THE LAW REFORM COMMISSION

DOMICILE AND HABITUAL RESIDENCE

CHAPTER 1 : INTRODUCTION

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)(Prl. 5984)).

2. Pursuant to this provision of the Act, the Attorney General submitted to the Law Reform Commission for its examination three matters, including the subject of 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 the organisations and individuals listed in Appendix - on page 106 infra. The Commission was also in communication with law reform agencies, lawyers and jurists in other countries. The Commission acknowledges with gratitude the help and information, which was so freely given, particularly that given by Dr J.H.C. Morris and Dr P.M. North.

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, particularly as dependent domicile arises in the case of minors (children under the age of majority) and mentally disordered persons as well as in the case of married women. Moreover, the constitutional problem raised by Mr Justice Walsh in Gaffney in regard to married women would also seem to arise in regard to minors - in so far as the common law rule discriminates against the mother. Where the father is alive, the child, if legitimate, takes his domicile of origin from him under that rule. (See, however, In re Tilson, /1951/ I.R. 1.)

5. In the present Working Paper, the Law Reform Commission sets out its provisional views on the subject and on possible

avenues of reform. The Commission invites comments on the Working Paper from interested persons and organisations, and from the general public. A Report will be published in due course after the Commission has reviewed the subject in the light of the comments that it receives.

CHAPTER 2 : THE NATURE OF DOMICILE

6. The concept of domicile[1] is of considerable importance in a number of areas of law. Domicile is a "connecting factor" or link between a person and the legal system or rules that will apply to him in specific contexts, such as the validity of a marriage, matrimonial causes (including jurisdiction in, and recognition of, foreign divorces, legal separations and nullity decrees), legitimacy, succession and taxation. Thus, for example, the law of the country of the domicile of a person will determine whether, as regards such requirements as age and capacity, he or she may validly be married elsewhere and whether he or she may obtain a divorce that will be recognised elsewhere.

7. The law relating to domicile is complex and in a number of respects uncertain. The domicile of a person is, essentially, the country where he or she intends to reside permanently or indefinitely[2]. Every person must have a domicile, and it is not possible at any time to have more than one domicile. There are three types of domicile: domicile of origin, domicile of choice and domicile of dependency.

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[1] See generally, Dicey and Morris on the Conflict of Laws, Ch.7 (10th ed., 1980).

[2] Id., p. 100 et seq.

8. The domicile of origin is the domicile that every person acquires at birth. A legitimate child born during the lifetime of his father has his domicile of origin in the country in which the father is domiciled at the time of the birth, and an illegitimate child or a legitimate child born after his father's death has his domicile of origin in the country where his mother is domiciled at the time of the birth.

9. A domicile of choice is acquired by an independent person by residing in a country with the intention of continuing to do so permanently or indefinitely. Any circumstances throwing light on the question may be considered in determining whether a domicile of choice has been acquired. Where a person abandons his domicile of choice in a particular country but does not acquire a new domicile elsewhere, his domicile of origin will revive and continue to govern his legal position until he acquires a new domicile of choice or of dependency.

10. A domicile of dependency arises in respect of children under 21 years, married women and mentally disordered persons. Their domicile will generally be the same as, and will change (if at all) in accordance with, the domicile of the person on whom they are deemed to be legally dependent. Thus, a legitimate child's domicile during his minority will depend on the domicile of his father during the father's lifetime and (in general) on that of his mother after his father's death. An illegitimate child's domicile during his minority will (usually) depend on his mother's domicile.

11. The domicile of a married woman (whether or not she has reached the age of 21) is the same as, and changes with, that of her husband. If the husband is under 21, the wife's

domicile will depend on the domicile of the person on whom her husband is legally dependent - in the normal case her father-in-law.

12. The domicile of a mentally disordered person would appear to be that which he had before he became ill. If, however, he becomes ill during his minority, he will be treated as though he were a minor even after he has attained his majority. It seems, however, that the domicile of a married woman who becomes mentally disordered is not affected by her illness and that, accordingly, her domicile will continue to be determined by that of her husband.

13. A rather confusing aspect of domicile arises in respect of what is known as proleptic (anticipatory) domicile. As has been indicated supra a wife has at common law the domicile of her husband. However, if her husband is domiciled abroad, she may, in England and in Scotland, if the marriage has been annulled or dissolved by a court of the domicile, seek a declaration or declarator as to the validity of the foreign annulment or foreign divorce, hoping that it will not be granted. The court in England and in Scotland, in order to assume jurisdiction, accepts without argument that the facts as alleged in her petition are correct, thus deeming her to have acquired an English or Scottish domicile and allowing her to have the court refuse recognition to her husband's foreign decree. If the law in Ireland is as suggested in the reservation of Mr Justice Walsh in Gaffney v Gaffney (supra) there is no need for a wife in Ireland to seek to avail herself of the fiction of proleptic domicile by asking the Irish courts to follow by analogy the decisions of the English and Scottish courts before the problem was solved in the British Domicile and Matrimonial Proceedings Act 1973 (c. 45), which provides in section 1 for the abolition of the wife's dependent domicile. (See P.M. North, Private International Law of Matrimonial Causes, Etc. (1977), pp. 87-88, 99-100).

CHAPTER 3 : CONNECTING FACTORS OTHER THAN DOMICILE - NATIONALITY AND HABITUAL RESIDENCE

14. Domicile is a connecting factor that commands support in the law of a number of countries, primarily those where the common law prevails. Apart from Ireland, England, the United States and the British Commonwealth, Denmark, Norway and Brazil generally adhere to the domicile principle although, as will be seen, this statement must be qualified in a number of important respects. There are, however, other connecting factors that command considerable support in many countries. Of these the most important are nationality and habitual residence. Accordingly, the link that connects a person to a particular system of law may be his or her domicile, his or her habitual residence or his or her nationality.

Nationality

15. Nationality represents a person's political status, whereby he or she owes allegiance to some particular country. Apart from cases of naturalisation, it depends essentially on the place of birth of that person or on his or her parentage. Nationality as a connecting factor was first adopted in France in 1803 with the promulgation of the Code Napoléon, in preference to domicile, which had generally prevailed throughout Europe before then. It gained very great support in Continental Europe as a result of the influence of Mancini in Italy. At present it is the basic connecting factor in the law of most continental European countries, some South American states and Japan.

16. The respective merits and demerits of domicile and nationality as connecting factors have been much debated. The issue is one in respect of which, as a leading commentator has stated, "/o/ne cannot reasonably be dogmatic"[1]. Briefly, the merits of nationality not shared by domicile are as follows:

(1) A person's nationality is normally an easy matter to determine, whereas a person's domicile is frequently quite difficult to establish. The difficulty can spring from the uncertainty of determining a person's intention on the available facts, or it may result from the application of the legal principles relating to domicile (e.g., the rules relating to domicile of dependency or domicile of origin). These uncertainties may compel those concerned with, for instance, administration of estates to have recourse to legal proceedings to settle the matter.

(2) Many aspects of the law relating to domicile result in the determination of a person's domicile in an artificial and inappropriate manner. This may arise particularly in cases where the domicile of origin revives in an artificial manner. For example, a man born in New York of Irish-domiciled parents may acquire a New York domicile when he reaches majority; some time later he may abandon this domicile but die before acquiring a new domicile of choice in the neighbouring State of New Jersey. To apply Irish law to certain succession questions in such a case might be inappropriate and contrary to the wishes of the deceased person.

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[1] R.H.Graveson, Conflict of Laws, 190 (7th ed., 1974).

17. On the other hand domicile has certain merits as a connecting factor that nationality does not have.

(1) The law of the country of one's permanent home, which is the notion of domicile, is arguably a more appropriate one by which to determine questions of status and property than that of one's nationality, with which one may have little or no practical connection. For example, an Irishman emigrating to the United States may never obtain citizenship in that country but may live for fifty years in New York and never return to Ireland or have any interest in doing so. It may be argued that to apply Irish law to questions of that man's status or of his property at the time of his death (which an application of nationality as a connecting factor would require) is less appropriate than to apply the law of New York, where he had long since become domiciled and with which he had (to use the term in section 102(3) of the Succession Act 1965 (No.25)) "the most real connexion".

(2) In countries such as the United States, Canada, Australia and Britain, where the same nationality embraces more than one legal system, the notion of domicile serves as a practical standard, since it permits the application of the law of the particular legal system in the State or Province, as the case may be. Nationality does not permit this. Thus, for example, since one may speak of the law of Texas in respect of succession or divorce - but not of the law of the United States - the notion of nationality as a connecting factor will not work, so that some modification of the nationality principle is required.

(3) Whilst a person may have only one domicile, he may have more than one nationality or he may have none. In such cases nationality as a connecting factor may become complex or inoperative.

Habitual Residence

18. Habitual residence has for some time been used as a connecting factor. It 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 legislation[2] and in Britain it is being used to an increasing degree in legislation in such important areas as matrimonial jurisdiction[3], recognition of foreign divorces[4] and succession[5]. Other European countries have also adopted the concept in their legislation. A British authority has recently stated that habitual residence

> "appears to be the most appropriate available concept to meet the demands of a fluid, modern society"[6].

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[2] In relation to the formal validity of wills: Succession Act 1965, Part VIII (No. 27).

[3] Domicile and Matrimonial Proceedings Act 1973 (c. 45).

[4] Recognition of Divorces and Legal Separations Act 1971, section 2 (c. 53).

[5] Wills Act 1963, section 1 (c. 44)(formal validity of wills).

[6] Graveson, Conflict of Laws, 194 (7th ed., 1974).

19. 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.

20. Nevertheless, 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 for

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 country in which he wishes to reside permanently.

21. It seems, therefore, that neither domicile nor habitual residence afford 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. However, if the connecting factor is habitual residence, these matters would, on one view, almost certainly be subjected to English law. It might be argued that the law of the country with which he 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 it may be argued 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.

22. The Commission is of the provisional view that, on balance, havitual 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. In addition, it would solve the problem of proleptic domicile, dealt with supra at p. 6.

23. "Habitual residence" is now the term being used in the various Hague Conventions on Conflict of Laws, in enactments in the various States ratifying these Conventions and in other enactments. (See, for example, subsection 102(2) of the Succession Act 1965 (No.27) and subsections 11(4) and 11(5) of the Air Navigation and Transport Act 1973 (No.29)). It should be noted that "habitual residence" and cognate terms are nowhere defined. This, as is pointed out in Dicey and Morris, Conflict of Laws, (1980, 10th ed., pp. 144, 145), "has been a matter of deliberate policy". Some civil law systems use the concept of *domicile* and the concept of habitual residence; but *domicile* in the civil law sense is quite different from domicile in the common law sense. For example, article 2 of the Swiss draft statute on private international law refers to both *domicile* and *residence habituelle* (Ger. Wohnsitz and gewöhnlicher Aufenthalt); and

the domicile of a person is defined in article 19 as the country which is the centre of his activities - où se trouve le centre de ses interêts. The draft Swiss law is published as volume 12 of Études Suisses De Droit International (Zürich 1978).

24. On 15 June 1955 there was concluded at The Hague a Convention to Regulate Conflicts Between the Law of the Nationality and the Law of the Domicile. Only two States (Belgium and the Netherlands) have so far ratified the Convention although five States (Belgium, France, Luxembourg, the Netherlands and Spain) have signed it. The Convention is limited in scope and does not resolve conflicts between the law of the nationality and the law of the situs (the law of the place where the property in question is situated). The main rules of the Convention have been closely followed in the Convention concerning the International Administration of the Estates of Deceased Persons (concluded on 2 October 1973) in the preparation of which Ireland took a prominent part. The 1955 Convention is discussed in the note drawn up by the late Professor L.I. De Winter (First delegate of the Netherlands) for the Twelfth Session of the Hague Conference (1972) and in the speech of the Irish delegate to the Fourth Commission of that Session. (See Actes et Documents de la Douzième Session, Tomes I et II (La Haye 1974) at pp. I-62, II-23 and II-124.)

25. In the present Working Paper, the Commission does not come to a final view on the subject. Instead it analyses the alternative solutions of, firstly, 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 appear to the Commission to be desirable) and, secondly, of replacing

domicile by habitual residence as a connecting factor. In both cases a draft Scheme of Legislation is included, in order to facilitate discussion. The Commission intends to furnish a Report on the subject after it has received submissions from interested persons and organisations in relation to the matters covered in the Working Paper.

26. In our law (subject to what is stated below) a woman's domicile on marriage becomes that of her husband and remains so until the marriage is terminated by the death of either spouse or by a dissolution that is recognised in this country. Thus, if a woman born and at all times domiciled in Ireland marries a man domiciled in France, her domicile immediately becomes French even though she may never have been in France. If her husband subsequently moves to New Zealand, she will acquire a domicile in New Zealand whether or not she has ever been to New Zealand. Even where the spouses have separated or the wife has obtained a divorce a mensa et thoro from her husband, the wife's domicile will be dependent on that of her husband.

27. In the Supreme Court case of Gaffney v Gaffney[1], Mr Justice Walsh stated:

> "The law has been that during the subsistence of a marriage the wife's domicile remains the same as, and changes with, that of her husband. For the purpose of this case it is proper to adopt this view, although it is possible that some day it may be challenged on constitutional grounds in a case where the wife has never physically left her domicile of origin while her deserting husband may have established a domicile in another jurisdiction".

The result of this statement appears to be that, where a married woman never leaves the country of her domicile of

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[1] /1975/ I.R. 133, at 152. For analysis of the decision, see Duncan, (1975) 9 Ir. Jur. (N.S.) 59, P.M. North, Private International Law of Matrimonial Causes Etc., (1977) 379 ff.

origin, her domicile does not change if her husband deserts her and establishes a domicile elsewhere. This would clearly have repercussions in the area of divorce recognition, for example, since it would mean, with respect to a woman whose domicile of origin was Irish and who never left Ireland, that a divorce obtained abroad by her husband if he deserted her and established a domicile elsewhere would not be recognised here. This is because the concept of dependent domicile in the case of a married woman may well be contrary to the Constitution.

CHAPTER 5 : THE DOMICILE OF MARRIED WOMEN IN OTHER COUNTRIES

(1) England

28. The position in England was formerly the same as it was in Ireland prior to enactment of the Constitution in 1937. The domicile of a married woman was dependent upon that of her husband whether or not the spouses were living together or separated by agreement or by judicial decree[1]. Since the Nineteen Twenties, there has been a slow but steady progress in England towards reform of the law on the subject. The Matrimonial Causes Act 1937, section 13, provided that a woman whose husband had deserted her or had been deported, and had immediately beforehand been domiciled in England, should be entitled to petition for a divorce, even though her husband had subsequently changed his domicile.

29. In 1954, the Private International Law Committee, established by the Lord Chancellor in 1952, produced its First Report, on the subject of domicile[2]. Whilst conceding that to enable a married woman to have an independent domicile would be "in conformity with modern tendencies"[3], the Committee recommended that the domicile of a married woman should remain that of her husband until

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[1] Lord Advocate v Jaffrey /1921/ A.C. 146 (H.L., 1920), Attorney-General for Alberta v Cook /1926/ A.C. 444 (P.C.).

[2] Cmd. 9068.

[3] Id., para. 17.

separated from him by court order, in which case she could acquire an independent domicile[4]. The Committee defended this limited proposal on the basis that, in the case of a judicial separation,

> "the relations of the spouses and their property rights have been investigated and put on a new basis by the decree of a court which has considered the whole matrimonial history"[5].

There was no immediate legislative response to the Committee's proposals, probably because of the fact that the Royal Commission on Marriage and Divorce (the Morton Commission) was reaching the final stage in its deliberations. The Commission reported in December 1955[6], and it recommended that the general principle of domicile of dependency of married women should continue, on the basis primarily that the "unity of marriage"[7] required it. The Commission stated that -

> ".... to say that a husband and wife are at liberty to acquire and retain separate permanent homes seems to us entirely inconsistent with a lifelong union and indeed with the duty of one spouse to cohabit with the other spouse"[8].

But the Commission recommended that the general principle of dependency should not apply for the purposes of divorce

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[4] Id., para. 18.

[5] Id.

[6] Report of the Royal Commission on Marriage and Divorce 1951-1955, Cmd. 9678.

[7] Id., para. 82.

[8] Id.

jurisdiction where a married woman was living separate and apart from her husband[9]. Nothing came of the Commission's recommendations on the matter.

30. In 1958, a Private Member's Bill on domicile was introduced by Lord Meston in the British House of Lords. The Bill contained a number of the main recommendations made by the Private International Law Committee, including the proposal that a married woman judicially separated from her husband should be capable of acquiring an independent domicile. At Committee Stage an amendment was moved by Lord Silkin proposing that a married woman should have an independent domicile in all cases. This was withdrawn on the assurance by the Lord Chancellor, Viscount Kilmuir, that an amendment to similar effect would be moved at Report Stage. This was duly done and the Bill as amended was passed by the House of Lords. The Bill was subsequently dropped, however, in the face of representations by businessmen from the United States and the British Commonwealth who were resident in Britain and who feared that certain proposals in the Bill (not connected with the domicile of married women) would prejudice their position with regard to taxation.

31. The following year, Lord Meston introduced another Bill (the Domicile Bill 1959) which was drafted so as to have regard to these fears. Clause 3 of that Bill provided (in effect) that a married woman should have an independent domicile in all circumstances. The Lord Chancellor welcomed

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[9] Id., para. 825.

the proposal describing it as "a most important principle"[10]. The Bill, however, suffered the same fate as its predecessor, the pressure of foreign businessmen being sufficient to ensure that it went no further than the House of Lords. This difficulty could have been avoided by providing that nothing in the proposed legislation should affect any legislation relating to income tax, capital acquisitions tax, capital gains tax, corporation tax, etc. (See head 10 of the General Scheme for an Age of Majority Bill (p. 92 of Working Paper No.2-1977) and section 1(4) of the English Law Reform Act 1969 (c. 46) - now replaced by section 16(1) of the English Finance Act 1969 (c. 32).)

32. After the defeat of the Bills, the Private International Law Committee was invited by the Lord Chancellor, Lord Dilhorne, to reconsider the recommendations for the reform of the law of domicile that had been contained in its First Report, in the light of the objection taken to the Bills, and to recommend what provisions would be required to avoid any legal difficulties that might be expected from the law enabling a married woman to acquire an independent domicile. The Committee reported, in its Seventh Report, in 1965[11].

33. On the domicile of married women, the Report adopted a conservative position. The Committee was of the opinion that "serious legal difficulties"[12] were in the way of enabling a wife to acquire an independent domicile for all purposes. These difficulties, as set out by the Committee, appear to be less serious than it perceived them to be.

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[10] H.L. Debs., vol. 214, col. 242.

[11] Cmd. 1955.

[12] Id., para. 24.

The major one, discussed at some length, was that a married woman might not be able to acquire the domicile of her husband although she wished to, until she resided in the country of her husband's domicile with the intention of living there permanently. It would appear, however, that, while such cases might cause legal difficulties, they would occur only rarely. (Of course, if the concept of habitual residence were to replace that of domicile the problem would not arise.)

34. The Committee did, however, raise more practical objections to granting an independent domicile to a wife in all cases. The rule regarding the domicile of children would have to be reviewed, as would the private international law rules relating to matrimonial property and succession. More generally the Committee stated that:

> "the conflict of laws is liable to throw up unexpected problems and even if we had gone through all the rules dealing with such subjects as marriage, legitimacy and succession with this point in mind (which we have not attempted to do) it would be rash to say that there were no other cases in which the existing rules would not work if the husband and wife had separate domiciles"[13].

The Committee accordingly repeated[14] the recommendation made in its First Report that only in cases where a judicial separation had been obtained should a married woman be capable of acquiring an independent domicile. There was no legislative response to the Committee's Reports during the Nineteen Sixties, but the subject of domicile was considered in two other reports, the Report of the Committee on the Age

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[13] Id., para. 29.

[14] Id., para. 33.

of Majority (the "Latey Report")[15] and the Report of the Committee of Enquiry to Examine the Law Relating to Women (the "Cripps Report")[16].

35. The Latey Report on the age of majority was published in 1967. The Report dealt only briefly with the question of domicile, stating that the Committee had "received little evidence on it"[17]. The Committee considered that, in the light of previous reports on the general subject of domicile, it was "not justified"[18] in making any recommendations concerning the law of domicile affecting persons under 21 other than that the age for capacity to acquire an independent domicile should be reduced to 18 years; and the Report so recommended[19].

36. The Cripps Report (the Report of the Committee of Inquiry set up by Mr Edward Heath M.P. to examine the law relating to women) was published by the Conservative Political Centre in 1969. It was entitled Fair Share for the Fair Sex. On the question of domicile, the authors of the Report considered that the domicile of dependency

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[15] Cmnd. 3342 (1967).

[16] Conservative Political Centre, No. 433, March 1969.

[17] Supra, fn. 15, para. 499.

[18] Id., para. 502.

[19] Id., para. 504.

of married women, "which has its origin in the common law subjection of the wife to the husband, is a clear example of discrimination and produces some absurdities"[20]. Whilst the Committee considered that "it would produce overcomplication and other undesirable results (for example in relation to tax) if a husband and wife living together had separate domiciles"[21], they stated that they could "see no justification for a wife having to continue to keep her husband's domicile once the couple are in fact living separate and apart (a situation as to the existence of which Courts often decide with no insuperable difficulty) whether or not there is any Court Order, divorce or judicial separation"[22]. Accordingly, the Committee recommended that:

> "a married woman, once she is living separate and apart from her husband (or ex-husband), should be treated just the same as a single woman and should be entitled to her own domicile quite independently of his"[23].

37. The English Law Commission and the Scottish Law Commission, which examined the question of married women's domicile in the limited context of jurisdiction for certain matrimonial proceedings, recommended[24] in 1972 that for the

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20 Cripps Report (supra fn. 16) at 18.

21 Id.

22 Id.

23 Id., at 19.

24 Law Com. No.48, Report on jurisdiction in Matrimonial Causes (1972); Scot. Com. No.25, Report on jurisdiction in Consistorial Causes Affecting Matrimonial Status. See also the Report of the Morton Royal Commission on Marriage and Divorce (1951-55)(Cmd. 9678) which in para.825 and Appendix IV (para. 6) recommended that for the purposes of divorce jurisdiction a married woman should be able to claim a separate domicile. (Cp. the concept of proleptic domicile, dealt with supra).

purposes of jurisdiction in divorce, nullity and judicial separation, the domicile of a married woman should be determined independently of that of her husband.
The following year, the Domicile and Matrimonial Proceedings Act 1973 finally resolved the question, but went further by allowing a married woman to claim a separate domicile in the same way as any independent person may. The Act was the result of a Private Member's Bill introduced in 1972 by Mr Ian MacArthur, M.P. Section 1(1) of the Act provides that the domicile of a married woman:

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

Section 1(2) of the Act provides that what had been a woman's domicile of dependency is to be treated as being retained by her (as a domicile of choice, if it is not also her domicile of origin) after the enactment of the legislation:

> "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 Act also changed the law relating to the domicile of children, reducing the age at which an independent domicile could be acquired to 16 years and qualifying to some extent the rule that the father's domicile determines that of his children, by providing that, where the father and mother are not living together, the child's domicile is to be determined by that of the parent with whom he has his home. This aspect of the question will be discussed in detail in Chapter 8 infra.

38. The debates during the passage of the legislation are noteworthy for the virtual unanimity among those who contributed to them that the abolition of the domicile of

dependency of married women was a desirable reform. Very little detailed analysis of the likely practical effects of the change, however, was attempted in the debates. No attempt was made to reform the law as to the concept of domicile. Usually the question of where a person is domiciled is determined by the common law rule. However, in Ireland for the purposes of the Conflict of Laws relating to testamentary dispositions, the determination of whether or not the testator had his domicile in a particular place is to be governed by the law of that place - subsection 102(4) of the Succession Act 1965 and Article 1 of the Hague Convention on the Conflict of Laws Relating to the Form of Testamentary Dispositions (5 October 1961). This provision has been criticised on the ground that, as the concept of domicile referred to is the common law concept, French law, for example, to which the concept is unknown, could not possibly govern it. (As to *domicile* in the civil law sense, see s.v. *Domicile* in Dalloz, Nouveau Repertoire de Droit (Paris 1963) and Article 19 of the Swiss draft law on the Conflict of Laws (referred to supra at p. 13).)

(2) The United States

39. In the United States the position regarding the wife's domicile is somewhat complicated. The rule of dependency was carried over from English law but, from an early time, exceptions to this general rule were recognised. All the States conceded the right of a married woman to acquire an independent domicile for the purposes of divorce. As regards other exceptions the position was less uniform. An exception widely recognised arose where the husband had abandoned or deserted his wife. Another widely accepted exception arose where the wife had been forced to leave her husband by reason

of his violent or unreasonable conduct and a still wider exception arose where the husband had given his wife grounds for seeking a divorce although she had not actually done so. Beyond these exceptions, there was considerable conflict between the cases. Some were to the effect that a married woman, although living apart from her husband by reason of her own misconduct (desertion, for example), might nevertheless acquire an independent domicile, but there was strong authority to the contrary. In others it was held that, where the wife was living apart from her husband with his consent or mere acquiescence, she might have a domicile of her own.

40. Recently profound changes in constitutional and family law in the United States have had major repercussions in the legislative and judicial approach as to the question of domicile. Statutes in a number of States (including Alaska, Arkansas, Delaware, Hawaii, Maryland, New York, Oregon and Wisconsin) explicitly confer an independent domicile for all purposes on married women. Other States (California, for example), by repealing the legislative provisions imposing a domicile of dependency upon her, have effectively brought about the same position.

41. A large number of decisions of the United States Supreme Court have subjected laws containing sexual differentiation to scrutiny under the Equal Protection Clause of the 14th Amendment. Moreover, a number of States have passed Equal Rights Amendments, the effect of which, it is generally accepted, is to abrogate the principle of the wife's dependent domicile. More importantly, a proposed Amendment to the United States Constitution - the 27th Amendment, known as the Equal Rights Amendment - was passed by Congress in 1972. This amendment, if ratified, will require all States within two years to remove distinctions between the sexes from their

legislative provisions, including (in cases where it still remains part of the law) the concept of domicile of dependency of married women. Apart altogether from the Amendment, it is clear that the whole trend of American law is towards abandoning the concept of a married woman's domicile of dependency. The obligation of support has historically rested upon the husband and has been widely relied on to justify the concept of domicile of dependency (since, if the husband is responsible for support, selection by him of the place where the family should live has been regarded as a necessary aspect of the discharge of that obligation). However, in recent years, maintenance obligations have been placed on a more equal basis between the sexes, so that the principal rationale for the concept of dependent domicile has been swept aside. Moreover, the idea that there must be a "head of the household" has given way to the notion of joint responsibility for decisions regarding the family. Another factor worthy of note is that the emphasis on matrimonial fault has generally been greatly reduced in divorce law in the United States. The retention of some of the exceptions mentioned supra in regard to the domicile of dependency, which were premised on the notion of matrimonial fault, would clearly be out of harmony with this development.

(3) Canada

42. The domicile of dependency of married women no longer applies in respect of divorce jurisdiction, where married women have an independent domicile. Legislation in a number of provinces (including Ontario and Prince Edward Island) has provided that married women should have an independent domicile in all cases.

(4) Australia

43. The general rule in Australia is that the principle of domicile of dependency prevails. For the purposes of matrimonial jurisdiction, however, married women now have an independent domicile by virtue of section 4(3) of the Family Law Act 1975, which provides that "/i/n ascertaining the domicile of a party to a marriage for the purpose of this Act .... the domicile of a woman who is, or has at any time been, married shall be determined as if she had never been married". There is some uncertainty as to the precise scope of this limitation. One commentator has argued that, whilst a strict interpretation would apply the change in the law only to the notion of domicile whenever that occurs in the Act itself, the words should be given a wider meaning "as applying .... whenever it is necessary to ascertain a person's domicile for the purposes of exercising jurisdiction under the Act"[25].

(5) New Zealand

44. Legislation in New Zealand has conferred an independent domicile on married women. The Domicile Act 1976[26] contains a number of very useful reforms of the law relating to domicile. Section 5, which provides for the independent domicile of the wife, is drafted in a more simple style than its British counterpart (s.2 of the Domicile and Matrimonial Proceedings Act 1973).

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[25] P. Nygh, Reform of the Law of Domicile in Australia, (1976) 25 I.C.L.Q. 674, at 675.

[26] The Act is discussed by Webb, The New Zealand Domicile Act 1976, 26 I.C.L.Q. 194 (1977).

CHAPTER 6 : POLICY ARGUMENTS REGARDING THE DOMICILE OF MARRIED WOMEN

45. A number of arguments may be made in favour of enabling a wife to acquire a separate domicile:

Firstly, the policy of subjecting the domicile of a wife to that of her husband involves social and cultural assumptions that are at variance with contemporary standards.

Secondly, the concept of unity of domicile is an artificial one, which may bear no relation to the actual circumstances of the spouses. By virtue of the operation of the concept, a wife may be domiciled in a country with which she has no real connexion.

Thirdly, the concept of unity of domicile may work hardship in some cases and may easily be abused in others. A husband might avail himself of the concept in order to acquire property or other rights in circumstances where his wife would not be able to do so; conversely, a wife might avail herself of her artificial domicile in order to assert property or other rights in a country with which she has no real connexion.

Fourthly, the concept of domicile of dependency may offend against Article 40 of the Constitution in that it discriminates invidiously between persons. Whilst the concept of domicile may be said to involve a question of status rather than that of personal rights (which are protected by Article 40), it would appear nonetheless capable of being subjected to constitutional scrutiny since it is used as a "connecting factor" in determining a large number of these personal rights.

Moreover, (as has already been mentioned)[1], doubt was expressed by Mr Justice Walsh in Gaffney v Gaffney[2] as to the constitutionality of the domicile of dependency in a case where a husband changes his domicile but a wife remains in the country of her domicile of origin. The same doubt must arise in regard to the rule as to the dependent domicile of a child in so far as it discriminates between the parents. (See the judgment of the former Supreme Court in Tilson[3], referred to supra, at p. 2).

Fifthly, apart from the specific constitutional issue, the concept of domicile of dependency is out of harmony with the mainstream of the law relating to the rights and obligations of spouses - maintenance, succession and guardianship, for example - where the general principle of equality of rights applies.

46. The principal argument that has been made in favour of retaining the concept of unity of domicile is that it simplifies questions of private international law: instead of having to devise rules (which may be complex) to deal with situations where there is in reality no common domicile, the concept of unity of domicile provides a relatively simple and more readily ascertainable solution in most cases, so that spouses and their legal advisers should be able to determine their position with some confidence.

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[1] See p. 16, supra.

[2] [1975] I.R. 133, at 152.

[3] [1951] I.R. 1.

47. This argument may be called into question. Whilst it may be true that the unity doctrine simplifies the law, it does so at a price (namely, sex discrimination), which is unacceptable by contemporary standards and which, in any event, appears to offend against the Constitution. Moreover, the rules as to domicile of dependency in the case of a wife have had to be modified by statute or by judicial decision in order to allow the wife to sue in matrimonial causes; and, as has been shown supra[4], the domicile of dependency rule has in fact been ignored by the use of the fiction of proleptic domicile. Moreover, even if a system of separate domiciles involves greater complexity, the task should be to devise a system capable of coping with, or reducing, this complexity rather than to accept a system that is otherwise unsatisfactory.

48. The balance of the argument appears to the Commission clearly in favour of the principle that a married woman should have an independent domicile - as, indeed, she may well have at the moment because of the Constitution and the judgments[5] (referred to supra) of the Supreme Court and of the former Supreme Court. Moreover, if the concept of proleptic domicile were applied in Ireland, a married woman could on the basis of a fictional domicile query in an Irish court a divorce obtained by her husband in a foreign jurisdiction (with which she had no connexion whatever except such as might be implied from the unity of domicile rule). The practical implications of giving a wife an independent domicile are discussed in Chapter 7 infra.

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[4] P. 6.

[5] Tilson [1951] I.R. 1 and Gaffney [1975] I.R. 133.

CHAPTER 7 : IMPLICATIONS OF ABOLITION OF DOMICILE OF DEPENDENCY OF MARRIED WOMEN IN CERTAIN AREAS OF THE LAW

(A) RECOGNITION OF FOREIGN DIVORCES

Present Law

49. The law relating to the recognition in the State of foreign divorces would appear to be that a divorce obtained in a country of the common domicile of the spouses would be recognised here[1], subject to the constitutional issue raised in the reservation of Mr Justice Walsh in Gaffney v Gaffney[2], which has been referred to supra, and subject, in addition, to the acceptance by the Irish courts of the proleptic domicile rule adopted in other jurisdictions, which has also been referred to supra, p. 6. (It is, of course, possible that the Courts may adopt wider principles of recognition of foreign divorces at some time in the future thus enlarging the Conflict of Laws rules as they existed at the time (1 July 1937) of the enactment by the People of the Constitution). The effect of the domicile of dependency rule is that a wife is deemed to be domiciled in the country where her husband is domiciled, even though she may never have been there or desired to go there. Thus, where a husband domiciled in Ireland subsequently acquires a domicile in England, a divorce obtained by him against his wife, who has always lived here, might be recognised here subject to the constitutional doubt mentioned and to the granting of a proleptic domicile to the wife (if she wished to challenge the divorce). Conversely, on the same

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[1] See Bank of Ireland v Caffin [1971] I.R. 123 [H.C.].

[2] [1975] I.R. 133, at 152. See Duncan (1975)9 Ir. Jur.(N.S.)59.

hypothesis, if the wife left in Ireland obtained a divorce in England, simply by fulfilling the residence qualifications there, it might be recognised here on the basis of the dependency rule, even though, unlike her husband, she had not in fact become domiciled in England (other than by operation of the rule of dependency).

Implications of a Wife Acquiring an Independent Domicile

50. The granting of an independent domicile for married women would not, on a narrow interpretation, require a change in the recognition rule, namely that a divorce will be recognised only when granted in the country of the spouses' common domicile. In future, as the dependency principle would no longer operate, it would be necessary for both spouses independently to share a common domicile.

51. There are, however, reasons why a requirement of a common domicile might be considered to be too restrictive. It may be argued that since the dependency principle has effectively meant the recognition of a divorce granted in the domicile of one spouse (the husband), the other spouse (the wife) should be accorded the same treatment so that a divorce acquired by her in the country of her domicile (which is not that of her husband) would also be recognised. A major factor in the resolution of these different approaches is the fact that there exists The Hague Convention on the Recognition of Divorces and Legal Separations - concluded 1 June 1970, which deals comprehensively with the subject of recognition of divorces and legal separations. The Convention, in the preparation of which Ireland played an active part, has been ratified by 7 countries, including the United Kingdom. Enactment of its 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 Convention requires States parties to it to recognise divorces and legal separations obtained in other Contracting States "which follow judicial or other proceedings officially recognised" in those States and which are legally effective there. The Convention does not apply to ancillary orders, such as orders for maintenance or for the custody of the children, thus following what is known as the doctrine of divisible divorce. (See the decision of English Court of Appeal in Wood v Wood [1957] 2 All E.R. 14 and para. 60, p.40 infra.)

52. Article 2, which is the central provision of the Hague Convention, provides as follows:

> "Such divorces and legal separations shall be recognised in all other Contracting States, subject to the remaining terms of this Convention, if, at the date of the institution of the proceedings in the State of the divorce or legal separation (hereinafter called 'the State of origin'):
>
> (1) the respondent had his habitual residence there; or
>
> (2) the petitioner had his habitual residence there and one of the following further conditions was fulfilled -
>
> a) such habitual residence had continued for not less than one year immediately prior to the institution of proceedings;
>
> b) the spouses last habitually resided there together; or
>
> (3) both spouses were nationals of that State; or
>
> (4) the petitioner was a national of that State and one of the following further conditions was fulfilled -
>
> a) the petitioner had his habitual residence there; or

b) he had habitually resided there for a continuous period of one year falling, at least in part, within the two years preceding the institution of proceedings; or

(5) the petitioner for divorce was a national of that State and both the following further conditions were fulfilled -

a) the petitioner was present in that State at the date of institution of the proceedings and

b) the spouses last habitually resided together in a State whose law, at the date of institution of the proceedings, did not provide for divorce".

Article 3 of the Convention provides as follows:

"Where the State of origin uses the concept of domicile as a test of jurisdiction in matters of divorce or legal separation, the expression 'habitual residence' in Article 2 shall be deemed to include domicile as the term is used in that State.

Nevertheless, the preceding paragraph shall not apply to the domicile of dependence of a wife".

53. The Convention contains a number of highly important provisions that require Contracting States to elect between alternative policies. Thus, for example, Article 7 permits, but does not require, States to refuse to recognise a divorce when, at the time it was obtained, both parties were nationals of States which did not provide for divorce (and of no other State). Article 19 permits a State when ratifying or acceding to the Convention to reserve the right, firstly, to refuse to recognise a divorce or legal separation between two spouses who are nationals of the State in which recognition is sought (and of no other State) where "a law other than that indicated by the rules of private international law" of the State of recognition was applied in granting the divorce, unless the result reached is the same as that which would have

been reached by applying the law indicated by those rules; and, secondly, to refuse to recognise a divorce when, at the time it was obtained, both parties habitually resided in States that did not provide for divorce. A State availing itself of the latter reservation may not, however, refuse recognition by the application of Article 7. It may be noted that the first reservation provided for in Article 19 was allowed in order to cover the position in the Netherlands while the rule contained in the second reservation was adopted at the request of Ireland. (See tome II (Divorce) of Actes et documents de la Onzième session (La Haye/1970).

54. Article 20 of the Convention permits a State whose law does not provide for divorce to reserve the right not to recognise a divorce if, at the date it was obtained, one of the spouses was a national of a State whose law did not provide for divorce. This article should be read in conjunction with Articles 7 and 19 (dealt with supra) and also with Article 6, which prevents a State in which recognition is sought examining the merits of the divorce decision.

55. As may readily be appreciated, the Convention raises many questions for resolution before Ireland could adhere to it. The task of analysing the implications of the Convention as a whole and of considering the respective merits of the alternative policies that it embraces is one that involves extended research and deliberation. Work in this regard has been in progress for some time, and the Commission will publish a Working Paper on the subject shortly. If the proposals in the present Working Paper with regard to domicile of dependency of married women are implemented it will mean that a foreign divorce obtained in the country of the husband's domicile will not be recognised here, unless the wife is independently domiciled there.

However, if the concept of the habitual residence is introduced, a divorce in the country of the common habitual residence will be recognised. There is, of course, no such thing as the wife's habitual residence of dependency.

(B) DIVORCE A MENSA ET THORO (LEGAL SEPARATION)

Present Law

(1) Jurisdiction

56. It would appear that either the domicile or the residence of the respondent in this country will ground jurisdiction for these proceedings[2], although in a case decided in 1959[3] the view was expressed that the residence of both parties was required.

(2) Recognition of Foreign Decrees

57. There is a dearth of authority in this country. English decisions are also scanty, but it would appear that, if they were to be followed here, decrees made in the country of the domicile of the respondent and perhaps also of his or her residence would be recognised here. The 1970 Hague Convention covers legal separations as well as divorces.

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[2] Cf. Sproule v Hopkins, /1903/ 2 I.R. 133. See P.M. North, op. cit., 360.

[3] Hood v Hood, /1959/ I.R. 225, at 234-235. See also, the dictum of Andrews, J., in Sproule v Hopkins, to the effect that the domicile of the respondent would suffice to ground jurisdiction.

(3) Implications of abolition of domicile of dependency

58. The abolition of the dependency rule would have few practical effects, and those that it would have would seem to be beneficial, since they would be more in harmony than at present with the factual circumstances of the spouses. The fact that residence is an alternative ground of jurisdiction at present reduces the importance of the change. In the case of recognition of foreign decrees, where the ground of residence is less certain, the effect of abolishing the dependency principle would nevertheless appear to be satisfactory. There seems to be no reason why a decree obtained by a husband against his wife in the country of her domicile should not be recognised here when, under existing law, a decree obtained by a wife against her husband in the country of his domicile would appear likely to be recognised here (that is, of course, if the concept of domicile of dependency is not repugnant to the Constitution).

(C) MAINTENANCE PROCEEDINGS

Present Law

59. The Family Law (Maintenance of Spouses and Children) Act 1976[4] (as amended by the Courts Act 1981) is silent on questions of private international law. It would, however, appear that the residence of the respondent in the jurisdiction is a ground of jurisdiction. This interpretation is supported by the provisions in the Act

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[4] No. 11.

concerned with the jurisdiction of, for example, the District Court (which presuppose that the respondent will be residing within a local area under the Court's jurisdiction) and by the case law in other jurisdictions relating to similar legislation.

Implications of abolition of domicile of dependency of married women

60. The abolition of unity of domicile would not affect the law regarding maintenance obligations. However, in order to protect a wife's (or husband's) maintenance rights it would be better if the doctrine of divisible divorce (referred to supra[5]) were declared in statutory form so as to ensure that, while a foreign decree might be accepted as terminating the status of marriage it would not be accepted as prejudicing maintenance obligations in the State of recognition. In addition, consideration should be given to the adoption of the two Hague Conventions (concluded on 2 October 1973), which deal respectively, with (1) the Recognition and Enforcement of, and (2) the Law Applicable to, Maintenance Obligations.

(D) RESTITUTION OF CONJUGAL RIGHTS

Present Law

(1) Jurisdiction

61. Authorities on this matter are few. In Bell v Bell[6], jurisdiction was accepted where both spouses were domiciled in

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[5] P. 35.

[6] [1922] 2 I.R. 152.

Ireland; the residence of the respondent was accepted as a ground in Hood v Hood[7], and this is supported by a dictum in Bell v Bell.

(2) Recognition of Foreign Decrees

62. There are no authorities on the question in Ireland. It has been suggested[8] that the same recognition rules as apply in respect of divorce a mensa et thoro would be appropriate.

(3) Implications of abolition of domicile of dependency of the wife

63. Having regard to the fact that the residence of the defendant is a definite ground in regard to jurisdiction and a possible ground in regard to recognition, it would appear that the granting of an independent domicile to wives would have no appreciable practical effect in respect of proceedings for restitution of conjugal rights. In any event such proceedings are very rare in this country; and they have been abolished in England and in most other countries.

(E) MATRIMONIAL PROPERTY

64. Stated simply, the cases in which a court in Ireland will be called on to apply a foreign law are as follows:

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[7] [1959] I.R. 225.

[8] Cf. P.M. North, op. cit., 387.

(1) where the property concerned is subject to a marriage contract;

(2) where the spouses' property rights are subject to a foreign matrimonial regime;

(3) where immovables are situated abroad.

(1) Property Subject to a Marriage Contract

65. The better view would appear to be that "capacity to enter a marriage contract is governed by the proper law of the contract, that is to say, the law with which the contract is most closely connected"[9]. The "proper law" is usually regarded as the law of the "matrimonial domicile". Until 1956, there was uncertainty in England as to whether this meant the intended domicile of the spouses or the domicile of the husband. In favour of the former view was a noted authority, Professor Cheshire; in favour of the latter, another noted authority, Dr Morris. In Re Egerton's Will Trusts[10], Roxburgh J. adopted Dr Morris's view, although he stressed that it was a presumption which could be displaced by an express or tacit contract to the contrary. Roxburgh J.'s statement was admittedly obiter, but it might be accepted in Ireland as of sound authority unless, of course, domicile of dependency offends the Constitution. An example of the Court's holding that the matrimonial domicile did not determine the proper law is In Re Cloncurry's Estate[11], where the former

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[9] Dicey and Morris on the Conflict of Laws, rule 116(1)(9th ed., 1971). Cf. the 10th ed., 1980, Rule 114.

[10] [1956] Ch. 593.

[11] [1932] I.R. 687.

Supreme Court attached importance to the fact that the settlement in question had been drawn up by English solicitors of the wife who "did not profess knowledge of any law save that of England"[12], that the control of the investments had always been in London, and that the securities had been retained there.

(2) Property Subject to a Foreign Matrimonial Regime

66. It would appear to be settled that where there is no marriage contract or settlement and the parties to the marriage have not changed their domicile, the rights of husband and wife to each other's movables are governed by the law of the "matrimonial domicile". The "matrimonial domicile" means, generally, as in the case of marriage contracts discussed above, the domicile of the husband. Only where the express agreement of the spouses or their conduct justifies an inference to the contrary will these rules be displaced.

67. The position where there has been a subsequent change of domicile is far from certain. Dicey and Morris, noting that "the question is, on the authorities, very much an open one"[13], states the rule as follows:

> "Where there is no marriage contract or settlement, and where there is a subsequent change of domicile, the rights of husband and wife to each other's movables, both inter vivos and in respect of succession, are governed by the law of the new domicile except in so far as vested rights have

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12 Id., at 712 (per Murnaghan, J.).

13 Dicey and Morris on the Conflict of Laws, p.672 (10th ed., by J.H.C. Morris, 1980).

been acquired under the law of the former domicile"[14].

The whole question is a complicated one since there are strong policy arguments both for and against the view that a change of domicile should alter the law governing the spouses' mutual rights in each other's movables. The compromise position adopted by Dicey is not a perfect solution since it may involve uncertainty in its application in particular cases. At the Thirteenth Session (October 1976) of the Hague Conference on Private International Law a Convention was adopted "on the Law Applicable to Matrimonial Property Regimes", in the preparation of which Ireland took an active part. The Convention, which has so far been ratified only by France, does not apply to (1) maintenance obligations between spouses; (2) succession rights of a surviving spouse; and (3) the capacity of the spouses. Generally, the property regime is governed "by the internal law designated by the spouses before marriage". However, "/i/f the spouses, before marriage, have not designated the applicable law, their matrimonial property regime is governed by the internal law of the State in which both spouses establish their first habitual residence after marriage". The Convention is one that might readily be adopted by Ireland; and the Commission hopes to examine at a later stage the various provisions of the Convention with a view to recommending the legislation necessary if the Convention is to be ratified. It will be noted that the Convention adopts the concept of habitual residence and not the concept of domicile. (As to the background of the Convention, see

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[14] Id., Rule 116, p. 70.

Actes et Documents de la Treizième session, tome II (Matrimonial property regimes), which contains detailed statements on the law in the various member States (including Ireland) of the Conference). It should be noted that the Convention does not make any distinction between movables and immovables, as does, for instance, the Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions - concluded on 5 October 1961 and implemented in Part VIII of the Succession Act 1965.

(3) Immovables Situated Abroad Governed by Lex Situs

68. Subject to the rules discussed in paras. 65 to 67 supra, it would appear that immovables situated abroad are governed by the lex situs. Authority is, however, very sparse. In Welch v Tennent[15], the House of Lords, in a Scottish appeal, held that, in the absence of a marriage contract, whilst

> "/t/here can be no doubt .... that the rights of the spouses as regards moveable property must .... be regulated by the law of /the matrimonial domicile/ .... it is equally clear that their rights in relation to heritable estates are governed by the law of the place where it was situate".

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[15] /1891/ A.C. 639, at 645.

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Implications of abolition of domicile of dependency of married women in relation to matrimonial property

(1) Marriage Contracts

69. Since the present law does not require that the law of the husband's domicile should determine the issue, it may be argued that no consequential legislation would be necessitated by the abandonment of the unity of domicile between husband and wife. The Courts will merely be called on to apply the "proper law" (as they would in respect of all contracts), with the respective domiciles of the spouses being a valuable indication, but not the determining one, of what that law might be. It may, however, be argued that simply to abolish unity of domicile without specifying what the "proper law" or "matrimonial domicile" is to be would not satisfactorily settle the state of the law for the Courts in future cases. The Courts might consider themselves bound by some rule similar to the former rule or they might be quite uncertain as regards what rule to apply. It might, therefore, be advisable to provide by statute that the "matrimonial domicile" of the spouses would mean the domicile of both spouses, if the spouses share a common domicile or, if not, the country of the common habitual residence (or, perhaps, of an intended domicile). Alternatively, a provision might be enacted that would make it clear that henceforth the presumption regarding the husband's domicile is no longer to apply, thus leaving the Courts to fill the vacuum as they think proper. Overall, however, the Commission considers that a specific provision is required, even if only to guide the Courts as to the proper inference to be drawn from the abolition of the wife's domicile of dependency.

(2) Matrimonial Regimes

70. As in the case of marriage contracts, there may be merit in including a specific provision settling the "new regime". The whole question of the private international law of matrimonial property is a highly complex one and the more of it that is stated in statutory form the better. As has already been mentioned a Convention on the subject was prepared in 1976 at the Thirteenth Session of The Hague Conference (the Convention on the Law Applicable to Matrimonial Property Regimes)[16]. The connecting links utilised by the Convention are those of nationality and habitual residence, with no reference to domicile. The Law Reform Commission will consider the desirability of adopting the Convention and implementing its provisions in Irish legislation. The Commission is of the view that it would be unwise to attempt to deal with the subject of matrimonial property regimes in legislation that is designed to amend the law in regard to domicile generally.

(3) Immovables Situated Abroad

71. No problem appears to arise in respect of immovables situated abroad as a result of abolishing the domicile of dependency of married women, because such property is, in accordance with the principle of scission, governed by the lex situs and not the lex domicilii.

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16 See Philip, 24 Am. J. Comp. L. 307 (1976), Reese, 25 Am. J. Comp. L. 393 (1977), Glenn, 55 Can. Bar. Rev. 586 (1977) and tome II of Actes et documents de la Treizieme session (Matrimonial Property regimes).

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(F) TESTAMENTARY CAPACITY

(1) Capacity

72. It is clearly established in England that the capacity of a testator is determined by the law of his domicile. Thus, in In the Estate of Fuld Deceased (No.3)[17] Mr Justice Scarman said:

> "The general rule is clear. The capacity of a testator is to be determined by the law of his domicile ...."

Presumably the Irish Courts would accept this decision as stating the law in this country. A matter less certain, however, is whether the time for determining this question is at the making of the will or at the death of the testator. There is no decision in point and academic authorities are divided. Section 89 of the Succession Act 1965 (No.27) provides that a will shall, with reference to all estate comprised in the will and every devise or bequest contained in it, be construed to speak and take effect from the date of the testator's death unless a contrary intention appears from the will. (Section 89 overruled the decision in Wild's Case (1599) 6 Co. Rep. 16b, which had survived for almost 400 years notwithstanding the provision in section 24 of the Wills Act 1837 (c.26) that a will speaks from death "with reference to the real estate and personal estate comprised in it". See also section 95 of the Succession Act 1965 (which deals with the creation of estates tail) and paras. 55 and 57 of the Explanatory Memorandum to the

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17 [1968] P. 675, at 696.

Succession Bill 1965 (as passed by both Houses of the Oireachtas and enacted as the Succession Act 1965)).

(2) Formal Validity

73. Domicile is relevant as regards formal testamentary validity in that section 102(1) of the Succession Act 1965[18] provides that a testamentary disposition is to be valid as regards form if its form complies with (among four other criteria) the internal law

> "of a place in which the testator had his domicile either at the time when he made the disposition, or at the time of his death".

Subsection (4) of section 102 provides that:

> "/t/he determination of whether or not the testator had his domicile in a particular place shall be governed by the law of that place".

The wording of the section follows exactly the wording of the Hague Convention of 5 October 1961 referred to supra. The concept of domicile mentioned in the Convention is the Common Law concept and not the Civil Law one.

(3) Essential Validity

74. The essential validity of a will of movables is determined exclusively by the law of the testator's domicile at the date of his death. (Formal validity and essential validity also arise in the case of marriage.)

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[18] No.27.

Implications of Abolishing the Domicile of Dependency

75. A criticism of the domicile of dependency is that a wife's capacity to make a will and the devolution of her personal property on her death may be governed by a system of law of a country with which she has no connexion. The abolition of the domicile of dependency would introduce an improvement in this regard. There would, however, appear to be some difficulty.

76. If the capacity of a testator - or testatrix - is to be determined by the law of his or her domicile at the time of making the will rather than at his or her death, it would mean that, where a married woman domiciled in Ireland by virtue of the concept of dependency, has made a will in 1970, then, although she might acquire an independent domicile in 1981 (as a result of reforming legislation), she would have the disposition of her estate determined by her 1970 domicile. Since there is some uncertainty regarding the time which determines the issue, the matter should be settled definitively in any reforming legislation. A similar problem arises where, for example, an Irish person domiciled (in the Swiss sense) in Switzerland by a professio juris (made before the coming into operation of the Succession Act 1965) submits his succession to Irish law and then dies in 1970. Is the law that applies Irish law at the time the professio juris was made or Irish law as contained in the Succession Act 1965? The solution could be very important for the widow if her husband had disinherited her or not provided sufficiently for her. The better view is that the law that applies is the law obtaining in Ireland at the testator's death.

77. Normally, of course, in the case of a change of domicile there is no great objection to the time being fixed at the

date of the making of the will. Indeed, this would appear to be the most realistic time to select. It might be argued, however, that this could mean that a woman who made a will in (say) 1970 would be tied to a domicile (of her husband) totally foreign to her and that reforming legislation should not place her in this position. Against this, it may be said that the weight of authorative opinion is in favour of the view that the time of the making of the will should determine the issue and that it would be unsatisfactory to have to overturn this rule for the sake of what are likely to be a small number of cases. Moreover, a woman wishing to avoid the effects of her former status would simply have to subject herself to the relatively minor inconvenience of making a new will after the passage of the reforming legislation.

78. Overall, the Commission is of the view that the balance of argument is in favour of including in the legislation a provision to the effect that the capacity of all testators (not just those affected by the abolition of the domicile of dependency) is to be determined by the law of their domicile at the time they made the will rather than at the time of their death. The appropriate date for determining a testator's capacity is the date of the making of the will in the same way as the date of the marriage is the appropriate date for determining capacity to marry. The date of the making of the will is also the appropriate date for the construction of expressions (such as "infancy" and "majority") in a will. However, different considerations apply as regards determination of the estate comprised in a will and of devises or bequests contained in it. This latter is now governed by section 89 of the Succession Act 1965 which specifies the date of the testator's death as the relevant date. (See para. 72 supra and p. 93 of the Commission's Working Paper No.2 on the Age of Majority Etc.).

(G) LEGITIMATION

79. Section 1(1) and (2) of the Legitimacy Act 1931 (No. 13) provides that legitimation by subsequent marriage will be effective "if the father of the illegitimate person was or is at the date of the marriage domiciled in Saorstat Eireann ...." and if the father and mother could have been lawfully married to one another at the time of the birth of such person or at some time during the preceding ten months. Section 8 of the Act provides that where the parents marry but the father is at the time of the marriage "domiciled in a country other than Saorstát Eireann by the law of which the illegitimate person became legitimated by virtue of such subsequent marriage", the child will be recognised as having been legitimated from the date of the marriage, "notwithstanding that his father was not at the time of the birth of such person domiciled in a country in which legitimation by subsequent marriage was permitted by law". From this it would appear that an adulterine child may be legitimated if the father is at the time of his marriage to the child's mother domiciled in England, for example, even if he is domiciled in Ireland at the time of the birth of the child - and this although Irish internal law does not allow for the legitimation of an adulterine child[19]. The common law conflicts rule which, it seems, continues to exist notwithstanding the enactment of the 1931 Act, is that the law of the father's domicile at the birth of an illegitimate child and the law of the father's domicile at the time of the subsequent marriage of the child's parents will determine whether the child becomes legitimate in consequence of the

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19 For a contrary view, see Dicey and Morris, Conflict of Laws (10th ed., 1980) pp. 482-484.

subsequent marriage of the parents[20]. Section 2(1) of the 1931 Act (as amended by section 20 of the Courts Act 1971 (No. 36)) enables a person to institute proceedings under the Legitimacy Declaration Act (Ireland) 1868[21] claiming that he or one of his parents, or his child, or a remote ancestor, is or was a legitimated person, "whether he is or is not domiciled in Saorstát Eireann and whether he is or is not a natural-born British subject within the meaning of the .... 1868 /Act/ ....".

Implications of Abolishing the Domicile of Dependency

80. It seems clear that the abolition of the domicile of dependency of married women would not affect the law regarding legitimation since a person's capacity to be legitimated depends on the law of his father's domicile and not on the domicile of his mother or both parents.

81. A larger question is whether it would be desirable to change the rule whereby the domicile of the father determines the effectiveness of legitimation. There is much to be said on both sides of this question. It might be argued that, if the domicile of dependency of married women should be abolished on the grounds of sexual equality, it is appropriate that the same principle should apply in respect of legitimation. There is also, of course, the Constitutional difficulty. However, there are some practical difficulties involved in amending the existing rule. The result of making the validity of the legitimation depend on the law of the domicile of both parents

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[20] See Dicey and Morris, Conflict of Laws (10th ed. (1980)) pp. 47 et seq. and Moffett v Moffett /1920/ 1 I.R. 57.

[21] C. 20.

would be that less children would be legitimated, a result which is hardly attractive. Alternatively, a more liberal recognition rule might be adopted that would extend legitimation by recognising legitimations that are effective under the law of the domicile of either parent. This could, of course, lead to "limping" legitimations and the implications for succession law would have to be considered. However, the answer appears to be that we will have to live with "limping" legitimations in the same way as we have to live with "limping" marriages - marriages that are valid in one country but not in another.

(H) LEGITIMACY

82. Private international law aspects of legitimacy are a matter of considerable controversy. Neither the judicial decisions nor the academic commentators are in agreement, and the law can be stated only with considerable hesitation, with no certainty that a court would necessarily adopt the view of the Law Reform Commission. It would appear that the view formerly attracting support, that legitimacy depends on the validity of the marriage of the child's parents judged by conflict of laws rules, now no longer commands general acceptance. In its place, it has been proposed that the law of the child's domicile of origin should govern his legitimacy. This approach has the support of a number of authorities including Cheshire and North, Wolff and Graveson, and there are judicial dicta on record. The difficulty, however, which this approach occasions is that, since the child's domicile of origin is that of its father if legitimate but of its mother if illegitimate, "the legitimacy of the child cannot depend on its domicile of origin if its domicile of origin

depends on its legitimacy"[22].

83. One solution is to determine the question by breaking the vicious circle arbitrarily, making the law of the father's domicile prevail. This would place legitimacy in the same position as legitimation. Some authorities consider this to be advisable; others do not agree. Dicey and Morris's solution, following the English decision of Re Bischoffsheim[23], a decision which "must be regarded as authoritative until the matter is reconsidered by a higher tribunal"[24], would make the legitimacy of the child depend on the domicile of each of his or her parents at the date of the child's birth. As has already been indicated, however, it is not certain what approach an Irish Court would take on the question. It appears to the Law Reform Commission that a statutory rule might provide that the legitimacy of the child should depend on the law of the domicile of that parent that, at the date of the child's birth, is the more favourable to legitimacy - and this is, indeed, in line with Professor Graveson's suggestion.

Implications of Abolishing Domicile of Dependency

84. It would appear that abolition of the domicile of dependency would have no untoward effect on the law relating to legitimacy since, if the parents were married to each

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22 Dicey and Morris on the Conflict of Laws, p. 457 (10th ed., 1980).

23 [1948] Ch. 79.

24 Dicey and Morris on the Conflict of Laws, p. 460 (10th ed., 1980).

other at the relevant time, no problem will arise, as the child is legitimate: if they were not married the question of dependent domicile will be irrelevant. The validity of the marriage will, of course, where it takes place outside the jurisdiction, depend on the law applicable.

(I) TAXATION

85. Domicile is used in taxation legislation as a connecting factor between the individual and the State. Other and more important connexions are 'residence' and 'ordinary residence'. Domicile for taxation purposes has no special meaning different from its meaning in other contexts. The domicile of dependency of married women therefore generally applies with regard to taxation in the same way as in all other aspects of the law.

86. In the ordinary event, the issue of domicile arises in regard to a possible connexion between an individual and his or her legal status or financial position in private law; in the case of taxation, however, domicile is used as a link between an individual and the State. If, therefore, the effect of abolishing the wife's domicile of dependency were to prove unsatisfactory to the Government because too great a reduction in revenue would result, it is always open to the Government to introduce specific legislative provisions seeking to recoup the amount involved (or some part of it) in some other way. To do this is the Government's prerogative and it is not the function of the Commission in this Working Paper to prescribe limitations on fiscal policy in this

respect. What the Working Paper can do, however, is to recommend that no longer should it be possible in taxation legislation for the principle of the domicile of dependency of married women to operate. And this may well be the position in the light of the reservation of Mr Justice Walsh in Gaffney v Gaffney [1975] I.R. 133, referred to supra at pp. 16 and 33.

CHAPTER 8 : THE DOMICILE OF CHILDREN

Present Law[1]

87. The present position regarding the domicile of children in Ireland is not easy to state with certainty since there are few relevant decisions in this country and no clear rules can be deduced from the cases in other jurisdictions. Some principles, however, are well established. What follows must, of course, be read as subject to the rules to be derived from the Constitution, following on Tilson and Gaffney, referred to supra at pp. 2, 16 and 31.

88. The domicile of a person under twenty-one years is a "domicile of dependency": that is to say, his or her domicile may not be acquired or changed by him or by her, but instead depends on the domicile of one or both of the parents. The domicile of a legitimate child follows that of the child's father until the father's death, and after that (subject to what is said below) it follows that of the mother until the child reaches the age of twenty-one. In the nineteenth century decision of Re Beaumont[2] it was held that the domicile of the child of a widow did not change automatically with a change in the widow's domicile and that it would do so only as a result of the exercise by the widow of a power vested in her for the welfare of the child, which, in the child's interest, she might abstain from exercising when changing her

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[1] See Duncan, The Domicile of Infants, (1969) 4 Ir. Jur. (N.S.) 36 , Spiro, Domicile of Minors Without Parents, (1956) 5 I.C.L.Q. 196, Clive, The Domicile of Minors /1966/ Jr. Rev.1.

[2] /1893/ 3 Ch. 490.

own domicile. If a widow should have this power, it would appear only reasonable that the mother of an illegitimate child, or the father of a legitimate child, should also have it. The position, however, is by no means clear. Academic commentators have argued that this is already the law with regard to mothers of illegitimate children; and it has been contended that it is also the law as regards the fathers of legitimate children.

89. The domicile of a child in the custody of its mother after a divorce decree has also given rise to uncertainty. There are no relevant decisions in this jurisdiction. In a Scottish decision, Shanks v Shanks[3], Lord Fraser considered that the general rule that the father's domicile controlled "does not suffer exception" in such a case. In the Northern Ireland case of Hope v Hope[4], however, Lord MacDermott L.C.J. came to a different conclusion, stating that:

> "/On principle, it would seem that this rule /that the father's domicile controls/must be based on the authority and responsibility that a father has to act for his child; and it is, I think, clear that on the death of the father his capacity to change the child's domicile will ordinarily pass to the surviving parent. This recognises the rule as a manifestation of parental authority and responsibility. But why should it apply to tie the domicile of the child to the will of a father who has abjured his responsibility by walking out of his child's life and by so conducting himself that his marriage is dissolved by a competent court which grants custody of the child to the mother? In such a case the status and position of the father to which the rule is related have gone, and the mother has become the parent in charge and responsible for the welfare of the child".

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[3] 1965 S.L.T. 44.

[4] /1968/ N.I. 1, analysed by Carter, (1969) 20 N.I.L.Q. 304.

There is obviously considerable merit in Lord McDermott's approach, although the limits of the principle expounded by him are difficult to state with certainty. The question is an open one in this jurisdiction, but, having regard to the fact that spouses now have equal rights and responsibilities in respect of the guardianship and maintenance of their children, it is quite probable that a court here would take the same view of the law as did Lord MacDermott.

90. Other aspects of the law relating to the domicile of children are uncertain. It is generally assumed by the commentators that the domicile of a wife who is a child is that of her husband, but there is no direct authority to this effect. The domicile of a child widow, in the view of one commentator, "probably remains that of her deceased husband until she changes it by her own act ...."[5], but an Australian Court in Shekleton v Shekleton[6], held that her domicile followed that of her father. Whether a child legitimated by the marriage of his or her parents takes the domicile of his or her father is a matter which has not been resolved by judicial decision and the position has been described by a commentator, Professor Graveson, as "a little uncertain"[7]. The general view is that the child will take the father's domicile on legitimation, although this will not affect the child's domicile of origin, which is that of the child's mother. The question of the domicile of a child legitimated other than by the marriage of his or her parents (as, for instance, by recognition) appears

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[5] Graveson, Conflict of Laws, 189 (6th ed., 1969).

[6] /1973/ 2 N.S.W.L.R. 675.

[7] Graveson, supra, fn. 5 190.

to be entirely open. The position regarding the domicile of an adopted child is not certain. In the absence of legislative or judicial guidance, the commentators are generally of the view that the child's domicile changes with that of its adoptive parents, but that his or her domicile of origin is that of the natural mother or father.

91. There are no authorities on the question of the domicile of a child after the death of its parents or, in the case of an illegitimate child, the death of its mother. Dicey and Morris[8] refer to two possible solutions. The first is that a distinction might be drawn between "natural guardians" (i.e. grandparents), who have the power to change the child's domicile, and others, who do not. The second is that a guardian has power to change the child's domicile to a country in which he is recognised as guardian, but not otherwise. Dicey and Morris, however, admit that "these are speculative possibilities" and they say that the safest view appears to be that the domicile of a child without living parents cannot be changed[9].

92. There are no authorities on the domicile of a posthumous legitimate child, but it is generally considered that the domicile of the child's mother at the time of birth will control. It is also generally considered that a foundling child's domicile of origin is the country where he or she is found.

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[8] Dicey and Morris on the Conflict of Laws, pp. 135-136, (10th ed., 1980).

[9] Id., p. 136.

Proposals

93. The most desirable law with regard to the domicile of children would appear to be one that places the child's legal position:

(1) in harmony with the factual circumstances of the child;

(2) on a basis that takes account of the interests of the child; and

(3) on a footing that does not discriminate between the father and the mother, except, possibly, in the case of an illegitimate child.

To give effect to these principles requires some radical alteration in the present law.

94. One possible change would be for the law to provide that a child should be capable of acquiring a domicile independent of that of its parents. This proposal has been made by Mr William Duncan, of Trinity College, in an article on the subject published in The Irish Jurist[10] in 1969. Some of the advantages of the proposal may be mentioned briefly. It would, for example, mean that the inappropriate attributions of domicile that can occur in some cases under existing law would no longer occur. It would remove the possible injustice to mature teenagers who may have set out on their own away from their families. It would resolve the very difficult, if not intractable, problem of harmonising the domicile of dependency of children with the principle of sex equality[11]. To give all children independent domiciles would, however, involve some difficulties, the most important of which is uncertainty. The advantage of the existing law is that it

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[10] Duncan, The Domicile of Infants (1969) 4 Ir. Jur. (N.S.) 36.

[11] This is discussed in detail, infra, pp. 97 ff.

normally yields a more certain (albeit, on occasion, inappropriate) result than if children acquired an independent domicile.

95. This problem could be solved to some extent by legislation providing general rules for the courts or rebuttable presumptions, such as the presumption that, where the child is living with parents who share the one domicile, his domicile is the same as theirs. Nevertheless, as will be shown, it is very difficult to solve all problems in this fashion and it is precisely the difficult cases that are the ones that defy satisfactory rules (or presumptions). On this account, the Commission does not at present wish to propose that children should be capable of acquiring an independent domicile. It would prefer to hear the views of interested members of the public on this proposal before taking a final decision on the matter. Accordingly, the Commission formally requests the submission to it by interested persons or groups of their views on the proposal that children of all ages should in future have a domicile independent of that of their parents.

96. Possible compromises might be considered. The age at which a child may acquire an independent domicile could be set at twelve or fourteen years, for example, or the High Court could be given power to change the domicile of a child where that would be in the best interests of the child; or legislation could provide that a child would acquire an independent domicile where he ceased to live with his parents. Some of these possibilities will be considered in more detail infra.

97. On the assumption that the child's domicile is to remain one of dependency, the implications of the Commission's proposal that married women should acquire an independent

domicile must be analysed. In the narrow sense, this change in the domicile of married women does not necessarily involve any consequential change in respect of the domicile of children, but in terms of consistent policy a change would seem to be required. The assumption that the father of the child born in wedlock should select the child's domicile might be considered to be as discriminatory as the assumption that he should select the domicile of his wife. It would appear, therefore, that some way round the policy of selecting the domicile of one parent rather than the other must be found, since the law now appears to dictate that neither parent is to be preferred.

98. A solution for most cases that commends itself to the Commission would be for the legislation to provide that the domicile of the parent with whom the child has his home determines the child's domicile. Since in the majority of cases the child will be living with both his parents, both of whom are likely to have the same domicile, this will resolve the problem of preference of one parent in all but a very few cases.

99. With regard to those cases where the child has his home with one rather than the other parent, the rule would still appear to have a great deal to be said in its favour, since, in the usual case, it would be appropriate that that parent should have the power to determine the domicile of the child.

100. Out-of-wedlock children present a problem since the status of the unmarried father relative to his child is a matter of some considerable debate. There would appear to be some merit in letting the rule of "the parent with whom the

child has his home" apply in the case of all children, whether born in or out of wedlock. It is true that this would mean that in most cases the domicile of the out-of-wedlock child would follow that of the mother. But in a case where the child lived with his or her father there seems to be no fundamental reason why this factual community of interests should not be recognised by the law[12]; and special legislative provision could be made for this type of case.

101. The proposal to make the child's domicile dependent on that of the parent with whom he has his home is not, as has been noted, a total solution. Parents living harmoniously together with their children may have different domiciles. In such a case whose domicile is to determine the domicile of the children? Some rule must be found, if this is at all practicable. The difficulty of finding a workable answer to the question seems to have defeated the legislators in the United Kingdom and New Zealand: in both of these countries the statute that abolished the domicile of dependency in relation to married women retained the general rule that the father's domicile should determine that of his children, although its scope was reduced by providing that where the parents are living apart the child's domicile should follow that of the parent with whom he has his home.

102. A possible rule that would be likely to solve most cases and which commends itself to the Commission is that where parents living together have different domiciles and the country in which they are living is also the domicile of one

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12 The problem of ascertainment of paternal affiliation will be dealt with in the Commission's forthcoming Working Paper on Illegitimacy.

of the parents, then that domicile will determine the child's domicile. To take a straightforward case: an English man comes to Ireland where he marries and subsequently resides with an Irish woman. According to the proposed rule, their child should have an Irish domicile. The fact that the father may retain such an attachment for England as to amount to retention of an English domicile ought not, it is submitted, be permitted to prevail over the two important facts: (1) that his wife's domicile is Irish and (2) that he is rearing his child in a united family unit in Ireland.

103. Where, however, the domicile of parents differs and they are living together with their child, but in a country in which neither parent is domiciled, it is not so clear what rule should apply. The strength of the combination between the domicile of one party and the fact of united family residence is missing in such a case. Such a situation, whilst not likely to be of any great significance in this country, is by no means so improbable in an "immigrant" country, such as Canada or the United States, to which spouses of different domiciles may go and in which, despite extended residence, neither spouse may acquire a new domicile. One solution would be to introduce the concept of habitual residence to resolve the problem created by this limited group of cases. To do so could be defended on the basis that there is much to commend habitual residence as a connecting factor and that it is already part of our law to a limited extent - pp. 10-15 supra. Whatever decision ultimately may be taken regarding the general adoption of habitual residence as a connecting factor in preference to domicile, it would appear to provide a useful solution in the present very limited context. To the charge of inconsistency in "mixing" domicile and habitual residence, it might be said that habitual residence is being called in aid

only where domicile cannot supply a solution on its own. Moreover, habitual residence and domicile have been used together as connecting factors in legislation without any difficulty or confusion arising. (See Part VIII of the Succession Act 1965 (Conflict of Laws relating to Testamentary Dispositions) and Article 19 of the draft Swiss Federal Law relating to private international law published as vol. 12 of Études Suisses De Droit International).

104. Assuming that habitual residence is to be used to fill the lacuna in these cases, it must be decided whether the habitual residence of the child should determine the issue simpliciter or the habitual residence of either or both of the parents. The Commission is of the view that the habitual residence of the child should determine the issue. To provide rules regarding the habitual residence of the parents would be a complex matter, since the parents may have separate habitual residences. Moreover, the habitual residence of the child should be a relatively easy matter to establish. A second possible solution - considerably more flexible than the habitual residence concept - would be to provide that in these exceptional cases the country with the most "real and substantial connexion" to the family or, more specifically, to the child, should determine the child's domicile. Such a solution would have the familiar advantage (primarily flexibility) and the disadvantage (primarily uncertainty with the consequent requirement of resort to the courts) associated with the "real and substantial connexion" criterion generally. On balance, the Commission is of the view that the approach based on the habitual residence of the child is to be preferred. (As to the use of the term "most real connexion", see section 102(3) of the Succession Act 1965. As to "real and substantial connexion" see Indyka /1969/ 1 A.C. 33)).

105. Another matter requiring resolution arises in relation to guardians or other persons with whom a child may be sent to live. Whilst it might be considered that the child's domicile should follow the domicile of the person with whom he or she may have his home, it is not clear that this would always be a desirable rule. The child might, for example, have his home with a third person in a country where both his parents have their home and are domiciled but where the third person is not domiciled. Thus, a child living in Ireland with Irish parents may be sent to live with a third person who is also living in Ireland but domiciled in France. It might be argued that a child with such strong connexions with this country should not have a foreign domicile. The issue is essentially one of the extent to which reference should still be made to the domicile of the parents, when they have little real connexion with the child. Here again, the concept of habitual residence might be adopted.

106. A fundamental issue in this context concerns the social and legal basis for determining the domicile of a child. That domicile might be regarded as being closely related to the general rearing and education of the child. Against this view it might be argued that, unlike other aspects of family upbringing, domicile has no educative or formative aspects and is merely a factual phenomenon, which should be determined according to the present realities of the child's life or, indeed, according to the best interests of the child. The Commission takes the view that the parental claim, in a case where a child has his home with a person other than the parents, is not sufficiently strong to require that the child's domicile be determined by reference to his parents' domicile. When, of course, the child returns to live with his parents, their domicile will once again determine his. The Commission has come to the view that, where the child has

his home with a third person, his domicile should be determined by reference to the child's habitual residence. This seems the only workable solution for this type of case. Other possible approaches considered by the Commission have been rejected on the ground of undue complexity. (The Commission is, of course, aware that even though the custody, domicile or habitual residence of a child is foreign the parents are still the guardians of the child and, as such, control his or her welfare.)

107. The next problem is a major one and difficult to resolve satisfactorily. Assuming that the domicile of the child is to follow that of the parent with whom he has his home, should the child's domicile change automatically on the change of that parent's domicile or should that parent, whilst changing his or her domicile, be permitted not to change that of the child, or conversely change the child's domicile while not changing his or her own domicile? In what cases should such a difference between the domicile of the parent and that of the child be permitted? And how should such a determination be manifested?

108. These problems raise issues of considerable complexity both as regards social policy and as regards their practical implications. It should be borne in mind that the present law scarcely affords satisfactory, or, indeed, readily discernible solutions to them. The Commission's view is that any new law relating to the domicile of children should provide that a parent (with whom the child has his home) should, whilst changing his or her own domicile, be permitted (1) to leave the child's domicile as it is where to do otherwise would be to the child's detriment, and (2) subsequently to change the child's domicile to his or her own present domicile at any time thereafter, provided that to do

so would not be to the child's detriment. The first recommendation goes no further than what would appear to be the law already in relation to changes of domicile by widows and mothers of children born out of wedlock; and the second recommendation simply removes the rigid implications of leaving the child's domicile frozen until adulthood if the parent with whom the child has his home changes his or her domicile without changing that of the child. It is possible that even under present law a court would hold that a widow or mother of a child born out of wedlock has this power, since the welfare of the child is the basis of the primary rule.

109. A more difficult question is whether the child's domicile may be changed by a person with whom he or she is living even though that person does not change his or her own domicile. A New Zealand decision, Re G.[13], has suggested that such a power should be recognised, but the Commission takes a different view. It would be very difficult to specify limits to such a power and even if the welfare of the child were a necessary element in its exercise it would in effect amount to the creation of a power to select any country in the world as the child's domicile, with quite unpredictable implications. It would perhaps be possible to limit the power by requiring that there be some minimum connexion between the child and the country selected; but, overall, the Commission considers that there is no necessity for a provision along these lines.

110. A further question arises as to how the intention of the parent or other person not to change the child's domicile on changing his or her own (or, as the case may be,

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13 [1966] N.Z.L.R. 1028.

to change it subsequently) may be manifested. Under present law, there is no specified procedure whereby a widow may show this intention. This means that the Court, in purporting to interpret the intentions of the widow, in effect makes an objective decision as to the merits of recognising a change of domicile on the facts of the case, and "discovers" an intention by the widow to make the change, where such is desirable. Since a particular issue facing the court (the right of the child to maintenance, for example) may well encourage the Court to make a finding in one direction and another issue (the tax liability of the child's estate, for example) may well encourage the Court to make a finding in another direction, it is clear that the view that the widow is making a choice is little more than a fiction in most cases. This is strengthened by the fact that the overwhelming majority of widows will never have addressed themselves to the problem at all, being completely unaware of their legal powers in the matter. As has been explained supra, the domicile of a legitimate or legitimated child depends on that of his father, if alive, whereas the domicile of an illegitimate or fatherless child is that of his mother: and a change in the mother's domicile does not automatically change the child's domicile.

111. If the law as to a child's domicile is to be changed it might be advisable to continue the policy of letting the Court make a decision on the merits under the guise of interpreting the intention of the person with whom the child is living. There is much to recommend this approach, since it is likely to yield a better result in cases that are litigated. The price, however, is a lack of certainty, which might not be in the interests of certain children as respects property expectations and as respects such fundamental matters as capacity to marry. It might be possible to devise

a system whereby the domicile of a child would change only on the lodgment of a notice in a specified registry, or on the making of a statutory declaration on the matter , by the person with whom the child is living. However, declarations are frequently self-serving and the law of domicile always treats them with suspicion[14]. It would be difficult to ensure that this problem would not arise in the present context. On the other hand, to require a declaration as a precondition of the "non-change" option by the person with whom the child is living would restrict the benefit of the rule to the few who have the advantage of expert legal advice.

112. Overall, the Commission is of the view that the Court should be charged with the task of determining (on the basis of the principles proposed supra) whether a change of domicile has in fact occurred. Of course, declarations would not thereby be excluded any more than they are excluded under the existing law, but they would not decide the issue. Before considering in more detail the practical implications of the scheme proposed in respect of the domicile of children, certain other problems require solution.

113. As has been mentioned, the domicile of foundlings is a matter of uncertainty. Legislation in New Zealand provides that their domicile should be considered to be that of the country where they are found until their parents are identified. This solution, in harmony with the view of many commentators as to what the Court would hold under present law, has much to be said for it and the Commission recommends that any new enactment should adopt it. Where the foundling

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14 Cf. Heald, Note: Self-Serving Declarations and Acts in Determination of Domicile, (1946) 34 Geo. L. J. 220.

takes up home with a parent, he should, in the Commission's view, be treated in the same way as any other child and his domicile should change accordingly.

114. With regard to adopted children, the Commission considers that under the new law the position should be covered specifically so that for all purposes these children would be treated as though they were the children of their adoptive parents. At present, as mentioned above, the general view is that the domicile of origin of the child is that of his or her natural father or mother. It may be argued that this is an unsatisfactory criterion, being contrary to the general policy of adoption, which is to create a new parent-child relationship. Moreover, the practical difficulties of establishing the true position as to the real parents, as well as the hardship that might be caused to the child or to his or her natural parents, makes the retention of any such criterion unsatisfactory. Accordingly, the Commission proposes that the domicile of origin of an adopted child should be determined by that of his adoptive parents at the time the adoption order is made. A similar rule should apply where a person is in loco parentis to a child.

115. Turning to the general scheme suggested with regard to the domicile of children, the first issue requiring examination is the concept of the child's "having a home with" a person. This expression has been used in the English and New Zealand legislation on the subject. Clearly, it gives rise to an individual determination in each case. The core of the concept is easy to understand and simple in application, although it is possible to imagine cases in which it is difficult to say that a child has his home with one person rather than with another. The difficulty in such cases is,

nevertheless, not a reason for rejecting the concept. The concept has the advantage of being an everyday notion that most people will readily understand; and the law is no stranger to difficult determinations of questions of fact. It would, indeed, always be possible to strengthen the definitional certainty of the concept, as, for instance, by specifying a minimum number of days' residence, but to do so would, in the Commission's view, weaken the value of the concept, which is its flexibility in responding to the complexities of human relationships and behaviour. The concept of "having a home" with a person might, of course, be combined with the concept of in loco parentis relationship with that person so that a child would not be considered as "having a home" with A unless A were in loco parentis to the child, but the Commission does not recommend this.

116. The present age of twenty-one years for the attainment of an independent domicile appears to be too high, having regard to present realities. The Law Reform Commission has proposed in its Working Paper The Law Relating to the Age of Majority, the Age for Marriage and Some Connected Subjects[15] that the age of majority should be reduced to eighteen years. (The age for marriage is sixteen.) Legislation on domicile in England and New Zealand has reduced the age for acquiring an independent domicile to sixteen years. Since a child of sixteen years is not normally likely to be ordered by a Court to live with his or her parents and, since many persons in their late teens marry, go to work or go abroad, there are those who do not favour the retention by the child of a dependant domicile beyond the age of sixteen. There are also those who favour the retention by the child of a dependent domicile until majority is attained. The law might, of course,

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[15] Working Paper No.2 - 1977.

provide that a child could acquire an independent domicile when mature enough to do so. The Commission, however, considers that a specific age limit, whilst admittedly arbitrary, is preferable in this context, since the price of uncertainty would be too great. The Commission would welcome views as to the age at which a child should be capable of acquiring an independent domicile - at sixteen as in Northern Ireland, England and New Zealand or at eighteen (the proposed new age of majority), and in either case, on marriage at a younger age. Of course, if the recommendations of the Commission, op. cit., are implemented, a child under the age of sixteen will be incapable of contracting a valid marriage.

117. A question that merits consideration is whether a rule might be introduced whereby any person with a genuine interest in the matter, or, indeed, the child himself, should be permitted to apply to the Court for an order declaring that the child's domicile should, in the interests of the child, be changed to that of a different country. The argument in favour of such a provision is that the child is in a vulnerable position in that (unlike an adult) he has no power over a matter which may have very important consequences, both financial and personal, for him or her. The child is protected to some extent under the proposal made by the Commission that a change in the domicile of a parent on whom a child's domicile depends should not necessarily result in a change in the child's domicile. Yet, in a case where that person changed his own domicile with what appeared to the child to be deleterious effects for him, the child would be obliged to await the determination of the issue in legal proceedings - possibly some years later. Immediate access to the Court for the child would appear to the Commission to be of advantage in such a case. However, such access should be allowed only where one parent (1) is dead, (2) has deserted, or been deserted by, the other parent, or

(3) is living separately and apart from the other parent. Under existing law it is only in these cases that a person other than a parent may apply for the maintenance of a dependent child of the family. Normally, the rearing, upbringing, education, and maintenance of a child are matters for the child's parents and no "outsider" is entitled to intervene as between the parents and their children - except, of course, where criminal matters such as cruelty are involved. The policy of the civil law in this regard is spelled out in section 5(1)(b) of the Family Law (Maintenance of Spouses and Children) Act 1976 (No. 11), which is concerned with the maintenance of dependent children where one of the parents is dead, etc.; and the Commission considers that the rules as to a change in the domicile of a child should not go beyond the provisions of that Act. The Commission is of the view, however, that where an application is made, the Court should not have unlimited power to change the domicile of the child concerned. The argument already made (para. 109 supra) against giving power to the parent to determine a child's domicile without the parents taking up that domicile has force in the present context. It would surely be quite improper that either a parent or a court in this country, by waving a wand, as it were, should be permitted to confer (say) a Japanese domicile on a child who has never set foot in Japan and has no connexion whatever with that country. The Commission, therefore, suggests that the provision giving the Court this power should be carefully drafted so as to ensure that the power would not be used too broadly.

118. The Commission recommends that limitations on the following lines should be imposed on the Court:

(1) The Court should not be empowered to confer a new domicile on the child unless the child has a genuine

connexion with the country of the proposed new domicile. In other words, there must be some good reason why the new domicile is being sought. The formula of a "real and substantial connexion" with the country of the proposed new domicile, which has been used by Courts in a number of countries in regard to other aspects of private international law, might usefully be adopted;

(2) Only where it would be clearly in the interests of the child that a change of domicile be made should the Court sanction a change. This restriction should ensure that only cases where the issue is one of major importance will come before the Court;

(3) The Court should be required not to order a change of domicile unless it is satisfied that the interests of other persons would not be unreasonably affected. For this purpose the Court should be empowered to permit any person who might be so affected to participate in the proceedings, with an obligation to give notice - perhaps public notice - to such persons being imposed on the applicant;

(4) The Court should make the order only where (a) the applicant has his or her habitual residence or domicile in Ireland, or (b) where the child has his or her habitual residence in Ireland.

CHAPTER 9 : OTHER ASPECTS OF THE LAW RELATING TO DOMICILE

119. There are certain aspects of the law relating to domicile, apart from the domicile of dependency, that appear to the Commission to require reform - that is, of course, if the concept of domicile is to be maintained. These are discussed below.

A. Strength of Domiciliary Intention

120. There is some disagreement among the judicial decisions as to the strength of intention required to constitute a domiciliary intention. According to some decisions the intention must be an intention to reside in a country permanently. According to others, especially those in recent years, the intention required is an intention to reside indefinitely. The second approach is generally more favoured by commentators. The Commission is of the view that a specific provision be included in the proposed legislation expressing this latter approach. This would have the advantage of making the concept of domicile approximate more closely to that of habitual residence (whilst, admittedly, still some distance from it) as well as clarifying what is at present a matter of uncertainty.

B. Changes in the Concept of a Domicile of Origin

121. A person's domicile of origin attaches to him or her at birth by operation of law. At common law, the domicile is that of the person's father, if the person is born in wedlock. Otherwise, the domicile is that of the person's

mother. Domicile of origin has two features, namely:

(1) it is harder to abandon than a domicile of choice; and

(2) in cases where a domicile of choice is abandoned but a new domicile of choice is not yet acquired, the domicile of origin revives.

The greater difficulty in shaking off a domicile of origin may have been due to the view of English courts during the nineteenth century (the formative period of the principles of domicile) that persons born with an English domicile would be very loath to abandon it. This was manifested for a time in decisions that a domicile in an oriental country could never be acquired by a person of European origin. Whilst natural sentiments towards one's own country make it reasonable that the Courts should not too hastily find that a domicile of origin has been abandoned, it would appear that "English courts have given an exaggerated emphasis to this aspect of the domicile of origin"[1]. The decisions in this country do not manifest such an exaggerated emphasis but the Commission considers that this would be a good time to clarify the position. Accordingly, it proposes that legislation should abolish the rule that a domicile of origin is more difficult to abandon than a domicile of choice.

122. The second aspect of the domicile of origin mentioned supra is its capacity to revive when a domicile of choice has been abandoned but another one has not yet been acquired. This would occur when, for instance, a man who was born in Ireland with an Irish domicile went to the United States at a young age

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[1] Graveson, Conflict of Laws, 199 (7th ed. 1974).

and acquired a domicile of choice in New York. If on his retirement he decided to live the rest of his days in California, but died on the way there, he would be deemed to have been domiciled in Ireland at the time of his death, by reason of the revival of his domicile of origin. The New York domicile was abandoned but the California domicile had not been acquired, since the man did not actually reach California. It is quite inappropriate that succession to that man's movable estate should be governed by the law of a country that he left half a century previously[2]. However, the problem is not easy to solve. In some countries - the United States and New Zealand, for example - the law of the domicile just abandoned continues until a new domicile is acquired. Whilst this solution is obviously less unsatisfactory in most cases than the revival rule, it still is hardly totally satisfactory since ex hypothesi the man has abandoned the domicile in question, possibly for strong personal reasons of antipathy towards the country or State in question, and he might resent his incapacity to "shake off" that connection until a new domicile is acquired. An alternative solution might be to create a new rule (relatively uncertain in its formulation but capable of

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[2] The law of his domicile might, in any event, allow him to make a professio juris submitting his succession to Irish law if he had continued to retain his Irish nationality. As to professio juris, see Article 22 of the Swiss Federal Law of 1891 (as applied and extended by Article 59 of the Final Title of the Swiss Civil Code). See also Article 91.2 of the draft Swiss Federal Law on Private International Law (published as Vol. 12 of Etudes Suisses De Droit International (Zurich 1978)).

yielding satisfactory determinations in individual cases), namely, that, where a person has abandoned one domicile but has not yet acquired another, his domicile is to be that of the country with which he is most closely connected. Overall, however, it appears to the Commission that the solution adopted by the United States and New Zealand is preferable. To provide that the abandoned domicile is to continue until a new domicile is acquired has the advantages of clarity and greater certainty, which seem to the Commission to outweigh the disadvantages that may arise in a small number of cases. Accordingly, the Commission recommends that the proposed legislation should provide accordingly.

C. The Domicile of Mentally Ill Persons

123. The domicile of mentally ill persons is a matter of considerable uncertainty, with rules that have become obsolete in their application. It appears that the domicile of a person who becomes mentally ill in adult life is frozen at the point when he becomes ill and will not change until he regains his health. In the case of a person born with mental illness, however, or of a person who becomes mentally ill before adulthood, it appears that, so long as he remains ill, his domicile is determined as if he continued to be a dependent person. The present law affords a rather blunt and uncompromising solution in freezing the domicile at what it was before the onset of the illness. The Commission considers that a degree of flexibility should be introduced by enabling the Court, on application to it by an interested party, to change the domicile of a mentally ill person where it appears to the Court to be in the interest of the person, and, having regard to the interests of other persons, proper to do so. In cases where there is a Committee of the mentally ill

person's estate, it should be made the appropriate applicant, and a provision similar to that contained in section 56(12) of the Succession Act 1965 (No.27) should be inserted in the legislation. The English Private International Law Committee, in its First Report on Domicile in 1954, recommended that the Court should have power to change the domicile of a mentally ill person.

124. The rule that the domicile of a mentally ill child should, after majority, still depend on that of his or her parents for the rest of his or her life or until he or she gets well should not, in the Commission's view, be retained. However, the issue is a difficult one, on which the Commission makes only a tentative suggestion at this stage, since there are sound arguments both ways. In the Commission's view, the present rule involves too great an assumption of a continuing close association of interests between parent and child. The Commission, therefore, tentatively suggests that it would be better to let the child retain the domicile which he or she had before reaching majority, permitting it, in an appropriate case, to be changed by the Court. There should also be power to apply to the courts for a change of domicile on behalf of a child whose domicile is dependent on that of a mentally ill person.

CHAPTER 10 : SUMMARY OF RECOMMENDATIONS ON THE ASSUMPTION THAT DOMICILE IS TO BE RETAINED AS A CONNECTING FACTOR

(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] [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. 65-68).

(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. 69-72).

(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 domicilary 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 recommnedation (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).

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CHAPTER 11 : GENERAL SCHEME OF A BILL TO REFORM THE LAW OF DOMICILE

Note: This Scheme has been prepared on the assumption that domicile is to be retained as a connecting factor in private international law. In other words, it is being assumed that the law of the domicile of a person will govern his capacity to marry and to make a will, succession to his movable property, etc.

1. (1) Provide that on the commencement of the Act the domicile of every married person is an independent domicile; and that any rule of law whereby upon marriage a woman acquires the domicile of her husband and is thereafter during the subsistence of the marriage incapable of having any other domicile is abolished.

(2) Provide that this section 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.

Note: The object of this section is to abolish the domicile of dependency of married women, as recommended in Recommendation (1) supra (p.83). The section is drafted so as to make the abolition extend to all marriages, wherever solemnised and whatever the law under which they may have been solemnised.

2. Provide that the domicile that a person had at any time before the commencement of the Act shall be determined as if this Act had not been passed.

Note: The object of this section is to clarify the position as to how the law, after the proposed legislation, is to determine the domicile of married women before the legislation. The section provides in effect that the abolition of the domicile of dependency is not to be retrosprecive, that is, of course, on the assumption that the concept of domicile of dependency does not conflict with the Constitution.

3. Provide that subject to any rule of law relating to the domicile of mentally ill persons, every person becomes capable of having an independent domicile upon attaining the age of /16 years/ /majority/ or on marriage, and that he thereafter continues to be so capable.

Note: This section reduces the age for acquiring an independent domicile from 21 years to 16 years or to the time of marriage, if the person concerned marries under the age of 16 years. See Recommendation (5) supra (p. 83).

4. (1) Provide that the domicile of a person who has attained the age of /16 years/ /majority/ or who has married before attaining that age is an independent domicile.

(2) Provide that in this section "child" means a person under the age of /16 years/ /majority/ who has not been married; and that "parent" includes an adoptive parent.

(3) (a) Provide that, subject to the other provisions of this subsection, a child has the domicile of the parent with whom he has his home.

(b) Provide that where the child has his home with both parents and the domicile of one parent is not the same as that of the other, then:

(i) if one parent is domiciled in a State in which the parents have their habitual residence, the domicile of the child shall be in that State;

(ii) in any other case, the domicile of the child shall be in the State in which he has his habitual residence or, if the domicile of origin is in issue, in the State in which he was born.

(4) Provide that, where a child ceases to have his home with a parent, his domicile shall be determined by reference to his habitual residence until such time as next he has a home with a parent or reaches the age of majority.

(5) Provide that unless and until a foundling child has its home with one or both of his parents, both his parents shall, for the purposes of this section, be deemed to be alive and domiciled in the State in which the foundling child was found.

(6) Provide that on adoption, the domicile of origin of a child shall be the domicile that the child would have had if it were the child of the adoptive parents born in wedlock to them at the time the adoption order was made; and that thereafter the domicile of the child shall be determined as though it were the child of the adoptive parents born in wedlock to them.

(7) Provide that a parent, on whose domicile a child's domicile depends may on changing his own domicile or (in a case covered by subsection (3)(b)(i)) his habitual residence elect to leave the child's domicile unchanged where a change in domicile would be to the child's detriment; and that, where the domicile of a child so remains unchanged, it may thereafter be changed by a parent (with whom the child has his home) in order to coincide with the present domicile of that parent; provided, however, that the subsequent change would be in the child's interest.

(8) (a) Provide that, on application to it by an interested person, the Court may make an order changing the domicile of a child to that of another State where it considers it proper to do so.

(b) Provide that the Court shall not make an order under paragraph (a) unless it is satisfied:

(i) that either parent of the child is domiciled or habitually resident in the State or that the child is habitually resident in the State;

(ii) that there is a real and substantial connexion between the child and the State to which it is sought to change his domicile;

(iii) that it would clearly be in the interest of the child to make such an order; and

(iv) that the making of such an order will not unreasonably affect the interests of other persons.

(c) Provide that, before granting an order under paragraph (a), the Court may direct notice of the proceedings to be served on any person appearing to it to have an interest in the matter.

(9) An application may not be made under this section except where a parent -

(a) is dead

(b) has deserted, or has been deserted by, the other parent,

(c) is living separately and apart from the other parent, or

(d) is mentally ill.

Note: This is a wide-ranging section, which gives effect to the Commission's recommendations as regards the domicile of children - Chapter 8 supra and Recommendations (5) to (12) in Chapter 10 supra (pp. 58-77, 83-85).

Subsection (1) proposes that persons /aged 16 years/ /of full age/ and persons married before that age are to have an independent domicile. Subsection (2) proposes the formal definition of a "child" as being "a person under the age of /16 years/ /majority/ who has not married"; and proposes that "parent" includes an adoptive parent. Subsection (3) sets out the rules for determining the domicile of a child in most cases. Paragraph (a) covers the most normal case: where the parents are living together and are of the same domicile. The child's domicile will, if he has his home with his parents, follow theirs. Where the parents are not living together the child's domicile will follow that of the parent with whom he has his home. Where the parents do not have the same domicile, then, if they have their havitual residence in the State where one of them is domiciled, the child's domicile will be in that State - subsection 3(b)(i). Where the parents are living together but do not share the same domicile and do not live in a State which is that of the domicile of either of them, the child's domicile will be that of the State in which he has his habitual residence

or, in the case of a domicile of origin, the State in which he is born - subsection 3(b)(ii).

Subsection (4) provides that, where a child ceases to have his home with a parent, his domicile will be determined by reference to his habitual residence until next he has a home with a parent or reaches full age. Thus there should never be a time when it is not possible to determine the child's domicile.

Subsection (5) provides that a foundling's domicile is to be that of the country in which the foundling is found, unless and until the child has his home with one or both of his parents, in which case his domicile will change to that of the parent or parents.

Subsection (6) places adopted children in substantially the same position regarding their domicile as legitimate children - the time the adoption order is made being regarded, for the purpose of determining the adopted child's domicile of origin, as the time of his birth.

Subsection (7) enables a parent with whom the child resides to elect not to change the domicile of the child when changing his or her own domicile, if to do so would be to the detriment of the child. He or she may, however, change the child's domicile to that of his or her own domicile at some later stage where to do so would be in the child's interest.

Subsection (8) enables the Court to change a child's domicile on application to it by an interested person. Paragraph (b) of the subsection, however, provides that the Court may not do so unless (i) either parent is domiciled or has his habitual residence in the State or the child has his habitual residence in the State, (ii) there is a "real and substantial connexion" between the child and the State to which it is sought to change the domicile; (iii) it would clearly be in the child's interest to do so; and (iv) the interests of other persons would not be unreasonably affected (as, for example, where the change would deprive a person of an inheritance). In this context, the Court is

empowered by paragraph (c) to serve a notice on any such person who may have an interest in the matter.

Subsection (9), which lists the circumstances in which an application to the Court may be made, follows the rule contained in section 5(1)(b) of the Family Law (Maintenance of Spouses and Children) Act 1976 (No.11), which paragraph deals with applications for maintenance orders as respects dependent children.

5. (1) Provide that where a person of full age becomes mentally ill his domicile remains that which it was at the commencement of his disability.

(2) Provide that where a child is or becomes mentally ill his domicile is determined in accordance with the provisions of section 4.

(3) Provide that, where a person referred to in subsection (2) reaches full age, his domicile remains that which it was at the date of reaching full age.

(4) Provide that the Court may change the domicile of a person who is mentally ill where, on application to it by the committee of the estate of that person or, if there is no committee, by an interested party, it appears to the Court to be proper to do so in the interest of the mentally ill person and having regard to the interests of other persons.

(5) Provide that the domicile of a person whose domicile is dependent on a person who is by virtue of mental illness incapable of changing his domicile shall be determined by reference to the domicile of the latter.

(6) Provide that, for the purpose of subsection (4), "the Court" shall mean the High Court or the Circuit Court in a case within the latter Court's jurisdiction.

Note: This section sets out the proposed rules for determining the domicile of a mentally ill person. The domicile of a person who becomes mentally ill when an adult will remain frozen at what it was at the commencement of his disability - subsection (1). If a child is or becomes mentally ill he will be treated as all other children are treated during his minority, but thereafter his domicile shall be frozen at the date of his reaching full age - subsections (2) and (3). The Court is being given power to change the domicile of a mentally ill person when it would be in his interest to do so - subsection (4). Where a person's domicile depends on that of another person who is or becomes incapable, his domicile will nonetheless continue to depend on the domicile of the incapable person - subsection (5). In appropriate cases, an application to the Court for a change of domicile may always be made under section 4(8).

6. Provide that the domicile a person has immediately before he becomes capable of having an independent domicile continues until he acquires a new domicile in accordance with section 7, and that it then ceases.

Note: The purpose of this section is to provide that, on the attainment of an independent domicile, a person's former dependent domicile will continue until he acquires a new domicile of choice. The object is to prevent any vacuum arising.

7. Provide that a person acquires a new domicile in a State at a particular time if, immediately before that time -

(a) he is not domiciled in that State;

(b) he is capable of having an independent domicile;

(c) he is in that State; and

(d) he intends to live indefinitely in that State.

Note: This section sets out the requirements for acquiring a new domicile. In particular it provides that an intention to live "indefinitely" in a State (rather than "permanently") will suffice. (See para.120 p.78 supra).

8. Provide that a person who has his habitual residence and intends to live indefinitely in a State (that has two or more territorial units in which different systems of law apply as respects domicile) but has not formed an intention to live indefinitely in any territorial unit forming part of that State shall be deemed to intend to live indefinitely -

(a) in that territorial unit in which he has his habitual residence;

(b) if he does not have habitual residence in any such unit, in the territorial unit in which he ordinarily resides; or

(c) if he has neither his habitual residence nor his ordinary residence in any such unit, in whichever unit he was last ordinarily residing.

Note: This section sets out the rules for determining the domicile of a person who comes to a federal State with the intention of living there indefinitely but who has not formed a settled intention of residing in any one jurisdiction in that State. The section is similar to the one in the recent legislation in New Zealand, but it uses the concept of "habitual residence" rather than that of "ordinary residence" favoured in New Zealand legislation. As to "ordinarily resides" see section 23 of the Family Law (Maintenance of Spouses and Children) Act 1976 (No.11).

9. Provide that a new domicile acquired in accordance with Section 7 continues until a further new domicile is acquired in accordance with that section; and that any rule of law whereby a person's domicile of origin revives upon his abandoning a domicile of choice is hereby abolished.

Note: The main purpose of this section is to abolish the rule that one may abandon a domicile of choice without acquiring a new domicile of choice. Under present law, in such a case, the domicile of origin revives. For a statement of the Commission's view as to why the revival rule should no longer apply, see para. 122, pp. 79-81 supra.

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

Note: This section gives effect to Recommendation (4) of the Commission in Chapter 10 supra that the capacity of a testator should be determined by the law of his domicile at the time of the making of the will.

11. 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 the doctrine of divisible divorce in statutory form. See Recommendation (3) in Chapter 10 supra and Article 14(3) of the Hague Convention on the Law Applicable to Maintenance Obligations (2 October 1973). This provision in the Convention was inserted at the instigation of Ireland and of the United States.

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

Note: The object of this provision (which is modelled on Article 3 of the Hague Convention on the Recognition of Divorces and Legal Separations (1 June 1970)) is to allow for the recognition of divorces etc. where the State of origin of the divorce etc. uses the concept of habitual residence.

13. Provide that this Act may be cited as the Domicile Act 1981.

CHAPTER 12 : HABITUAL RESIDENCE

(1) Introduction

125. As has been mentioned[1], the Commission has examined the more radical proposal that domicile be replaced as a connecting factor by habitual residence. Presented infra[2] is a General Scheme of a Bill designed to give effect to this change. However, certain aspects of the proposal merit detailed consideration.

(2) Determination of Habitual Residence

126. An important question arises as to whether legislation replacing the concept of domicile by the concept of habitual residence should define "habitual residence" or leave the matter to the courts to determine. 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 may be considered a useful exercise for the legislation to assist this judicial analysis by drawing the broad guidelines. The Commission favours this approach. Firstly, the Scheme 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" - section 3(1). Clearly, this is a very general guideline. It is designed to stress the existing reality as to the position of the person

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[1] Supra, p. 10.

[2] P. 101.

in question rather than to refer to his ultimate long-term aspirations. (These aspirations will continue to be a factor but will lose their present predominance, as the next sentence makes clear). Secondly, section 3 provides that, in making a determination of a person's habitual residence, account is to be taken of the duration of his personal, social and economic interests and of the intentions of the person relative thereto - subsection (2). As with the first principle, broad guidelines have been favoured. Thirdly, section 3 provides that the habitual residence of any person is not as a matter of law to be determined by that of a spouse, parent or any other person - subsection (3). In other words, habitual residence will involve no concept similar to the domicile of dependency of married women or of children.

(3) Habitual Residence of a Spouse

127. Where habitual residence is adopted as a connecting factor no problems arise similar to those relating to domicile of dependency of married women. 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 section 4 of the Scheme, 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.

(4) Habitual Residence of a Child

128. The Commission recommend for consideration a fairly simple approach to this problem. Section 5 of the Scheme provides that a child is presumed to have the habitual residence of his parents or of that parent in whose custody he is 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 his parents since only a rebuttable presumption is involved. The section does not attempt to give precise rules for all cases. Where the habitual residence of one parent differs from that of the other, the habitual residence of the child will be that of the parent with whom the child has his home or in whose custody he is. Difficult cases can best be dealt with by the courts (rather than by the legislature) in the light of all the circumstances of the particular case.

(5) Change of Habitual Residence

129. Section 6 provides that a person may have his habitual residence only in one State and that he is to be deemed to have his habitual residence in that State until such time as he acquires 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. The provision deeming a person to have an habitual residence in one State until such

time as he acquires it in another reflects policy similar to that which was favoured in respect of domicile, namely, that the most satisfactory solution to the problem of abandonment of one habitual residence without acquisition of another is to deem that the previous habitual residence persists.

130. On the assumption that domicile would continue as the appropriate connecting factor, the Commission has proposed supra that the capacity of a testator should be determined by the law of his domicile at the time of the execution of the will. If habitual residence is to replace domicile as a connecting factor, it seems desirable that the legislation should specify a similar rule, namely, 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.

CHAPTER 13 : 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

Short Title

1. Provide that the Act may be cited as the Conflict of Laws (Habitual Residence) Act 1981.

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

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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 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. (For a general discussion of the concept of habitual residence, see paras. 18-25, pp. 10-15, supra.)

(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. Subsection (3) is included to make clear that doctrines analogous to the dependency of domicile rule will have no application in determining habitual residence. (See para. 126, pp 97-98 supra.)

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. (See para. 127, p. 98 supra.)

5. Provide that a child under the age of /~~sixteen~~/ /~~majority~~/ 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 minor 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 in all cases. (See para. 128, p. 99 supra.)

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. *(See para. 129, p. 99 supra.)*

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 section is similar to section 10 of the General Scheme of the Bill on Domicile. *(See p. 95 supra.)*

8. Provide that where the State of origin uses 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. See also section 12 of the General Scheme of the Bill on Domicile - p. 96 supra.

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: This provision is the same as section 11 of the General Scheme of the Bill on Domicile - p. 96 supra.

APPENDIX

PERSONS AND ORGANISATIONS WHO MADE SUBMISSIONS TO THE COMMISSION ON THE DOMICILE OF MARRIED WOMEN

Council for the Status of Women

The AIM Group

Women's Representative Committee

Irish Women United

Irish Housewives' Association

An tArd Chlaraitheoir

Mr William R. Duncan, Senior Lecturer in Law, Trinity College, Dublin

Mrs. Nora O'Connor, Betaghstown, Clane, Co. Kildare

Mrs. Margaret Ridgway, Rossmore, Mallow, Co. Cork.