

# Comments

## DOMICILE — THE NEED FOR REFORM

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In 1961 the Commissioners on Uniformity of Legislation in Canada drafted a Model Act "to reform and codify the law of domicile."<sup>1</sup> This Act has, as yet, not been adopted by any province in Canada. Lawyers have lost sight of the need to reform the law of domicile. It is the purpose of this note to illuminate some of the technicalities and artificialities associated with domicile in the hope, if not the expectation, that reforms can soon be made. I propose to outline the existing rules relating to domicile and to point out those areas which demand reform. I will discuss the limited piecemeal reforms which have already been introduced and attempt to point the way to a more complete reform of the law of domicile. In so doing I will take a close look at the Model Act and determine whether that proposal is the proper vehicle for reform or whether a more comprehensive proposal can be formulated.

Domicile is very important in the Conflict of Laws. Many questions fail to be determined by the law of a person's domicile. Its main area of application is in the field of domestic relations. Thus the law of a party's ante-nuptial domicile determines whether or not he has capacity to enter a valid marriage.<sup>2</sup> A petitioner in a divorce suit must establish, *inter alia*, that he is domiciled in Canada before a court can assume jurisdiction over that petition.<sup>3</sup> The domicile of the petitioner in Manitoba is a sufficient jurisdictional basis in a nullity suit<sup>4</sup> and the domicile of one or other or both of the parties plays a significant role in the determination of whether or not foreign decrees of divorce<sup>5</sup> or nullity<sup>6</sup> should be recognized in Manitoba. Similarly, the existence and, to a certain extent, the incidents of a person's status are governed by the law of his domicile.<sup>7</sup>

The relevance of domicile, however, is not confined to family law. The law of a deceased's last domicile governs

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1. *Conference of Commissioners on Uniformity of Legislation in Canada* (1961) 139.

2. *Brook v. Brook* (1861), 9 H.L. Cas. 163.

3. *The Divorce Act*, R.S.C. 1970, c. D-8, s. 5(1)(a).

4. *Savelieff v. Glouchkoff* (1964), 45 D.L.R. (2d) 520 (B.C.C.A.).

5. *Le Mesurier v. Le Mesurier*, [1895] A.C. 517 (P.C.) (Ceylon); *Armitage v. The Attorney-General*, [1900] P. 135.

6. *Salvesen or Von Lorange v. Administrator of Austrian Property* [1927] A.C. 641 (H.L.); *Re Capon* (1965), 49 D.L.R. (2d) 875 (Ont. C.A.).

7. *Lister v. McAnulty*, [1944] S.C.R. 317.

questions of intestate succession to his movable property<sup>8</sup> and the essential validity of any bequest of movables.<sup>9</sup> Furthermore, a testator's domicile at death and his domicile at the time of making his will are two of the laws to which reference can be made to uphold the formal validity of his will insofar as it deals with movable property.<sup>10</sup> The domicile of the defendant in Manitoba is, also, one of the grounds upon which the plaintiff can serve the Statement of Claim on the defendant out of Manitoba.<sup>11</sup>

Since, for most purposes, the object of a domicile is to attach a person to a legal system so that the applicable law can be determined, it is, in general, necessary to establish a domicile in a territory subject to one body of law<sup>12</sup>. It is insufficient, for example, to establish a domicile in Canada or the United States; you have to prove the acquisition of a domicile in one of the provinces of Canada or in one of the states of the United States.<sup>13</sup> There are certain statutory exceptions to this rule, for example a domicile in Canada is relevant for the purposes of divorce jurisdiction.<sup>14</sup>

#### *The Existing Rules Relating To Domicile*<sup>15</sup>

There are a number of general principles relating to domicile to be borne in mind.<sup>16</sup> Thus it is quite clear that everybody must have a domicile somewhere<sup>17</sup> because otherwise it would be impossible to apply the law of the domicile to a given legal question and for similar reasons nobody can have more than one domicile at the same time for the same purpose.<sup>18</sup> The burden of proving a change of domicile is upon the party asserting the change<sup>19</sup> and, finally, the forum applies its own law to determine where a person is domiciled.<sup>20</sup>

The law distinguishes between three different types of domicile — domicile of origin, domicile of choice and domicile of dependency. At birth everybody is assigned a domicile of origin. In the case of legitimate children their domicile or origin is the domicile of their father at birth.<sup>21</sup> Their domicile or origin, therefore, will not necessarily be the place where they are born.

8. *Re Maldonado*, [1954] P. 223 (C.A.).

9. *The Wills Act*, C.C.S.M. c. W 150, s. 39(2).

10. *The Wills Act*, C.C.S.M. c. W150, ss. 39(2), 40 (1)(b).

11. *The Queens Bench Rules*, Man. Rev. Reg. 1971, C280-R1 r. 28(d).

12. *Trottier v. Rajotte*, [1940] S.C.R. 203.

13. Throughout this paper I shall use the term 'country' to refer to a territory subject to one body of law.

14. *Supra* n. 3.

15. For a fuller treatment of the law relating to domicile, see J. Castel, *Canadian Conflict of Laws* (1975) 101 — 136 or Dicey and Morris, *The Conflict of Laws* (9th ed. J. Morris 1973) 85 — 129.

16. See Dicey and Morris, *supra* n. 15, 88 — 92.

17. *Udny v. Udny* (1889), L.R. 1 Sc. & Div. 441, at 457 (H.L.).

18. *Id.*, at 448.

19. *Re Fuld* (No. 3), [1968] P. 675, at 685.

20. *Re Martin*, [1900] P. 211 (C.A.); *Re Annesley*, [1926] Ch. 692.

21. *Supra* n. 17.

An illegitimate child takes the domicile of his mother at birth as his domicile of origin.<sup>22</sup> If it is impossible to ascertain the domicile of the relevant parent at birth the child is treated as a foundling and his domicile of origin will be in the place of his birth.<sup>23</sup>

Every independent person (i.e. not a member of the unholy trinity of wife, child or lunatic) is free to acquire a domicile of choice in a given country. There are two elements in the acquisition of a domicile of choice. The person must reside in a particular country with the intention of residing there permanently or indefinitely.<sup>24</sup> The residence must not be for a particular length of time or for a particular or temporary purpose. The residence must be indefinite in its contemplation.

The residence requirement is usually easy to satisfy. The term 'residence' implies the establishing of some sort of a home in the country but there is no requirement that the residence be long. A brief residence of a few hours is quite sufficient provided that the requisite intention is present.<sup>25</sup>

It is far more difficult to prove the necessary intention. The judges are reluctant to presume the existence of the intention merely from the fact of a long continued residence in the particular country. The intention must be proved in fact with the result that the courts tend to delve very deeply into all the circumstances of a person's life to determine whether he had the intention to reside permanently in the country in question. Very often surprising conclusions are reached as to a person's domicile. The classic and most criticized example of this approach is the House of Lords decision in *Winans v. The Attorney-General*.<sup>26</sup> Long, almost uninterrupted, residence in England was insufficient for Winans to acquire a domicile of choice there. The fact that Winans was an intense anglophobe and hoped eventually to return to America, to build a fleet of cigar-shaped ships to take away trade from Britain, militated against the formation of a fixed purpose to settle permanently in England.<sup>27</sup>

Later Canadian authorities have been more ready to find the requisite intention. The fact that a person will leave the country of his residence upon some vague contingency will not prevent

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22. *Ibid.*

23. *Re McKenzie* (1951) 51 S.R.N.S.W. 293.

24. Note Lord Westbury in *Udny v. Udny*, supra n. 17, at 458:

"Domicile of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place with an intention of continuing to reside there for an unlimited time."

See also *Wadsworth v. McCord* (1886), 12 S.C.R. 466, at 475 *per* Ritchie C.J.

25. *White v. Tennent*, 8 S.E. 596 (W. Va. 1888).

26. [1904] A.C. 287 (H.L.).

27. The *Winans* case was applied in *Ramsay v. The Liverpool Royal Infirmary*, [1930] A.C. 588 (H.L.).

the acquisition of a domicile of choice there. In *Gunn v. Gunn*<sup>28</sup> a husband wanted to show that he had acquired a domicile of choice in Saskatchewan for the purposes of divorce jurisdiction. He had left Manitoba some six years earlier to manage a theatre in Saskatchewan for his employer. He testified that he would move elsewhere if he were offered a better job. The Court of Appeal held that he had acquired a domicile in Saskatchewan. Gordon J.A.<sup>29</sup> adopted the dictum of Kindersley V.C. in *Lord v. Colvin*:<sup>30</sup>

That place is properly the domicile of a person in which he has voluntarily fixed the habitation of himself and his family, not for a mere special and temporary purpose, but with the present intention of making it his permanent home, unless and until something (which is unexpected, or the happening of which is uncertain) shall occur to induce him to adopt some other permanent home.

Similarly, in *Osvath-Latkoczy v. Osvath-Latkoczy*<sup>31</sup> a refugee from the Hungarian Uprising of 1956 acquired a domicile of choice in Ontario despite his testimony that he would return to Hungary if the Russians abandoned their occupation. He had, also, stated that he had "no hope or expectation that political conditions would permit of his return."<sup>32</sup>

A person is always free to abandon his domicile of choice in a given country by leaving there with the intention of not returning. He will not, of course, lose his domicile of choice in that country by going away on a vacation because he still intends to return there to live. Similarly, he will not lose his domicile of choice there by intending to settle elsewhere if he does not carry that intention into effect.<sup>33</sup> But the acquisition of a new domicile of choice is **not** an element in the abandonment of the old. A person can abandon a domicile of choice without immediately acquiring another domicile of choice. Until he does in fact acquire a new domicile of choice by residing in a country with the intention of residing there indefinitely, his domicile of origin will revive to fill the gap.<sup>34</sup> This is one reason why the domicile of origin is so important. It always remains in abeyance ready to spring to life as soon as a domicile of choice is abandoned. It is, thus, obvious that a person cannot abandon his domicile of origin.<sup>35</sup> It will continue until it has been supplanted by the acquisition of a domicile of choice and then it will revive again once that domicile of choice has been lost.

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28. (1956), 2 D.L.R. (2d) 351 (Sask. C.A.).

29. *Id.*, at 353.

30. (1859), 4 Drew 366, at 376, 62 E.R. 141, at 145 (ch.).

31. [1959] S.C.R. 751.

32. *Id.*, at 752.

33. *Fedeluk v. Fedeluk* (1968), 63 W.W.R. 638 (Alta. S.C.).

34. *Udny v. Udny*, *supra* n. 17; *Re Rattenbury*, [1936] 2 W.W.R. 554 (B.C.S.C.).

35. *Bell v. Kennedy* (1868), L.R. 1 Sc. & Div. 307 (H.L.).

Married women, children and lunatics are regarded as legally dependent because they are incapable of acquiring a domicile of choice. During the subsistence of the marriage the wife's domicile depends upon that of her husband. Her domicile is the same as and will change with that of her husband and this is the case even if the parties are living apart or are judicially separated.<sup>36</sup> Only upon the termination of the marriage is she free to acquire a domicile of choice. The domicile of a legitimate minor will be the same as and will change with that of his father during minority.<sup>37</sup> *Coyne J.A. in Hannan v. Eisler* suggested the sensible qualification that if the parents are divorced or separated the domicile of the child should depend upon the parent with permanent legal custody.<sup>38</sup> There is, however, no direct Canadian or English authority supporting this proposition. From the time of legitimation a legitimated minor presumably takes the domicile of his father. But his domicile of origin will be the domicile of his mother at the time of birth. The domicile of an illegitimate child and of a legitimate child whose father has died will depend on that of his mother.<sup>39</sup> Lunatics form the third category of dependent persons. Presumably a lunatic in this context means a person who, as a result of mental disorder, is incapable of forming the necessary intention for the acquisition of a domicile of choice. It is difficult to predict what degree of insanity or mental disorder will be needed to establish such incapacity. Such people retain the domicile they had when they began to be treated as insane.

#### *The Need For Reform*

Domicile has been loosely defined as permanent home.<sup>40</sup> Unfortunately certain technical rules relating to domicile have led to that concept becoming removed from the notion of permanent home. It is submitted that many of the artificialities associated with domicile can be eradicated. There are three aspects of the law of domicile which are ripe for reform. These are (1) the element of invention in the acquisition of a domicile of choice, (2) the importance of the domicile of origin and (3) the concept of the dependent domicile.

It is very difficult to prove that a domicile of choice has been acquired in a given country because the courts insist that the intention to settle must be proved in fact. This approach necessitates the bringing of a great deal of evidence to try and establish that intention. Proceedings can be protracted and

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36. *Attorney-General for Alberta v. Cook*, [1926] A.C. 444 (P.C.).

37. *Wadsworth v. McCord*, supra n. 24 at 469.

38. [1955] 1 D.L.R. 183, at 189 (Man. C.A.).

39. *Pottinger v. Wightman* (1817), 3 Mer. 67; 36 R.R. 26 (ch.) *Re Beaumont*, [1893] 3 Ch. 490.

40. *Whicker v. Hume* (1858), 7 H.L. Cas. 124 at 160 per Lord Cranworth.

expensive and it is very difficult for a lawyer to advise his client as to the domicile of a given individual. These problems were brought out by the English Private International Law Committee in its first report in 1954:<sup>41</sup>

... [I]t is clear that it may be extremely difficult to ascertain a person's true intention about his permanent residence, where this involves, as it often does, an investigation of the state of mind of a deceased person. . . . The court has no presumption of law to guide it in weighing evidence of a man's subjective intentions, but "there is no act, no circumstance in a man's life, however trivial it may be in itself, which ought to be left out of consideration in trying the question whether there was an intention to change his domicile" (per Kindersley V.C. in *Drevon v. Drevon* [1864] 34 L.J. (N.S.) 129 at p. 133). The undesirable results of this are obvious. Trials are apt to be long and expensive; for since a man's state of mind must be investigated, evidence even of the smallest matters is relevant. Besides, the difficulty of reaching certainty in matters of domicile in the absence of any decision by a competent court is a serious inconvenience to numerous people when they come to make a will or in the many other circumstances in which it is necessary to know which legal system is applicable. The practitioner may find it impossible to advise his client with confidence, since he cannot prophesy what impact the facts will have upon the judge's mind.

Criticism has centered on the decisions of the House of Lords in *Winans v. The Attorney-General*<sup>42</sup> and *Ramsay v. Liverpool Royal Infirmary*.<sup>43</sup> It will be instructive to look more closely at the *Winans* case.

William Louis Winans was born in the United States, with an American domicile of origin, in 1823. In 1850 he went to Russia and was employed by the Russian Government in equipping railways. He assisted the Russians during the Crimean War by constructing and equipping gun boats to be used against the English. His health, however, was failing and his doctors advised him that another Russian winter could kill him. He was told to winter in Brighton on the south coast of England. Reluctantly, he followed that advice and for the next ten years of his life he spent the winters in Brighton. Gradually he increased the time he spent in England and from 1883 to his death in 1897 he lived almost continuously in England. The question arose as to his domicile at death. If he died domiciled in England, English legacy duty was payable.

The majority of the House of Lords<sup>44</sup> held that the Crown had not discharged its burden of proving that Winans had acquired a domicile in England. Winans, therefore, retained his American domicile of origin despite the fact that he had not returned to the

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41. *First Report of the Private International Law Committee* (1954) Cmd. 9068, para. 9.

42. *Supra*, n. 28.

43. *Supra*, n. 27.

44. Lords Halsbury and MacNaghten.

United States since he left in 1850. Lord MacNaghten held that the intention to settle in England had to be affirmatively proved. Long residence, alone, was insufficient for the acquisition of a domicile of choice. He had to consider "what manner of man Mr. Winans was, what were the main objects of his existence, and what sort of life he lived in this country [England]." <sup>45</sup> He came to the conclusion that Winans had three main objects in life:

His first object was his health. He nursed and tended it with wonderful devotion. He took his temperature several times a day. He had regular times for taking his temperature, and regular times for taking his various waters and medicines. <sup>46</sup>

The two other objects in Winans' life were the important ones for Lord MacNaghten's decision. The first was the construction of a fleet of cigar shaped ships which would be able to cross the Atlantic without pitching or rolling. These ships would take away trade from England and would give America command of the seas. The second was the development of a large piece of property in Baltimore. Docks would be constructed for the ships and Winans would build a huge house for himself from which he could take charge of the entire operation. Winans kept these two objects in mind throughout his life and "one was anti-English and the other wholly American." <sup>47</sup> At the end of his life Winans was working night and day on his schemes.

Lord MacNaghten took into account the objects of Winans' life together with the fact that he never bought himself an estate in England and concluded that he had retained his American domicile of origin:

When he came to this country he was a sojourner and a stranger, and he was, I think, a sojourner and a stranger in it when he died. <sup>48</sup>

Thus, Lord MacNaghten delved very deeply into all the aspects of Winans' existence to determine whether an intention to settle in England had been established; found that that intention could not be shown and as a result came to an artificial conclusion as to Winans' domicile. Lord Lindley, dissenting, adopted a more common sense approach:

Where was Mr. Winans' home — his settled permanent home? He had one and only one, and that one was in this country; and long before he died I am satisfied that he had given up all serious ideas of returning to his native country. He was an American citizen permanently settled in this country. But although so settled he was proud of his nationality and had no intention to change it. He may at one time have looked back on Baltimore as his possible ultimate home, but he had ceased to do so long before he died. <sup>49</sup>

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45. *Supra*, n. 26, at 294.

46. *Id.*, at 295.

47. *Id.*, at 297.

48. *Id.*, at 298.

49. *Id.*, at 300.

It is true that Canadian courts have been more generous in finding the acquisition of a domicile of choice<sup>50</sup> and they are especially prepared to find a change of domicile between two Canadian provinces.<sup>51</sup> But Canadian courts often encounter great difficulties in finding the requisite intentions.<sup>52</sup>

To cut out the artificiality and uncertainty of domicile, that concept should be assimilated more with the notion of home. The residence element should be emphasized rather than the intention element. A person should be domiciled in the place where he has his home and if he has more than one home he should be domiciled in his principal home, unless it is evident that his residence there is of a purely temporary nature. But the longer the residence, the harder it should be to establish that the residence was merely temporary.

The present law places a great emphasis on the domicile of origin. "Domicile of origin . . . differs from domicile of choice mainly in this — that its character is more enduring, its hold stronger, and less easily shaken off."<sup>53</sup> Its enduring character is partly due to the fact that it is very difficult to prove that it has been displaced in favour of a domicile of choice<sup>54</sup> and partly due to the doctrine of the revival of the domicile of origin. This doctrine was established in *Udny v. Udny*<sup>55</sup> and it can lead to some surprising results:

e.g. A is born in Germany in 1935 with a German domicile of origin. Immediately after his birth, his parents decide to settle in Canada. They move to Manitoba and buy a farm there. A lives in Manitoba until 1976 when he accepts a job in British Columbia. While driving to British Columbia to take up his appointment, A is killed in an accident in Alberta. The question arises as to A's domicile at death for the purpose of the distribution of his movable property. A dies domiciled in Germany. He has acquired a domicile of choice in Manitoba but, as soon as he leaves Manitoba with the intention of not returning, his German domicile of origin revives and remains until he acquires a domicile of choice in British Columbia. He dies before he acquires that domicile of choice.

It is quite ridiculous to distribute A's property according to German law. He lived in Germany only for a few weeks. Canada has been his home for over 30 years. All of his property has been acquired while he was living in Canada and it is probably situated in Canada.

The doctrine of the revival of the domicile of origin is especially unfortunate in Canada. A large proportion of Cana-

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50. *Gunn v. Gunn*, *supra* n. 28; *Osvath-Latkoczy v. Osvath-Latkoczy*, *supra* n. 31.

51. *Gunn v. Gunn*, *supra* n. 28; *Young v. Young* (1960), 21 D.L.R. (2d) 616 (Man. C.A.).

52. e.g. *Trottier v. Rajotte*, *supra* n. 12.

53. *Winans v. The Attorney-General*, *supra* n. 26, at 290 per Lord MacNaghten.

54. *Winans v. The Attorney-General*, *supra* n. 26; *Ramsay v. The Liverpool Royal Infirmary*, *supra* n. 27.

55. *Supra* n. 17.



dians are immigrants with European domiciles of origin. Furthermore, Canada is a federal state and people commonly move from province to province and thus the chances of the domicile of origin being revived are multiplied. There is much to be said in favour of the American doctrine that an existing domicile, whether of choice or of origin, continues until a new one has been acquired.<sup>56</sup> The American courts would have found A to be domiciled in Manitoba at his death.

There is no need to place undue stress on the domicile of origin. The doctrine of the revival of the domicile of origin should be abolished and it should be no harder to displace the domicile of origin than it is to displace a domicile of choice.

Above all, the domiciles of dependency are in need of reform.

There is no reason why a married woman should be unable to acquire a domicile of choice. In the majority of cases her domicile will be the same as that of her husband but that factor should not militate against her ability to acquire a domicile on her own behalf. The present law can lead to ridiculous results:

e.g. H is born in New Zealand with a New Zealand domicile of origin. He leaves New Zealand to teach in Canada. W is born in Winnipeg with a Manitoba domicile of origin. H obtains a teaching position at the University of Manitoba, H and W are married in Manitoba and they live together there for 10 years. H, then, deserts W and returns to New Zealand to live permanently. At that time and until the termination of the marriage W is domiciled in New Zealand although she might never have been away from Canada in her lifetime. If she were to die her movables would devolve according to the law of New Zealand.

The wife's domicile of dependency should be abolished.

Similarly there is no reason why the domicile of a legitimate child should invariably depend upon the father nor why the domicile of an illegitimate child should invariably depend on the mother. If the parents are separated or divorced and the child is living with the mother, it is very artificial for the child's domicile to depend upon that of his father. The domicile of a child should depend upon the domicile of the person with custody whether that person be the mother, the father or some guardian.<sup>57</sup>

Some relaxation of the present law must be made, also, in the case of lunatics. It is very harsh that their domicile is incapable of change. Perhaps a rule can be introduced whereby they will be domiciled in the place where they have their principal home.

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56. *Re Jones*, 182 N.W. 227 (1a. Sup. Ct. 1921).

57. Lord MacDermott in *Hope v. Hope*, [1968] N.I. 1, at 4—5 (Q.B.) thought that the rule that the domicile of a legitimate child depended upon the father was based upon the responsibility that the father had over that child and he saw no reason why that dependency should remain when custody had been awarded to the mother.

### *Reforms Already Introduced*

No substantial reforms have been made of the common law rules of domicile. The common law position remains except in the area of divorce. By section 6(1) of the **Divorce Act**<sup>58</sup> the domicile of a married woman, for the purposes of divorce jurisdiction, is to be determined as if she were unmarried and, if she is a minor, as if she has attained the age of majority. This reform is undoubtedly useful in enabling the wife to bring a divorce petition but it is a limited reform. It deals with just one of the artificialities of domicile in just one area. More comprehensive reforms have been introduced in the United Kingdom by the **Domicile and Matrimonial Proceedings Act** which reforms the dependent domiciles of married women and infants for all purposes.<sup>59</sup> But even this Act makes no attempt to deal with the other difficulties associated with the present law relating to domicile. A more complete reform of domicile is now needed.

### *The Model Act — A Vehicle for Reform?*

In view of the problem areas outlined and in the light of the movement for reform in the United Kingdom, the Commissioners on Uniformity of Legislation in Canada drafted their Model Act in 1961:<sup>60</sup>

58. R.S.C. 1970, c. D-8.

59. *Domicile and Matrimonial Proceedings Act*, 1973 c. 45 (U.K.)

Section 1 (1) Subject to subsection (2) below, the domicile of a married woman as at any time after the coming into force of this section 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 3 (1) The time at which a person first becomes capable of having an independent domicile shall be when he attains the age of sixteen or marries under that age; and in the case of a person who immediately before 1st January 1974 was incapable of having an independent domicile, but had then attained the age of sixteen or been married, it shall be that date.

Section 4 (1) Subsection (2) of this section shall have effect with respect to the dependent domicile of a child as at any time after the coming into force of this section when his father and mother are alive but living apart.

- (2) The child's domicile as at that time shall be that of his mother if
- (a) he then has his home with her and has no home with his father; or
  - (b) he has at any time had her domicile by virtue of paragraph (a) above and has not since had a home with his father.

(3) As at any time after the coming into force of this section, the domicile of a child whose mother is dead shall be that which she last had before she died if at her death he had her domicile by virtue of subsection (2) above and he has not since had a home with his father.

(4) Nothing in this section prejudices any existing rule of law as to the cases in which a child's domicile is regarded as being, by dependence, that of his mother.

60. *Supra* n. 1.

DRAFT ACT TO REFORM AND CODIFY  
THE LAW OF DOMICILE

1. This Act may be cited as the Domicile Code.
2. This Act replaces the rules of the common law for determining the domicile of a person.
3. In this Act, unless the context otherwise requires, "mentally incompetent person" means . . .
4. (1) Every person has a domicile  
(2) No person has more than one domicile at the same time.  
(3) The domicile of a person shall be determined under the law of the province.  
(4) The domicile of a person continues until he acquires another domicile.
5. (1) Subject to section 6, a person acquires and has a domicile in the state and in the subdivision thereof in which he has his principal home and in which he intends to reside indefinitely.  
(2) Unless a contrary intention appears,  
(a) a person shall be presumed to intend to reside indefinitely in the state and subdivision where his principal home is situate; and  
(b) a person shall be presumed to have his principal home in the state and subdivision where the principal home of his spouse and children (if any) is situate.  
(3) Subsection (2) does not apply to a person entitled to diplomatic immunity or in the military, naval or air force of any country or in the service of an international organization.
6. The person or authority in charge of a mentally incompetent person may change the domicile of the mentally incompetent person with the approval of a court of competent jurisdiction in the state and subdivision thereof in which the mentally incompetent person is resident.
7. This Act comes into force on a day to be fixed by the Lieutenant-Governor by his proclamation.<sup>61</sup>

The Act makes a bold attempt to deal with those aspects of domicile in need of reform. It introduces most of the changes needed to ensure that domicile is no longer such an artificial notion.

Thus, the intention element in the acquisition of a domicile is reduced in importance. The presumption laid down in section 5(2)(a) means, in general, that a person will be domiciled where he has his principal home. The courts will not have to undertake an in-depth search into all the circumstances of the case to determine whether a person has the requisite intention. The necessary intention will be presumed unless some evidence is given to the contrary. If the Act is ever passed, cases like **Winans**<sup>62</sup> can be permanently laid to rest. It will be far easier to determine where a person is domiciled.

No special emphasis will be placed upon the domicile acquired at birth. There will no longer be a presumption in

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61. For an excellent discussion of the reforms propounded by the Model Act, see W.S. Tarnopolsky, "The Draft Domicile Act — Reform or Confusion?" (1984), 29 Sask. B. Rev. 161.

62. *Supra* n. 26.

favour of the continuance of the domicile of origin and the doctrine of its revival is abolished by section 4(4). The possibility of a Canadian immigrant dying domiciled in some remote foreign country, with which he has little connection, will not arise.

At last the domicile of a married woman will not be dependent upon the domicile of her husband. She will be as free as anybody else to acquire a domicile on her own behalf, though there is a presumption in favour of a single domicile for a single family (section 5(2)(b)).

With the approval of the court the domicile of a lunatic will be capable of change though the Act leaves the definition of a mental incompetent to the individual province.

All of these changes are most welcome but the Act is not perfect. Its major defect lies in the fact that it purports to be a code and to replace the common law rules of domicile and yet it is not complete in its coverage. The common law rules will still be relevant to a certain extent.

Thus the Act does not deal clearly with the dependent domicile of children. Section 5(1) is not readily applicable to young children because they will be incapable of forming the necessary intention. Perhaps the presumption in section 5(2)(a) takes care of the problem so that in the case of young infants there is an irrebuttable presumption that they intend to reside indefinitely in their principal home. If that is the intention of the Commissioners, it should have been spelled out and not left to inference.

Moreover, section 5(3) lays down that the presumptions in section 5(2) do not apply to diplomats, servicemen or employees of international organizations. For these people, the common law rules will apply. At common law such persons can acquire a domicile where they are stationed<sup>63</sup> or where they are working but the burden of proof is heavy because they have not freely chosen their residence and generally they will retain their old domicile.<sup>64</sup> It is, also, difficult to understand why these three groups have been singled out as exempted from the presumptions. Do the presumptions apply to other groups of people who have not freely chosen their residence, such as fugitives and refugees? Presumably they do. I see no reason why the presumptions in section 5(2) should not apply to the classes of people specified in subsection (3).

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63. e.g. *Donaldson v. Donaldson* [1949] P. 363, where Ormerod J. held that a Royal Air Force Officer could acquire a domicile of choice in Florida whilst he was stationed there.

64. e.g. *Young v. Young*, *supra* n. 51.

It must be admitted, however, that the Model Act goes a long way to remedying the present artificiality and uncertainty inherent in the concept of domicile. The criticisms are, in the main, peripheral. It is a great pity that, as yet, no province has seen fit to adopt it. Fifteen years have elapsed since the Act was proposed and I can only hope that it will not be another fifteen years before it is adopted.<sup>65</sup>

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<sup>65</sup> It has been pointed out on a number of occasions, e.g. by Castel, *supra* n. 15, and Tarnopolsky, *supra* n. 81, that it is essential that the Model Act be adopted at the same time by all the Canadian provinces, otherwise more problems might be introduced than would be solved.

