

T H E L A W R E F O R M C O M M I S S I O N
AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

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REPORT ON DOMICILE AND HABITUAL RESIDENCE
AS CONNECTING FACTORS IN THE CONFLICT OF LAWS

IRELAND

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LAW REFORM COMMISSION

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1. The Law Reform Commission was established by the Law Reform Commission Act 1975 as a statutory body corporate to keep the law of the State under review and, in accordance with the provisions of the Act, to undertake examinations and conduct research with a view to reforming the law and to formulate proposals for law reform. The Act also provides that, at the request of the Attorney General, the Commission is to undertake an examination of, and conduct research in relation to, any particular branch or matter of law whether or not such branch or matter is included in any programme for examination of certain branches of the law with a view to their reform submitted by the Commission and approved of by the Government. If the Commission is so requested by the Attorney General, then it is to formulate and submit to him proposals for reform of the particular branches or matters of law submitted. (See section 4 of the 1975 Act and the First Programme of the Commission (December 1976) (Pr1. 5984).)

2. Pursuant to this provision of the Act, the Attorney General requested the Law Reform Commission to undertake an examination of, and conduct research in, "the law relating to the domicile of married women". This followed on the reservation of Mr Justice Walsh in Gaffney v Gaffney [1975] I.R. 133 at p.152 in regard to the domicile of dependency or unity of domicile rule in so far as married women are concerned. Later on in the

First Programme of the Commission it was indicated that the Commission proposed to examine, with a view to recommending reforms, the "concept of domicile and the concept of habitual residence". (See First Programme, pp. 6 and 7.)

3. Following the request by the Attorney General to examine the law relating to the domicile of married women, the Commission arranged for the publication of an advertisement in the daily press asking those persons who had views on the subject under examination to communicate their views to the Commission. Communications were received from a number of organisations and individuals named in the Appendix to Working Paper No.10 - 1981. The Commission was also in communication with law reform agencies, lawyers and jurists in other countries.

4. At an early stage in the examination of the domicile of dependency rule in so far as it related to married women it seemed to the Commission that it would be better to examine the whole concept of domicile, and, more radically, to consider whether domicile should be replaced by habitual residence as a "connecting factor" between a person and a particular legal system.

5. In its Working Paper No.10 - 1981, Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws, the Commission set out its provisional views on the subject and on possible avenues of reform. It analysed the alternative solutions of, first, abolishing the domicile of dependency of married women (with consequential amendments to the law relating to the domicile of minors and other changes in the law of domicile that appeared to the Commission to be desirable) and, secondly, replacing domicile by habitual residence as a connecting factor. In both cases a draft Scheme of Legislation was included in order to facilitate discussion. The Commission stated in the Working Paper (para. 25, p. 15) that it intended

to furnish a Report on the subject after it had received submissions from interested persons and organisations in relation to the matters covered in the Working Paper.

6. It seems to the Commission that, rather than cover again in detail the same ground in the present Report, the better approach is to repeat in summary form the Commission's proposals made in the Working Paper on the assumption that domicile was to be retained as a connecting factor. These were as follows:

- (1) The domicile of dependency of married women should be abolished. (Para. 48, p. 32.)
- (2) The present law relating to the recognition of a foreign divorce, legal separation, nullity or annulment should be retained, pending the completion of a detailed examination of The Hague Convention on the Recognition of Divorces and Legal Separations (1970). However, where the State of origin uses the concept of "habitual residence" as a test of jurisdiction in matters of divorce, legal separation, nullity or annulment, "domicile" should be deemed to include "habitual residence". (Para. 55, pp. 37-38.)
- (3) The doctrine of divisible divorce should be declared in statutory form so as to ensure that, while a foreign decree might be accepted as terminating the marriage, it would not be accepted as prejudicing maintenance obligations in the State of recognition. (Para. 60, p. 40.)
- (4) The testamentary capacity of a testator should be determined by the law of the State of the domicile at the time of the making or confirmation of the will or

other testamentary disposition. (Paras. 72 and 78, pp. 48 and 51.)

- (5) A person should be capable of acquiring an independent domicile on reaching the age of 16 years (or, alternatively, on majority or on marrying, whichever first occurs). (Para. 116, pp. 74-75.)
- (6) The domicile of a minor should, as a general rule, follow that of the parent with whom he has his home. (Paras. 98-100, pp. 64-65.)
- (7) Where a minor's parents are residing together but have different domiciles, and the State of the domicile of one of them is that in which they have their habitual residence, the child's domicile should be in that State. Where neither parent is domiciled in the State where they have their habitual residence, the child's domicile should be in the State of his habitual residence. (Paras. 101-104, pp. 65-67.)
- (8) Where a minor has his home with a person other than his parents, his domicile should be determined by reference to his habitual residence. (Paras. 105-106, pp. 68-69.)
- (9) The domicile of origin of a foundling should be that of the State in which he is found. (Para. 113, pp. 72-73.)
- (10) The domicile of an adopted child should be the same as if he were the child of the adopter or adopters born in wedlock to him, her or them; but his domicile of origin should be determined by the domicile of his adopter or adopters at the time of the adoption; and, if they have no common domicile, the domicile of origin of the child

should be determined by their habitual residence.
(Para. 114, p. 73.)

- (11) A person on whose domicile a minor's domicile depends should be entitled, when changing his own domicile, to leave the minor's domicile unchanged where a change in the domicile would be to the detriment of the minor. However, the domicile of the minor should be capable of being changed subsequently, where the change would be in the minor's interest. (Paras. 107-111, pp. 67-72.)
- (12) The court should be empowered to change the domicile of a minor where it considers it proper to do so. (Paras. 117-118, pp. 75-77 and para. 124, p. 82.)
- (13) The intention to reside indefinitely in a country should be sufficient to constitute a domiciliary intention. (Para. 120, p. 78.)
- (14) A domicile of origin should be no more difficult to abandon than a domicile of choice. (Para. 121, pp. 78-79.)
- (15) The rule whereby a domicile of origin may be revived should be abolished, and the domicile being abandoned should be deemed to be retained until a new domicile is acquired. (Para. 122, pp. 79-81.)
- (16) The court should, in appropriate cases, be empowered to change the domicile of a person who, because of mental illness, has a domicile of dependency. (Para. 123, pp. 81-82.)
- (17) Where due to mental illness a minor is or becomes

incapable during minority of forming the appropriate domiciliary intention, his domicile should, on his reaching full age, remain that which it is unless it is changed by the court. (Para. 124, p. 82.)

- (18) An application to the court in respect of a change of domicile under recommendation (16) or (17) should, if there is a committee of the mentally ill person's estate, be made by the committee to the court that has appointed the committee or, if there is no committee, by any person who can show an interest in the matter. (Para. 123, pp. 81-82.)

7. The Working Paper analysed the advantages and disadvantages of domicile, nationality and habitual residence, respectively, as connecting factors, linking a person to a particular system of law. It is considered unnecessary to repeat these arguments in respect of nationality since nothing has caused the Commission to change its view that nationality would not be an appropriate connecting factor.

8. With respect to habitual residence, it was noted in the Working Paper (para. 13, p.10) that this concept has played a most important role in the Conventions of the Hague Conference on Private International Law, since it is perceived as providing an alternative to nationality and as being free of the difficulties associated with domicile, such as those in regard to intention, origin, dependency and prolepsis. Habitual residence has already been adopted as a connecting factor in Irish legislation¹; in Britain and Northern Ireland it is being used to an increasing degree in legislation in such important areas as matrimonial

¹ Cf. Succession Act 1965, Part VIII (No. 27); Air Navigation and Transport Act 1973, section 11(5) (No. 29).

jurisdiction, recognition of foreign divorces and succession. Other European countries have also adopted the concept in their legislation.

9. As was stated in the Working Paper (para. 19, p. 11), habitual residence has some clear advantages over domicile:

- (1) It generally involves a simpler inquiry to establish where a person has his habitual residence than to determine what his domicile is. Also, intention, though relevant, is a less controlling factor in the determination of habitual residence.
- (2) The concept of domicile is one that is far from easily understood by lawyers and by members of the public generally. This is of practical importance where decisions have to be taken by administrative officials without ready recourse to judicial determination.
- (3) The concept of habitual residence does not involve any concept similar to domicile of dependency. This means that the application of the concept in specific cases may involve far less complex considerations than does domicile. More importantly the injustice and possible unconstitutionality of the principle of domicile of dependency of married women do not arise in the case of habitual residence.

10. Nevertheless, as was mentioned in the Working Paper (para. 20, p. 11), the concept of habitual residence has some drawbacks.

- (1) It may be difficult to determine where a person has his habitual residence if he is constantly on the move and has no real or continuing connection with any of the countries through which he passes.

- (2) The degree of importance that is to be given to intention as a factor in determining whether a person's residence is "habitual" may be a matter of debate and uncertainty in particular cases. While the question of intention in the case of domicile may give rise to difficulty, there is at least some reasonable degree of judicial consensus as to the strength of the intention that must be established: with habitual residence such consensus has yet to be attained.
- (3) Similarly, the question of how long a person's residence must continue before it may be described as "habitual" may give rise to considerable doubt in certain cases. One advantage of domicile in this respect is that where the requisite intention is present, a person may acquire a domicile immediately he arrives in the State in which he wishes to reside permanently.

11. Thus, neither domicile nor habitual residence affords totally satisfactory solutions in every case. It may be argued that domicile should be preferred since it affords full weight to the subjective intention of individuals in determining which legal system is to determine important questions of status and property rights. In the case of an Irishman who has lived for three years in England but who intends shortly to return to this country and reside here permanently, if the law of his domicile is to be applied, Irish law will determine such matters as his property and succession rights. If the connecting factor is habitual residence, these matters would, on one view, almost certainly be subject to English law. It might, however, be argued that the law of the country with which a person has "the most real connexion" is the more appropriate for determining important questions of status and property rights. "Habitual

residence" clearly imports something greater than casual or fleeting presence in a country, and the better view may be that, if a person's residence is sufficiently strong to be described as habitual, the present realities should determine his situation rather than an "intention" that is clouded, perhaps, by a degree of self-delusion as regards long-term plans.

12. In the Working Paper (para. 22, p. 13) the Commission expressed the provisional view that, on balance, habitual residence constitutes a more satisfactory connecting factor than domicile. Not only does it provide a more appropriate and simpler solution in most cases but it also is in harmony with trends in European private international law. In regard to the specific problem of the domicile of married women, the adoption of habitual residence as a connecting factor would remove any discrimination since it treats both sexes in exactly the same manner. (That the subject of domicile of dependency of married women involves some still unresolved questions is apparent from the recent decision of M.T.T. v N.T. [1982] I.L.R.M. 217, where the case appears to have proceeded on the implicit basis that the wife's domicile was determined by that of her husband as there is no indication that the point was argued.)

13. The Commission invited submissions from interested persons and organisations in relation to the matters covered in the Working Paper. Two submissions were received. The first was on behalf of the Conflict of Laws class at Trinity College Dublin. This submission recommended that the domicile of dependency of a married woman should be abolished and, if separate domiciles were introduced, that the law should state clearly whether the domicile of one party only or of both was sufficient for recognition in the State of a divorce obtained abroad, or for jurisdiction to grant a matrimonial remedy. In this context, the submission recommended that "international

/s/standards and requirements should be implemented as far as possible". As to the recommendation that the domicile of dependency of a married woman should be abolished, the submission stated:

"The rule that a married woman takes her husband's domicile is contrary to the generally accepted view on human rights, as accepted in the Constitution of Ireland, Article 40. It breaches the principle that domicile is governed by the place with which the person has the most substantial connection since a wife need have no connection with the place of her husband's domicile. It often works unfair results as when the wife's succession rights to her husband's property are governed by the law of a foreign state, or where she cannot have her foreign divorce recognised in this country; even if the rule sometimes works to her advantage, it is an unfair advantage on all the other wives subject to the rule.

The argument that dependent domicile reflects the duty to cohabit is fallacious, since this duty is not absolute and separate domiciles would not necessarily mean an end to cohabitation. Even if there was a connection between cohabitation and dependent domicile, there is no good reason why the husband's domicile should have priority in all cases.

It is also argued that it is better that mutual rights and obligations of the spouses be governed by the law of one domicile. But (i) not all rights and obligations are governed by the law of domicile; (ii) in case of succession each spouse may simply inherit in accordance with the law of his or her domicile; (iii) again, if one domicile is necessary there is no reason why it should be the husband's rather than the wife's."

14. The authors of the second submission were also students of the Law School of Trinity College Dublin. They summarised their submissions in the following terms:

"1. Habitual residence is a factual, not legal concept, referring to a person's principal home, the place where his 'quality' of residence is the greatest. Elements of intention and duration of residence are evidential or

secondary matters to be taken into account only when the answer is not immediately clear.

2. The tenacity of domicile or origin, as illustrated in the difficulty of acquiring a domicile of choice and in the revival doctrine, leads to some unjust and unduly complicated results. No such difficulties are involved in the application of habitual residence.

3. There is no doctrine of dependency in habitual residence which is preferable to the rules which not infrequently work injustices with domicile. Further the unity principle will be breached less often in normal circumstances (where the family is together) than in the case of a reformed domicile. Finally there is no element of sex-discrimination in the law of habitual residence.

4. Reforming the law as is proposed would help to align it with Europe, America and the tendency in the U.K.

5. It is submitted that it is not possible, as is sometimes suggested, to have no or more than one habitual residence, and the concept is a simple one readily understood by lay-people.

6. Since revenue law is in part based on private international law, there is little argument in favour of preventing a beneficial reform in the latter for the benefit of a few tax-payers; revenue law may be reformed if the responsible authorities believe it to be necessary, otherwise tax-payers will accrue the benefits already mentioned.

7. We recommend that the Commission adopt the proposal to

.substitute habitual residence as a connecting factor in private international law."

15. The authors of the submissions make a number of other specific observations, two of which are of particular interest to the Commission. First, the authors support the Commission's proposal (p. 102 of the Working Paper) to sketch a rough outline of habitual residence in the draft statute, but they regard section 3(1) as "a little unclear" since, they state, "a person may have his interests 'centred' in different jurisdictions or in so many that a centre cannot be isolated. Since habitual residence is primarily concerned with the quality of residence it is suggested that 'centre' be substituted by 'quality and locations'." The Commission sees the force of this comment. But it is not considered that it would be advisable in this context to replace one concept by two. The Commission feels that a reasonable interpretation of the "centre" of an individual's personal, social and economic interests would have to lay stress on the quality and locations of these interests.

16. The second point raised in the submission relates to section 3(2) of the General Scheme of a Bill on Habitual Residence. This subsection provides that, in making a determination of a person's habitual residence, having regard to the centre of his personal, social and economic interests, "account shall be taken of the duration of the interests and of the intentions of the person relative thereto". The authors of the submission consider that "the intention of the Commission to relegate the elements of intention and time to secondary or evidential status could be better served by the substitution of the word 'shall' by 'may'. As the sub-section stands it could be argued that the intentions of a lunatic or year old child must be taken into account, although on balance we agree that the present wording of sub-section (2) is quite clear enough".

17. Having considered this point, the Commission remains of the view that the subsection should include the word "shall" rather than "may". If "may" were adopted, there would be a real danger that a Court might choose to ignore the intentions of a person or (since "may" would also qualify the question of duration) the duration of the personal, social and economic interests in a particular State. If "shall" were adopted it is not considered that a Court would feel itself obliged to have regard to an insane "intention", but there would be nothing wrong with requiring a Court to have regard to the intention of a person who, although affected by some mental illness (depression, for example) was nonetheless well able to form a meaningful intention as to his or her business and personal life. In the case of children, manifestly a Court would not seek to construe the "intention" of an infant in arms; but it is desirable for the legislation to direct the Court to have regard to the intention of a child where this is meaningful, whilst at the same time leaving the Court free to attach such weight to this factor as it considers proper to the circumstances.

18. The Commission has re-examined in detail the question whether it would be better to reform the law of domicile or replace it as a connecting factor by habitual residence. After much consideration, it has come to the view that on balance the better course is to replace domicile by habitual residence. In coming to this conclusion regard was had to the fact that, having expressed the same view provisionally in its Working Paper, the Commission received no submission from any interested person or organisation arguing that such a step would be undesirable.

19. Appended to this Report is a General Scheme of a Bill designed to give effect to the Commission's proposals. A first draft of the General Scheme was included in the

Working Paper. Apart from the points made in one of the submissions recieved from the law students at Trinity College Dublin (to which reference has already been made), the first draft of the General Scheme evoked no comment from interested persons or organisations.

20. Brief reference will now be made to some aspects of the General Scheme which merited detailed consideration. The first question was whether the legislation should define "habitual residence" or leave the matter to the courts to determine. As was stated in the Working Paper (p. 97, para. 126), unlike the concept of domicile, which has been formulated by judicial decisions extending over a very long period, habitual residence has had relatively little judicial analysis. On that account it was considered desirable for the legislation to assist this judicial analysis by drawing the broad guidelines. Accordingly the General Scheme (section 3(1)) provides that the habitual residence of a person is a question of fact, to be determined having regard to "the centre of his personal, social and economic interests". This very general guideline is designed to stress the existing reality as to the position of the person rather than to refer to his long-term aspirations. (These aspirations will continue to be a factor but will lose the prominence they have at present with the use of the criterion of domicile.)

21. The General Scheme also provides (section 3(2)) that in making a determination of a person's habitual residence, account shall be taken of the duration of his personal, social and economic interests and of the intentions of the person relative thereto. As with the first principle, broad guidelines have been favoured. We are satisfied that this approach gives the Court an appropriate discretion, and (as is mentioned supra, p.13) we do not consider that the use of the word "shall" in in this context would result in perverse findings by a Court

in cases where a person through unsoundness of mind or lack of age is incapable of forming any intention on these matters.

22. An important advantage of habitual residence that has already been mentioned (supra, p. 7) is that it does not involve any concept similar to the domicile of dependency of married women or of children. The General Scheme specifically provides (section 3(3)) that the habitual residence of any person is not to be determined by that of a spouse, a parent or any other person. Thus clearly legal equality between the sexes applies and the habitual residence of one spouse will not depend on that of the other. To facilitate the determination of the habitual residence of spouses it seems desirable to the Commission that, where the spouses are residing together, they should be deemed to have the same habitual residence unless the contrary is shown. This rebuttable presumption, which is provided for in the General Scheme (section 4), would not appear likely to work injustice, whilst at the same time it would greatly facilitate the determination of the question of the spouses' habitual residence outside the context of formal legal proceedings.

23. The General Scheme (section 5) adopts a fairly simple approach to the question of the habitual residence of a child. A child is presumed to have the habitual residence of its parents or of that parent with whom the child has his home unless the contrary is shown. This should facilitate the determination of the child's habitual residence in the large majority of cases. The provision falls short of making the child's habitual residence dependent on that of its parents since only a rebuttable presumption is involved. The section does not attempt to give precise rules for all cases. It does not, for example, lay down specific provisions for the determination of a child's habitual residence where the child is living with both parents, but one parent's habitual residence

differs from that of the other. Experience shows that it is difficult, if not practically impossible, for legislation to deal specifically with problems such as this: it is far better to let the Court deal with them in the light of all the circumstances of the particular case.

24. One matter regarding the habitual residence of children was not resolved in the Working Paper. This related to the age beyond which the rebuttable presumption that a child has the habitual residence of its parents should no longer apply. For practical purposes three possible solutions present themselves. The first would be for the legislation to provide that the presumption continues until the child reaches the age of majority - at present 21 years but, under proposals we have made in our Report on the Law Relating to the Age of Majority, the Age for Marriage and Some Connected Subjects (LRC 5 - 1983), 18 years or on marriage. The second solution would be for the legislation to select some lower age - 14 or 16 years, perhaps. 16 is the age at which a child acquires an independent domicile in Northern Ireland, England and New Zealand. The third solution would be for the legislation to prescribe a less specific, more subjective, criterion, such as the age at which the particular child is sufficiently mature to have the intentions specified in section 3(2) independent of the influence of its parents or of other persons having care or control of the child.

25. In deciding which of these solutions would be preferable we were conscious of the fact that the General Scheme in section 5 does not lay down some inflexible rule of law akin to the domicile of dependency of children; instead, it merely prescribes a presumption capable of rebuttal on the facts of the individual case. Accordingly, whatever solution is adopted, the facts of the individual case will ultimately prevail. In

favour of the first solution, of continuing the presumption until the age of majority, it may be argued that it may simplify the resolution of certain cases where property has been settled on children or where the marriage of a minor is concerned. In favour of the second solution, of prescribing a specific age in the legislation, it may be argued that children of sixteen years are generally well able to form the intentions specified in section 3(2). Many persons of this age go abroad; moreover, the Court is not likely in many cases to order a child of 16 or 17 to live with its parents. The third solution, of adopting the more subject criterion of the maturity of the individual child, may have much to recommend it in theory but seems to us likely to be difficult to operate in practice, as well as leading to considerable uncertainty in specific cases.

26. After much consideration, the Commission has concluded that, on balance, the second solution is to be preferred, with the legislation specifying the attainment of 16 years as the date beyond which the presumption is not to apply. This solution seems likely to offer the most realistic approach, whilst at the same time creating no undue difficulties for courts or non-judicial agencies. The practical difference between the first and second solutions is likely to be small but in those cases where a difference may arise the second solution appears more likely to provide an appropriate result.

27. Other aspects of habitual residence must now be mentioned. The General Scheme (section 6) provides that a person may have his habitual residence only in one State and that he is deemed to have his habitual residence in that State until such time as he acquires an habitual residence in another State. It is necessary for the legislation to provide that one be capable of having an habitual residence only in one State since this

removes the possibility of a person's status or legal rights being determined by conflicting systems of law. Moreover, the definition of habitual residence that has been adopted does not lend itself to a person's having an habitual residence in more than one State. (This is one of the advantages that is seen as flowing from the adoption by section 3(2) of the concept of "the centre" of a person's personal, social and economic interests). The provision deeming a person to have an habitual residence in one State until such time as he acquires it in another is based on the view that this is the best way to deal with the problem of the apparent abandonment of one habitual residence without the clear subsequent acquisition of another.

28. On the question of testamentary capacity, it seems desirable that the legislation should specify that the capacity of a testator should be determined by the law of his habitual residence at the time of the execution of the will. Section 7 of the General Scheme gives effect to this policy. A testamentary disposition made abroad is valid as to form if it complies with the internal law of the place in which the testator had his domicile or his habitual residence "either at the time when he made the disposition or at the time of his death" - section 102(1)(c) and (d) of the Succession Act 1965 (No.27). The Commission considers that there is no need to follow the provision in the 1965 Act (which incidentally adopts the wording of the Hague Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions - 5 October 1961). There is a well known distinction between the formal and the substantive requirements of a will, as there is also between the formal and the substantive requirements of marriage. In other words a different choice of law rule applies where the issue is that of the formal validity of a will from that which applies where the issue is the essential validity of a will.

The capacity of a testator (like the capacity of a person to marry) is a matter of essential validity.

29. Section 9 of the General Scheme deals with the question of the spouse's rights to maintenance after a decree of divorce, legal separation, nullity or annulment by default in a State in which the defaulting spouse did not have his or her habitual residence. The matter is discussed at pages 35 and 40 of the Working Paper and particular reference is made to the English case of Wood v Wood [1957] 2 All E.R. 14, which followed the approach adopted in a number of decisions of the United States Supreme Court.

30. The proposals in this Report will, if implemented, mean that the domicile of dependency rule (referred to supra, at pp. 1-2) will no longer obtain in Irish law. The existing rule as to the recognition of foreign divorces and legal separations is based on the assumption that a husband and wife always have a common domicile. This rule now needs to be reviewed in the light of the fact that domicile of dependency will no longer apply. On one view the effect of the proposed legislation would be that a foreign divorce would be recognised here only where both parties have their habitual residence in the country where the divorce was granted. This would mean that foreign divorces would not be recognised in a number of cases where they would be recognised under existing law. On the other hand, it has been represented to us that the effect of abolishing the domicile of dependency would be to leave a lacuna in the law as to recognition of foreign divorces. On this view the present recognition rule is premised on the supposition that the husband and wife always have a common domicile so that it could not be regarded as still applying in a situation where this supposition could no longer be made. The Commission is now examining the whole area of the recognition of foreign decrees of divorce and legal separation having

particular regard to the provisions of the Hague Convention on the Recognition of Divorces and Legal Separations - concluded 1 June 1970. The Convention, in the preparation of which Ireland played an active part, has been ratified or adhered to by ten countries, including the following Member States of the European Economic Community: Denmark, the Netherlands and the United Kingdom. Enactment of the Convention's provisions in Irish law would have many advantages since it provides rules for recognition that represent the fruits of many years' work by legal experts of both Common Law and Civil Law traditions. The Commission is conscious of the close relationship between the proposals in the present Report and the recognition of foreign divorces, legal separations and annulments and hopes to present a report on this subject at an early date. The Commission would welcome submissions from interested persons and bodies.

31. It should be noted that this Report is concerned only with the domicile of natural persons. It does not deal with the so-called "domicile" of a trust or with what is sometimes referred to as the "domicile" of a corporation. The concept of the domicile of a trust is to be found in Article 5(6) of the EEC Convention on jurisdiction and the enforcement of judgments in civil and commercial matters of 27 September 1968 (as amended by the Convention of Accession of 9 October 1978) - the Brussels Convention. Professor A.L. Diamond has suggested that the concept as in the Convention may refer to "the country whose law governs the trust". (See his "The Trust in English Law", Rivista di diritto internazionale privato e processuale, No.2, 1981, p. 304. See also para. 114 of Professor Peter Schlosser's Report on the Convention of Accession, quoting a statement from Professor A.E. Anton's Private International Law (1967) as to what the domicile of a trust is "thought to be" - Official Journal of the European Communities 1979, No. C.59/71.)

Specific provision for the domicile of a trust will have to be made in the legislation allowing for the ratification of the Brussels Convention, as was done in section 45 of the British Civil Jurisdiction and Judgments Act 1983.

32. Dicey and Morris point out in The Conflict of Laws (10th ed. (1980)) at p. 727 that "statutes occasionally and infelicitously attribute a domicile to corporations". They go on to say that the attribution is achieved by way of analogy with the domicile of origin which is ascribed to every natural person upon his birth, and that accordingly a corporation is domiciled in the country under whose law it was created. On the other hand, the residence of a corporation is the country where the central management and control is exercised. (See A.W. Scott's Private International Law (2nd ed. (1979) at pp. 34 and 203.)

APPENDIX

GENERAL SCHEME OF A BILL TO REFORM THE LAW BY SUBSTITUTING
"HABITUAL RESIDENCE" FOR "DOMICILE" AS A CONNECTING FACTOR FOR
THE PURPOSE OF THE CONFLICT OF LAWS

1. Provide that the Act may be cited as the Conflict of Laws (Habitual Residence) Act 1983.

2. Provide that where the relationship between a person and the law of a State or part of a State is determined by the domicile of that person it shall, as from the passing of this Act, be determined by his habitual residence so that the connecting factor or point of contact between that person and a particular system of law will, on and after the passing of this Act, be his habitual residence instead of his domicile.

Note: It is proposed in this section to substitute the concept of habitual residence for that of domicile. It is considered that the concept of domicile, as it has evolved, suffers from artificiality as a test in determining the country with which a person has the most substantial or real connexion. Habitual residence is being increasingly used in International Conventions and in municipal law as a connecting factor. (See, for example, Article 5 of The Hague Convention to Regulate Conflicts between the Law of the Nationality and the Law of the Domicile 1955; Article 2 of the Convention on the Recognition of Divorces and Legal Separations 1970; the Succession Act 1965, section 102(1)(d); and the Air Navigation and Transport Act 1973, section 11.) The concept has also been used (1) in British statutes (e.g., the Wills Act 1963, the Recognition of Divorces and Legal Separations Act 1971, and the Domicile and Matrimonial Proceedings Act 1973) and (2) in the E.E.C. Convention on Jurisdiction and the Recognition and Enforcement of

Judgments and the E.E.C. Convention on the Law Applicable to Contractual Obligations, both of which are to be ratified by Ireland.

3. (1) Provide that the habitual residence of a person shall be determined having regard to the centre of his personal, social and economic interests.
- (2) Provide that, in making a determination under subsection (1), account shall be taken of the duration of the interests therein specified and of the intentions of the person relative thereto.
- (3) Provide that the habitual residence of any person shall not be determined by that of a spouse, a parent or any other person.

Note: This section defines habitual residence in broad terms. In determining the centre of the person's personal, social and economic interests account must be taken of the duration of the interests and his intentions relative thereto. A more elaborate definition is avoided as it might result in undue weight being given to certain factors. For another and similar definition of "habitual residence", see Rule No.9 of the Residence Rules in the Annex to the Council of Europe Standardisation of the legal concepts of "domicile" and of "residence" (Strasbourg 1972). See also Professor David F. Cavers, "Habitual Residence": A Useful Concept?, 21 American University Law Review 475 (June 1972). Subsection 3 is included to make clear that doctrines analogous to the dependency of domicile rule will have no application in determining habitual residence.

4. (1) Provide that although the habitual residence of one spouse does not depend upon that of the other spouse, the habitual residence of one spouse may be taken into

account in determining the habitual residence of the other spouse.

- (2) Provide that, where the spouses are residing together, they shall each be presumed to have the same habitual residence, unless the contrary is shown.

Note: Subsection (1) is designed to make it clear that, although each spouse has an independent habitual residence, the habitual residence of the one spouse may be taken into account in determining that of the other. Subsection (2) is designed to simplify matters by providing that, where the spouses are residing together, they are to be deemed to have the same habitual residence, unless the contrary is shown. In other words, common residence will create a rebuttable presumption, but not an absolute rule.

5. Provide that a child under the age of sixteen who has not been married shall be presumed to have the habitual residence of his parents (including adoptive parents) or of that parent with whom he has his home unless the contrary is shown or unless the circumstances indicate otherwise.

Note: This section is designed to provide an uncomplicated solution to the question of the habitual residence of a child. It creates a rebuttable presumption that a child under the age of sixteen has the habitual residence of his parents or the parent with whom he has his home. The rule does not give a specific solution for every case, but provides a general solution to all cases.

6. Provide that a person may have his habitual residence only in one State or territorial unit of a State and that he shall be deemed to have his habitual residence in that State until such time as he acquires an habitual residence in another State.

Note: Existing concepts such as residence and ordinary residence admit of residence in more than one State at the same time. Habitual residence is intended to identify the State with which a person has the most substantial or real connexion. Accordingly, this section provides that a person may have his habitual residence only in one State or territorial unit of a State. In the interest of continuity a person's habitual residence in one State is deemed to persist until he acquires an habitual residence in another State.

7. Provide that the capacity of a testator is to be determined by the law of his habitual residence at the time of the execution or confirmation of his will or other testamentary disposition.

Note: This provision specifies that the capacity of a testator is to be determined by the law of his habitual residence at the time of the execution or confirmation of his will or other testamentary disposition (rather than at the time of his death).

8. Provide that where the State of origin used the concept of "domicile" as a test of jurisdiction in regard to decrees of divorce, legal separation, nullity or annulment of marriage, or restitution of conjugal rights, "habitual residence" shall for the purposes of recognition of any such decree be deemed to include "domicile" as the term is used in that State.

Note: This provision follows *mutatis mutandis* that contained in Article 3 of the Hague Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations.

9. Provide that a spouse's right to maintenance shall not be affected by the fact that the other spouse has obtained by

default a decree of divorce, legal separation, nullity or annulment in a State in which the defaulting spouse did not have her habitual residence.

Note: The object of this section is to declare in statutory form the doctrine of divisible divorce. See Article 14(3) of The Hague Convention on the Law Applicable to Maintenance Obligations (2 October 1973), which was inserted in the Convention at the instigation of Ireland and of the United States, and para. 29 of the Report *supra*. See also the English Law Commission Report, Financial Relief After Foreign Divorce (1982) Law. Com. No.117.