REFORM OF THE LAW OF DOMICILE IN AUSTRALASIA WITH PARTICULAR REFERENCE TO THE NEW ZEALAND DOMICILE ACT 1976

The reform of the law of domicile has been the subject of discussion between the Attorneys-General of the various states in all of Australasia,[1] but thus far (27 May 1977) concrete proposals have seen the light of day only in New Zealand in the form of the Domicile Act 1976. While the Attorneys-General in Australia have agreed that any reforms should be on a uniform basis between the Australian states, they have not yet agreed on the form of those reforms.[2] A discussion and analysis of the New Zealand measure should thus be of interest, and perhaps of use to both New Zealand and Australian lawyers.

The New Zealand Domicile Act 1976 is a radical measure: it strips away the common law and replaces it with a statutory code that will be used to determine domicile in all but a very few cases.[3] It is certainly the most far reaching reform of the law of domicile to reach the statute book in the common law world.[4]

The major provisions of the measure may be conveniently discussed under five heads.

A. The Domicile of Married Women

Section 5(1) expressly abolishes "the rule of law whereby upon marriage a woman acquires her husband's domicile and is thereafter during the subsistence of the marriage incapable of having any other domicile" and provides instead that "every married person is capable of having an independent domicile". This provision applies to the parties "to every marriage, wherever and pursuant to whatever law solemnised, and whatever the domicile of the parties at the time of the marriage" (section 5(2)).

These provisions are not as far reaching as they appear at first sight, for two important New Zealand statutes, the Matrimonial Proceedings Act

1 These discussions have been shrouded in secrecy. In correspondence with the writer the most that the Attorneys-General have been prepared to disclose is that discussions have taken place. Notwithstanding specific requests, no working papers, discussion papers or draft bills have been provided to the writer. It is difficult to understand why reform of a non-contentious matter, such as domicile, should be so secret; such legislation can surely only be improved by informed public discussion.

2 From a letter to the writer (dated 15 April 1977) from R. M. Armstrong, Secretary to the Standing Committee of Attorneys-General.

3 The Act itself does not purport to be so radical. Its short title reads simply: "An Act to abolish the dependent domicile of married women and otherwise to reform the law relating to domicile". Nonetheless, the Act appears to be a comprehensive code.

4 The Domicile and Matrimonial Proceedings Act 1973 (U.K.) contains similar provisions regarding the domicile of married women and children. However, it does not touch the question of revival at all, nor does it provide a statutory domicile of choice. Had the ill-fated Domicile Bills of 1958 and 1959 in the United Kingdom become law they would have been more far-reaching (see Cmd 9068, Cmd 9678, and Cmnd. 1955). The provisions of the U.K. Act are broadly similar to those contained in the New Zealand Domicile Bill of 1961.

1963 and the Domestic Proceedings Act 1968, already contain provisions[5] enabling married women to acquire their own domiciles for the purpose of these Acts. These Acts deal with a wide variety of family law matters in which domicile plays a part, including, inter alia, divorce, nullity, separation, restitution, and voidability. Section 5 will not have a substantial effect on the operation of the law in these areas.[6]

Nonetheless, the application of the reform will not be altogether free from difficulty. While the emphasis in the earlier legislation was on jurisdiction, the Domicile Act includes choice of law as well. New Zealand judges may find themselves puzzled by disputes in which a husband and wife have different domiciles, and therefore different personal laws which contain conflicting but relevant provisions. One area in which this might occur is matrimonial property.[7]

Choice of law in matrimonial property may, broadly speaking, be said to depend upon the matrimonial domicile (i.e. the common domicile of the spouses) at a particular time. Where husband and wife have different domiciles there is no longer a "matrimonial domicile" and thus no connecting factor for matrimonial property. In casting around for new connecting factors it should be remembered that the spouses' domicilary laws may contain conflicting provisions, or that the one domicilary law may recognise that domicile at the time of the marriage determines the proprietary regime "once and for all" (immutability principle) while the other recognises subsequent changes of domicile (mutability principle). In these circumstances fashioning new choice of law rules will not be easy.[8]

5 S.3 and s.6 respectively; these sections have been repealed by s.14 (3) (a) and (b) of the Domicile Act 1976.

6 However, the Minister of Justice in presenting the measure to Parliament, did not seem to think so; he saw the effect on married women as the major impact of the Act (Hon. D. Thomson 404 N.Z.P.D. 1136). The Opposition seemed to share this view (ibid., 1203).

7 Although many such problems will be avoided by the imperative terms of s.7 of the Matrimonial Property Act 1976. In summary, this section provides that the Matrimonial Property Act 1976 shall apply to immovable property situated within New Zealand (s.7(1) (a)) and to movables situated anywhere, if, at the date of an application pursuant to the Act or at the date of an interspousal agreement relating to the division of the matrimonial property, either of the parties is domiciled in New Zealand (s.7(1) (b)). S.7(2) further provides that the Act will apply where parties agree that it will, but s.7(3) provides that the Act will *not* apply, subject to s.7(2), where the parties agree prior to or upon their marriage that some other law will apply (and that agreement is in writing or otherwise valid according to that other law). It may be observed that it distorts the normal choice of rules structure: it specifies when a particular legal system (NZ) is applicable, rather than determining which of a number of systems should apply. Moreover, it adopts wholeheartedly the mutability principle of matrimonial property, thereby allowing one spouse to disadvantage the other simply by changing his or her domicile.

8 To illustrate with a factual example: H, presently domiciled in England may have married W, domiciled in France, while the former was domiciled in South Africa. The dispute between H and W concerns movables in New Zealand. The facts are outside the limits of s.7 of the Matrimonial Property Act 1976. French and South African law adopt the immutability principle and a regime of community of goods. English law adopts a mutability principle qualified to protect rights already acquired under the old domicile (Dicey and Morris, *The Conflict of Laws* (9th ed. 1973) 118) but does not have a system of community. Under the old law the matrimonial domicile would have been first South Africa and then England; the dispute then would have depended upon whether the movables were acquired before or after the change of the matrimonial domicile to England. The new law gives no clear guidance on this question

It is also anticipated that capacity difficulties may pose difficult choice of law problems. A wife's personal law may not allow her to sue her husband in tort, but his law may.[9] Which is to apply?

However, notwithstanding the difficulties mentioned, this reform is welcome. In this enlightened age a few choice of law problems are a small price to pay for the abolition of the rule which Lord Denning has stigmatised as "the last barbarous relic of a wife's servitude".[10]

B. The Domicile of Children

Section 6(1) of the Domicile Act explicitly provides that the rules contained in section 6 replace all previous rules relating to the domicile of children. Section 6(2) defines children as "unmarried persons under the age of sixteen", and section 7 makes the consequent provision that all persons, with the exception of lunatics, are capable of acquiring an independent domicile once they reach the age of sixteen, or marry.

Where the parents of the child are living together, section 6(3) provides that the child has the domicile of its father. In legislating for the situation where the father and mother have different domiciles, an arbitrary choice has to be made between assigning to the child the father's or the mother's domicile. The New Zealand legislation leans towards the status quo in the choice that it makes. This solution may not satisfy all feminists, but it is difficult to see what alternative, apart from the equally unsatisfactory mother's domicile, is available.

Where the parents live apart different principles apply: the general rule is that the child takes the domicile of the parent with whom it has its home (section 6(4) and (5)). Where the child lives with neither parent the position is more complex: if the child has its home with its father, then it takes its father's domicile (and if he dies his domicile on death) until it makes its home with its mother (section 6(4)); in other cases the child takes its mother's domicile or her domicile on death (section 6(5)).

In most cases these rules will not prove difficult to apply. However, there are some problems. A child that has been the subject of a keenly contested custody battle between the parents may in fact have no home, nor a "last home", in any accepted sense of that word; yet it must have a domicile. Moreover, there will be the cases in which a child has a home with both its parents.[11] But, it cannot have two domiciles.

9 Assuming this is a matter governed by the personal law. This is the generally accepted position in the United States and Australia: *Haumschild* v. *Continental Casualty Co.* 7 Wis. 2d. 130; 95 N.W. 2d. 814 (1959); *Warren* v. *Warren* [1972] Qd. R. 386 (S. C.). Morris, *Conflict of Laws* (1972) 277.

10 *Gray* v. *Formosa* [1963] P. 259, 267.

11 The Act gives no guidance on the definition of "home". In general, the length of time that a child spends with each parent should be a sound guide to where its home is, but this will not be an invariable rule. A child may have its home with its mother in a remote part of the country but in order to avoid the payment of fees at boarding school the child may live with its father in a city during term time; although it will spend a longer time with its father, it does not necessarily have its "home" with him. The Private International Law Committee (Cmnd. 9068) in defining "home" for the purposes of a presumption that a person intended to live there indefinitely, came to the conclusion that it could be defined only in terms of intention (para. 13). As determining the intention of a babe in arms may prove impossible (and because once one looks to intention one might as well allow children to acquire a domicile of choice), it is submitted that this is no way out of the difficulty. Nor will the parents' intention assist: in any difficult case they will probably have separate intentions concerning where the child has its "home".

It should be noted that no distinction is drawn between legitimate and illegitimate children. This is in accord with section 3(1) of the Status of Children Act 1969 which abolished the distinctions in law between legitimate and illegitimate children. The inevitable renvoi problem may arise; a child may take its father's domicile in accord with section 6, but the father's domicilary law may assert that the child is illegitimate and should therefore take its mother's domicile.[12]

Few would quarrel with the reforms contained in section 6. The settled principle that a child takes its domicile from the parent with whom it lives is surely superior to the sterile dispute whether the domicile of children follows custody or guardianship. Here the child's domicile does not depend upon any order of court but a question of fact: where does it have its home? Moreover, today children, before they are sixteen, often have permanent homes away from their parents; it is fitting that domicilary law reflect this.

Nonetheless, there will be circumstances in which these rules remain rigid. An orphan, for example, may find himself burdened with an unsuitable domicile that cannot be changed until he attains the age of sixteen years.

It is convenient to discuss here two further matters relating to the domicile of children. First, the domicile of foundlings. This question has been the subject of some academic discussion,[13] and section 6(6) now provides that "until a foundling child has its home with one of its parents, both its parents shall for the purposes of this section, be deemed to be alive and domiciled in the country in which the foundling child was found". The solution adopted is that generally advocated by commentators. However, as Professor Kahn has pointed out, this may at times be inappropriate where there is contrary evidence. Consider the following example. A small child babbling Swedish is discovered as a stowaway on a Swedish ship that has just put into a New Zealand port from Stockholm.[14] Applying the provisions of section 6, it will be domiciled in New Zealand. A better rule, it is submitted, would have been to create a presumption that the foundling's parents were domiciled in the country where it was found; this would never leave a foundling without a domicile, but would allow such evidence of its domicile as was available to be taken into account.

Secondly, the domicile of adopted children. Here statutory provision was made in the Adoption Act 1955. The relevant provision, section 16(2)(f), as amended by section 14(2)[15] of the Domicile Act 1976, provides that "the adopted child shall acquire the domicile of his adoptive parent or

12 It might be thought that the wide ranging terms of the Status of Children Act 1969, s.34, would preclude that difficulty. The section reads: "*for all the purposes* of the law of New Zealand 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 . . . " (emphasis added). Section 12(3) (a) of the Status of Children Act 1969, however, provides that nothing in the Act should "limit or affect any enactment or rule of law relating to the domicile of any person . . . "

13 See Kahn, [1971] Acta Juridica 19; Spiro, *The Law of Parent and Child* (3rd ed. 1971) 125.

14 This illustration is based on one provided by Kahn, ibid.

15 The unamended section made provision for an adopted child's domicile of origin. Such a child was to take the domicile of its adoptive parents, at the time the adoption order was made, as its domicile of origin, unless the child was older than three years at the time of its adoption, in which case it would retain its old domicile of origin.

parents, and the child's domicile shall thereafter be determined as if the child had been born in lawful wedlock to the said parent or parents". Although it appears clear that the adopted child will then be treated as the natural child of its adoptive parents for the purposes of section 6 of the Domicile Act, it remains an untidy provision. The reference to lawful wedlock is unnecessary, and the section also appears to create the impression that the unity of matrimonial domicile has not been abolished. It is a pity that when this section of the Adoption Act was amended by the Domicile Act and the references to the domicile of origin were removed, the amendments necessary to make the section dovetail with the spirit and purpose of the Domicile Act were not made.

C. Abolition of the Domicile of Origin

Section 11 provides that "the rule of law known as the revival of the domicile of origin whereby a person's domicile of origin revives upon his abandoning a domicile of choice is hereby abolished". Few would quarrel with the abolition of this rule; it is quite outdated today, and can and does lead to fickle results.[16]

However, the principle that everyone must have a domicile at all times means that there must be a gap-filling domicile that is used when a person casts off his last domicile i.e. some other rule must replace that of revival. The Domicile Act settles upon the persistence of the last domicile: section 8 provides that the children's domicile (i.e. a section 6 domicile) persists until a new domicile is acquired in accordance with section 9 (section 9, as noted below, creates a statutory domicile of choice). And section 11 provides that once a section 9 domicile is acquired, it will persist until a new section 9 domicile is acquired.

It should not be forgotten that the persistence rule itself may lead to capricious results. The refugee may be accorded a domicile in the country from which he has just fled, while the deportee is given a domicile in the country which has just rejected him. Nonetheless, in general the links of the propositus with his last domicile will be stronger than those with his domicile of origin. Thus the reform will lead to more appropriate domiciles being assigned to persons who have cast one domicile off and not yet acquired another.

D. Section Nine Domiciles

As outlined above, section 9 creates a new statutory domicile of choice. Given that the propositus is not already domiciled in the country and that he has capacity to acquire an independent domicile, he may acquire a section 9 domicile provided he is "in"[17] the country and he intends to live there "indefinitely". The provision relating to intent is crucial. It simply

16 To take a simple example: X emigrates from Scotland to New Zealand; before deciding to settle permanently in New Zealand, he marries and fathers a child, A. A's domicile of origin is Scotland. Having decided to settle permanently, X acquires a New Zealand domicile and A also acquires one as a domicile of dependence. A may remain domiciled in New Zealand until he obtains his majority and leaves New Zealand, casting off that domicile but not acquiring another. His Scottish domicile revives. Should he, before acquiring another domicile, father a child, that child's domicile of origin will be Scotland also.

17 Bare physical presence has generally been considered sufficient. The most extreme case was where one afternoon's visit was sufficient to satisfy the "residence" requirement: *White* v. *Tennant* (1888) 31 W. Va. 790.

consolidates the trend, evident for some time in the English cases, towards an easier test of intention and away from the old test that required an intention to live there forever. The word "indefinitely" was used most recently to describe the necessary intention in *Inland Revenue Inspectors* v. *Bullock*.[18] In this area then the Domicile Act does not affect a change in the law. As the history of the ill-fated English Domicile Bills shows[19] the domicile of choice is a difficult subject to reform. Nonetheless, it is an area where the law is very uncertain and certainly ripe for reform.[20] In this area then the Domicile Act does not live up to the reforming zeal it shows elsewhere.

E. Miscellaneous Reforms

1. *The transitional provisions.*

Section 3 provides that the domicile that a person had "at a time before the commencement of the Act shall be determined as if this Act had not been passed". Section 4 contains the converse provision that the "domicile that a person has at a time after the commencement of this Act shall be determined as if this Act had always been in force".

This form of transitional provision avoids the inelegance of sections 1(2) and 3(1) of the Domicile and Matrimonial Proceedings Act 1973 (U.K.). For example, section 1(2) of the U.K. Act provides: "Where immediately before this section came into force a woman was married and had her husband's domicile by dependence, she is to be treated as if retaining that domicile . . . unless and until it is changed by acquisition or revival of another domicile either on or after the coming into force of this section." The New Zealand provisions provide that domicile is to be determined as if the Act had always been in force, thus avoiding this difficulty.[21]

2. *The deemed intentions*

This measure was clearly drafted with an eye to the Australian federal structure, for there have been included a number of provisions dealing with the propositus who is domiciled somewhere within such a political union but it is not clear in which state thereof he is domiciled. Section 2 defines a "union" for the purposes of the Act as a "nation" which consists of two or more "countries". Although no definition of "nation" is provided, a "country" is defined as "a territory of a type in which immediately before

18 [1976] 1 W.L.R. 1178, 1184 (C.A.).

19 The Domicile Bills failed chiefly because of foreign business opposition to their attempt to make the acquisition of a domicile of choice easier by creating a series of presumptions of the necessary intent. The difficulty in proving the necessary intention made it easier for members of the foreign business community to show that they were not domiciled in England, and this granted them a valuable partial immunity from the British tax system.

20 There are considerable difficulties in proving the necessary intention; there is hardly an aspect of a man's life which may or may not be thrown into the melting pot either for or against the assertion that he intended to live in any particular place indefinitely (or permanently). This makes trials long, complex, unpredictable and expensive.

21 One transient disadvantage of these provisions should be mentioned: the Act has not yet been put into operation, but when the Governor-General makes an Order-in-Council commencing the operation of the Act (S.1(2)), ipso facto the domicile of certain persons will change. A lawyer seeking to advise a client regarding his domicile may have some difficulty, being unaware when the Act will commence operation.

the passing of the Act a person could have been domiciled". Section 10 then continues to provide that in certain circumstances a propositus shall be *deemed* to have the intention "to live indefinitely" in a certain country, thus facilitating the acquisition of a section 9 domicile in that country. Thus, where a person ordinarily resides and intends to live indefinitely in a union, but has not formed an intention to live indefinitely in any country in the union, he shall be deemed to intend to live indefinitely in: (i) that country in which he ordinarily resides; or (ii) if he does not ordinarily reside in any such country, in whatever country he is in; or (iii) if he neither resides, nor is in any such country, then in whichever country he was last in.

Certainly these provisions will make the task of the courts easier in a number of cases, but they bristle with difficulties. Their application may lead to the assignment of wholly artificial domiciles.[22] A less inflexible solution might have been to replace these deeming provisions with presumptions of the necessary intent.

More serious difficulties may arise from the failure of the legislature to define what it meant by nation in the definition of "union". Canada, Australia and the United States will clearly be included. They create no difficulty. But what is to be done about divided Germany or Ireland? One suspects that the legislature had some form of political union in mind and did not intend to include within the concept of nation Austria and Germany before the *Anschluss*. However a political union itself creates difficulties: at what stage, if at all, will the E.E.C. qualify as a political union under this section? One suspects that this was certainly a provision to which insufficient attention was given.

It may now be pointed out,[23] as was suggested at the beginning of this comment, that the Domicile Act 1976 is in fact a comprehensive code of the law of domicile save in the exceptional case of insane persons.[24] Given that

22 To take a particular example. X has decided to live indefinitely in Australia but has not yet decided in which state he will settle. He leaves his job in Queensland and flies to Singapore to discuss taking up a new job in Western Australia. On the way there he spends the weekend with a friend in Melbourne. He is domiciled in Victoria.

23 The only sections of the Act not discussed in the body of this comment are s.12, providing that the Act shall effect no change in the standard of proof required, and s.13, which provides that a person domiciled in a country which is part of a union is also domiciled in that union.

24 The domicile of the insane will remain difficult. At common law insanity robbed the afflicted of the capacity to acquire a new domicile; a lunatic, therefore, retains, while he is insane, his last domicile (*Urquhart* v. *Butterfield* (1887) 37 Ch. D. 357). Domiciles of dependence, however, do not depend upon capacity. Thus the domiciles of minor lunatics and married women are determined according to the normal rules (Dicey and Morris, supra n.8 at 17, exceptions 1 and 2. Indeed, even after the termination of an insane minor's minority, he continues to be treated as a minor: *Re G.* [1966] N.Z.L.R. 1028). S.7, which is the provision that grants capacity to acquire a domicile to all persons either married or older than sixteen, makes that grant "subject to any rule of law relating to the domicile of insane persons". Although couched in wide terms, it is submitted that this does not mean the domicile of lunatics must be determined as if the Domicile Act 1976 was not law; s.6 clearly provides that its rules replace "*all rules of law* relating to the domicile of children" (emphasis added), and is not restricted to sane children. Likewise, the abolition of the married woman's domicile of dependence in s.5(1) is in clear and imperative terms. Rather, it is submitted, the condition contained in s.7 should be limited to s.7, viz. to matters of capacity. Thus insane children will have their domicile determined by s.5, not the rules of the common law, and married insane women will not have their domicile determined by their husbands, but will be treated in the same way as an insane man, viz. as a person capable of an independent domicile but robbed of that capacity by insanity. The insane

one is called upon to determine the domicile of a person at a time after the commencement of the operation of the Act, it is clear that we must proceed as if the Act had always been in force.[25] Thus, the domicile of a child would have been determined according to section 6. Having once acquired a section 6 domicile, section 8 provides that it will continue until replaced by a section 9 domicile; and that domicile can, in terms of section 11, only be replaced by another section 9 domicile. Thus, a person will, from the cradle to the grave, be accorded either a section 6 domicile (of dependence) or a section 9 domicile (of choice). The domicile of origin has not been transmuted into statutory form, as has happened with the domiciles of dependence and choice: it has been effectively abolished although this is not expressly provided.

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child who has reached the age of sixteen remains a problem. Most probably, the courts would continue with a fictional extension of the period of dependence.

25 Domicile Act 1976, s.4.