>th</sup> Ed (Sweet and Maxwell, 2000) at para 6-029.

93

Sections 39(1) and (5) of the Adoption Act 1976, with effect from the date of adoption or 1 January 1976, whichever is the later.

94

Section 4 of the Domicile and Matrimonial Proceedings Act 1973, UK. This covers adopted children.

95

No authority can be found on this point. But see *Dicey and Morris on the Conflict of Laws* (13<sup>th</sup> Ed, Sweet and Maxwell, 2000) at para 6-092.

96

Section 3 of the Domicile and Matrimonial Proceedings Act 1973, UK (being- necessarily- domiciled in a legal system which permits marriage under 16) (applicable to the whole UK except Scotland). In Scotland, the age of legal capacity is 16 (section 7 of the Age of Legal Capacity (Scotland) Act 1991).

97

Section 1(1) of the Domicile and Matrimonial Proceedings Act 1973, UK.

98

Section 1(2) of the Domicile and Matrimonial Proceedings Act 1973, UK.

99

However, it seems that a mentally incapable person retains the domicile which he had when he became so incapable. If he becomes mentally incapable before attaining majority, his domicile may be changed by his parents or other natural guardian.

	<b><i>Domicile of children</i></b>	<b><i>Domicile of adults</i></b>	<b><i>Married women's Domicile</i></b>	<b><i>Domicile of the mentally incapacitated</i></b>	<b><i>Standard of proof</i></b>	<b><i>Domicile in a federal or composite state</i></b>	<b><i>Transitional provisions</i></b>
<i>(Law Commissions' proposal)</i>	<ul style="list-style-type: none"> <li>● D in the country with which he is most closely connected</li> <li>● parents D in the same country + child has home with either or both of them, child presumed to be most closely connected with that country</li> <li>● parents D in different countries + child has home with one of them, child presumed to be most closely connected with the country in which the parent with whom he has home is domiciled</li> <li>● discard D of origin and D of dependency</li> </ul>	<ul style="list-style-type: none"> <li>● at 16 (with no exception for child married earlier): capable of acquiring D of choice</li> <li>● D of choice: presence (but not "residence") + intention to settle (but not "reside") indefinitely</li> <li>● repeal the doctrine of revival of D of origin</li> </ul>	<ul style="list-style-type: none"> <li>● no retrospective effect</li> <li>● repeal section 1(2) of the Domicile and Matrimonial Proceedings Act 1973</li> </ul>	<ul style="list-style-type: none"> <li>● at 16, D in the country with which he is most closely connected</li> <li>● a question of fact as to whether or not a person has the mental capacity to acquire a D of choice</li> <li>● an adult lacking mental capacity, on regaining the capacity, retain D he had before regaining the capacity</li> </ul>	balance of probabilities for all disputes on D	present in a federal or composite state + intention to settle there indefinitely: D in the country therein with which he is most closely connected	<ul style="list-style-type: none"> <li>● no retrospective effect</li> <li>● the new legislation applies to any time before coming into force but only for determining where, at any time after it comes into force, a person is domiciled</li> </ul>

**TABLE COMPARING THE CURRENT RULES WITH  
THE PROPOSED RULES IN HONG KONG**

	Current Rules	Proposed Rules
<b><i>Domicile of children</i></b>	<p><b><u>Domicile of origin</u></b></p> <ul style="list-style-type: none"> <li>● legitimate: father; illegitimate: mother</li> <li>● adopted child: uncertain<sup>650</sup></li> <li>● foundling: domiciled in the country in which it was found<sup>651</sup></li> </ul> <p><b><u>Domicile of dependency</u></b></p> <ul style="list-style-type: none"> <li>● legitimate: father; illegitimate: mother</li> <li>● adopted child: uncertain (see above)</li> <li>● legitimated child: domicile of father<sup>652</sup></li> </ul>	<ul style="list-style-type: none"> <li>● domicile of origin and domicile of dependency to be discarded</li> <li>● no differentiation between legitimate and illegitimate children</li> <li>● domiciled in the country with which a child is most closely connected, and in applying the test, the courts should take account of all relevant factors, including the child's intention</li> <li>● parents domiciled in the same country + child has home with either or both of them, child presumed to be domiciled in that country, unless he is proved to be most closely connected with another country</li> <li>● parents domiciled in different countries + child has home with one of them, child presumed to be domiciled in the country in which the parent with whom he has home is domiciled, unless he is proved to be most closely connected with another country</li> <li>● "parents" includes adoptive parents</li> </ul>
<b><i>Domicile of adults</i></b>	<ul style="list-style-type: none"> <li>● at 18: capable of acquiring domicile of choice</li> <li>● domicile of choice: residence + intention to reside permanently or indefinitely</li> <li>● abandon domicile of choice by ceasing to reside + ceasing to intend to reside there permanently or indefinitely</li> <li>● revival of domicile of origin</li> </ul>	<ul style="list-style-type: none"> <li>● at 18 not mentally incapacitated: capable of acquiring domicile</li> <li>● to acquire domicile: presence in the country concerned + intention to make a home indefinitely</li> <li>● to acquire domicile in HK: as a general rule, lawful presence in HK is required, but in exceptional circumstances, where strict adherence to the rule would lead to injustice, the courts should have discretion to depart from the rule; and presence is presumed to be lawful,</li> </ul>

<sup>650</sup> It is uncertain whether section 13 of the Adoption Ordinance (Cap 290) would cover the issue of an adopted child's domicile. But it has been suggested that it would be reasonable in principle to say that during the life-time of an adoptive parent the adopted child's domicile was the same as and changed with that parent's domicile.

<sup>651</sup> This rule is generally accepted, though there is no direct authority to support it. *Dacey and Morris on the Conflict of Laws*, 13<sup>th</sup> Ed (Sweet and Maxwell, 2000) at para 6-029.

<sup>652</sup> No authority can be found on this point. But see *Dacey and Morris on the Conflict of Laws* (13<sup>th</sup> Ed, Sweet and Maxwell, 2000) at para 6-092.

	Current Rules	Proposed Rules
		<p>unless and until the contrary is established</p> <ul style="list-style-type: none"> <li>● to acquire domicile in a country other than HK, lawful presence or not is one of the factors to be considered by the courts</li> <li>● repeal the doctrine of revival of domicile of origin</li> <li>● existing domicile continues until acquiring another one by choice or by operation of law</li> </ul>
<b><i>Domicile of Married women</i></b>	<ul style="list-style-type: none"> <li>● married women's dependent domicile still applies</li> </ul>	Domicile of dependency of married women to be abolished
<b><i>Domicile of the mentally incapacitated</i></b>	<ul style="list-style-type: none"> <li>● incapacity occurs during infancy: domicile of dependency continues even after the age of majority</li> <li>● incapacity occurs after the age of majority: domicile last had before incapacity continues so long as he remains incapacitated</li> </ul>	<ul style="list-style-type: none"> <li>● a mentally incapacitated adult domiciled in the country with which he is most closely connected</li> <li>● a question of fact as to whether or not a person has the mental capacity to acquire domicile</li> <li>● on recovery, retaining the domicile last held before the recovery, and being able to acquire a domicile of his choice</li> <li>● also cover persons in a comatose, vegetative or semi-vegetative state, and anyone who for one reason or another is not able to form the required intention</li> </ul>
<b><i>Standard of proof</i></b>	higher standard for displacing domicile of origin	balance of probabilities for all disputes on domicile
<b><i>Domicile in a federal or composite state</i></b>	no specific provision	present in a federal or composite state + intention to make a home there indefinitely: domiciled in the law district therein with which a person is most closely connected
<b><i>Transitional provisions</i></b>	no specific provision	<ul style="list-style-type: none"> <li>● no retrospective effect</li> <li>● domicile at any time before the commencement of the Recommended Legislation determined as if the legislation had not been enacted</li> <li>● domicile at any time after the commencement of the Recommended Legislation determined as if the legislation had always been in force</li> </ul>

	Current Rules	Proposed Rules
<b>Codification</b>	N.A.	<ul style="list-style-type: none"> <li>● the Recommended Legislation should be as comprehensive as possible</li> <li>● the Recommended Legislation should set out the following general rules on domicile: <ul style="list-style-type: none"> <li>no person can be without a domicile;</li> <li>no person can at the same time for the same purpose have more than one domicile;</li> <li>for the purposes of a HK rule of the conflict of laws, the question of where a person is domiciled is determined according to HK law;</li> </ul> </li> <li>● a saving provision for the existing common law rules which are not inconsistent with the new statutory rules.</li> </ul>