REFORM OF THE LAW OF DOMICILE IN VICTORIA

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Following the lead given in the federal sphere by the *Family Law Act* 1975 (Cth),[1] the common law rules on domicile have now been altered for the purposes of Victorian Law by the *Domicile Act* 1978 (Vic.).[1a] The Victorian legislation does not purport to affect the rules for ascertaining a person's domicile at a point of time prior to the commencent of the Act, where this may be necessary.[2] An instance where this is likely to occur for some time concerns the formal validity of wills. A will is formally valid if, among other alternatives, it conforms to the law of the testator's domicile at the time the will was executed.[3] Thus in respect to this rule and concerning wills executed prior to the commencement of the Act, the common law rules still apply.

The ascertainment of a person's domicile at a time after the commencement of the Act proceeds, of course, in accordance with the rules set out in the Act and as if the Act had always been in force.[4] The latter qualification makes it quite clear that a person's domicile at a point of time after the commencement of the Act is not ascertained in accordance with the common law rules up to the commencement of the Act and thereafter in accordance with the Act. Rather, the statutory rules are applied at the outset.

It is provided that the Act has effect to the exclusion of the laws of any other country.[5] This conforms to the rule at common law that a person's domicile is ascertained in accordance with the *lex fori*.[6] The only doubt at common law concerns the particular question of the capacity of an infant to acquire a domicile of choice where there is some suggestion that foreign law might be relevant.[7]

Like the *Family Law Act*, the Victorian Act abolishes a married woman's domicile of dependency on her husband.[8] The common law rule[9] has long been criticized and has been changed by judicial decision in most American jurisdictions. The Victorian legislation also follows the federal legislation in abolishing the doctrine of revival of the domicile of origin.[10] At common law, when a domicile of choice was abandoned the domicile

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1 See s. 4(3).

1a The Act has not yet been proclaimed and may not be until corresponding legislation is enacted in other Australian jurisdictions.

2 *Domicile Act* 1978 (Vic.), s. 4(1).

3 *Wills (Formal Validity) Act* 1964 (Vic.).

4 *Domicile Act* 1978 (Vic.).

5 S. 4(4).

6 *Re Martin* [1900] P. 211, 227; *Re Cartier Deceased* [1952] S.A.S.R. 280; *Tee* v. *Tee* [1974] 1 W.L.R. 213, 215 (C.A.).

7 *Hague* v. *Hague* (1962) 108 C.L.R. 230, 240; *Urquhart* v. *Butterfield* (1887) 37 Ch.D. 357 (C.A.). On this point, see generally Sykes and Pryles, *Australian Private International Law* (1979) pp. 195-6.

8 S. 5.

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

10 S. 6.

of origin revived until a new domicile of choice was acquired.[11] Now a domicile of choice cannot be abandoned except by the acquisition of a new domicile of choice.

The Victorian Act contains a number of provisions dealing with infants. A person is capable of having an independent domicile upon attaining the age of majority which is now eighteen years.[12] This rule is confirmed by the *Domicile Act*,[13] and in addition it is provided that an infant is capable of having an independent domicile upon marriage.[14] It is now provided that the domicile of dependency of an unmarried infant whose parents are living separately or one of whose parents is dead is that of the parent where the child has its principal home.[15] If the child does not have his principal home with a parent the common law rules would still apply. Here the leading authority is still *Re Beaumont*[16] which held that the domicile of a legitimate minor whose father was dead was not necessarily that of its mother if the child was not living with the mother. The court's reasoning, however, seems to have been influenced by the fact that the mother herself had a domicile dependent on that of her second husband. Whether the *Beaumont* rule still applies in view of a wife's independent domicile under the *Domicile Act* is unclear. It is also unclear whether the *Beaumont* rule applies to the converse situation of a legitimate child whose mother is dead.

The *Domicile Act* fails to remove other obscurities existing at common law with regard to the domicile of children. For example, there has been no clarification of the domicile of a legitimate child without living parents or an illegitimate child without a mother. In the case of an adopted child, however, the Act makes express provision in section 8(4)

> "Notwithstanding any other Act, the domicile that a child has immediately after being adopted—
> (a) in the case of adoption by a husband and wife—shall be determined as if the child had been born to the husband and wife at the time of the adoption; and
> (b) in the case of adoption by one adoptive parent—shall be the domicile of that adoptive parent at the time of the adoption."

The termination of a child's dependent domicile is set out in section 8(3).

The Act makes a number of provisions in relation to domicile of choice. One has already been noted, namely the abolition of the common law rule that a domicile of choice can be abandoned without the acquisition of a new domicile of choice.[17] In addition, section 9 provides that "the intention that a person must have in order to acquire a domicile of choice in a country is the intention to make his home indefinitely in that country".

[11] *Udny* v. *Udny* (1869) L.R. 1 Sc. & Div. 441 (H.L.). Cf. the American position as illustrated by *In Re Estate of Jones* (1921) 182 N.W. 227.
[12] The age of majority was reduced to 18 in Victoria by the *Age of Majority Act* 1977 (Vic.).
[13] S. 7(1)(a).
[14] S. 7(1)(b).
[15] S. 8(2). As to the position at common law, see Sykes and Pryles, op. cit., p. 210.
[16] [1893] 3 Ch. 490.
[17] S. 6.

This does not really alter the position at common law. It is true that the older authorities stated that the necessary *animus* was an intention to reside permanently in the new country.[18] More modern authority, however, accepts as sufficient an intention to reside indefinitely.[19]

At common law the domicile of origin occupied a special place. This was evinced by the concept of revival of the domicile of origin upon abandonment of a domicile of choice before the acquisition of a new domicile of choice. It could also be seen in the particularly heavy burden placed on a party seeking to prove the displacement of a domicile of origin by the acquisition of a domicile of choice.[20] Now section 11 equates the displacement of a domicile of origin with the displacement of a domicile of choice by providing that

> "the acquisition of a domicile of choice in place of a domicile of origin may be established by evidence that would be sufficient to establish the domicile of choice if the previous domicile had also been the domicile of choice."

Other common law rules relating to evidence still remain, such as the rule that the more "foreign" the new domicile (in terms of language, social customs, religion, etc.) the more evidence that will be required in order to prove its acquisition.[21]

A provision of some consequence is found in section 10, which provides

> "A person who is, in accordance with the rules of common law as modified by this Act, domiciled in a union but is not, apart from this section, domiciled in any particular one of the countries that together form the union is domiciled in that one of those countries with which he has for the time being the closest connexion."

"Country" is defined in section 3 as a state, province or territory "(a) that is one of two or more territories that together form a country; and (b) domicile in which can be material for any purpose of the laws of Victoria". "Union" is defined in section 3 to mean "any country that is a union or federation or other aggregation of two or more countries and includes the Commonwealth of Australia".

The intention of section 10 is clear—a person domiciled in a union or federation as a whole but not domiciled in any constituent part is deemed domiciled in the part with which he has the closest connexion. However, while the intention of the section is clear, the operation it can have for the purposes of Victorian law is not without difficulty.

A person will be held domiciled in an area where a body of private law prevails. In a federation such as Australia or the United States this will generally be a constituent state or territory rather than the federation itself.[22] However, in Australia for the purpose of matrimonial law the

[18] See e.g. *Winans* v. *Attorney-General* [1904] A.C. 287, 288.
[19] See e.g. *Gulbenkian* v. *Gulbenkian* [1937] 4 All E.R. 618; *Hyland* v. *Hyland* (1971) 18 F.L.R. 461, 464.
[20] See *Fremlin* v. *Fremlin* (1913) 16 C.L.R. 212, 232.
[21] *Terrassin* v. *Terrassin* (1968) 14 F.L.R. 151, 159-60.
[22] See generally Sykes and Pryles, op. cit. pp. 3-4, 197; cf. *Godfrey* v. *Godfrey* [1976] 1 N.Z.L.R. 711.

relevant law area is Australia because the law in point is federal rather than state.[23]

The *Domicile Act* is not concerned with federal proceedings but with state proceedings. The inquiry will be whether a person is domiciled in Victoria or in another country be it a sister state or territory or a foreign country. The approach in state proceedings is not to inquire whether a person is domiciled in Australia (or in the United States or any other federation) and then select the relevant consituent unit. The inquiry is simply whether a person is domiciled in Victoria, New South Wales, France, Nevada, New York, or other country where a body of private law prevails. The question of domicile in a large unit never arises.

Consider the following example. Spiros has a domicile of origin in Greece. He migrates to Australia, landing in Perth in 1972. In 1974 he moves to Adelaide, thence to Melbourne in 1975, and Sydney in 1979, where he dies intestate. The question of the beneficial succession to his movable estate in Victoria arises in Victorian proceedings. The choice of law rule is clear—the law of the deceased's domicile at death governs[24]—but the court must determine where the deceased was domiciled at his death. Hitherto, a Victorian court would never have inquired whether Spiros was domiciled in Greece or Australia; the question would have been whether Spiros was domiciled in Greece, Western Australia, South Australia, Victoria or New South Wales. On the traditional approach the court would never have considered the question of domicile in the federation as a whole. Were this approach to be followed there would be no occasion for invoking section 10 of the Act because the condition precedent to its operation, the establishment of a domicile in a federation or union, would never be made. The court would conclude that Spiros was domiciled in Greece because, in view of his peripatetic habits, it would be impossible to hold that Spiros intended to reside indefinitely in any particular Australian state.

It seems, however, that section 10 now requires a court to inquire whether a person is domiciled in a federation as a whole, for the purpose of state proceedings, and then to allocate a particular state domicile in the way prescribed (assuming, of course, that domicile has not been established in a constituent state in the ordinary way). If the court were to do this there would be little difficulty in concluding that Spiros intended to reside indefinitely in Australia, and that in view of his greater length of residence in Victoria he had his closest connexion with Victoria and should be considered domiciled in that state.

Viewed as a mandatory provision requiring a court to consider domicile in a federation as a whole, after concluding that domicile has not been established in a constituent state in the ordinary way, section 10 has profound results. Its application in a case such as that described above would in fact result in a non-domiciliary law being applied to determine a question governed by the law of domicile. Indeed, selection of the law

[23] *Lloyd* v. *Lloyd* (1961) 2 F.L.R. 349.
[24] *Coleman* v. *Shang* [1961] A.C. 481, 494 (P.C.).

of a state on the basis of "closest connexion" could result in the application of the law of a state with which the deceased does not have very close contacts. One state of the federation would be chosen simply because the person concerned had his "closest connexion" with it; it does not ensure that that connexion is substantial or significant—it may simply be the best of a series of very tenuous connexions with several states.

It may be objected that it is wrong to apply Greek law to determine succession to the estate of Spiros when he has given up Greece and has settled in Australia. There is superficial attraction in this argument, but it is based on a misconception of the underlying jurisprudence. Australia does not exist as "one" country for the basis of property or succession law any more than the United States does. Each state is a separate private international law unit in the same way as France, Germany and Italy are separate units. It is true that the relevant law does not differ very much from state to state, but there are some federations or unions where the laws of the constituent states differ to an important degree. Can it be confidently asserted that the United States should be considered as one unit when Louisiana has a civil law background in contrast to the staunch common law traditions of most of the other states? Much the same can be said of the United Kingdom when considering Scots and English law.

There appears to be a growing tendency to use factors connecting individuals to public international law units, the nation state, for the purpose of private international law.[25] It is a trend that is not without objection.

The *Domicile Act* effects a number of important changes to the law of domicile in Victoria. The abolition of a married woman's dependent domicile and of the doctrine of revival of domicile of origin are significant and perhaps overdue modernizations that are to be welcomed. More questionable is the provision on domicile within a federation. It is a shame, however, that the opportunity was not taken to reform other aspects of the law of domicile and to clear up obscurities that exist at common law. Thus, for instance, the Act is silent on the moot question of the domicile of origin of a legitimate child born after the death of its father or after the divorce of its parents. Indeed, the very distinction drawn at common law between legitimate and illegitimate children needs to be reconsidered following the enactment of the *Status of Children Act* 1974 (Vic.). Section 3(1) of the latter Act provides

> "For all the purposes of the law of Victoria the relationship between every person and his father and mother shall be determined irrespective of whether the father and mother have been married to each other and all other relationships shall be determined accordingly."

Does this provision mean that the distinction drawn at common law between legitimate and illegitimate children, which is of significance in determining the domicile of origin and domicile of dependency of a child, is no longer of importance? One writer has doubted the impact of the

[25] Note, for example, the resort to "nationality" in the *Family Law Act* 1975 (Cth). See Sykes and Pryles, op. cit. pp. 268-71.

provision on the law of domicile.[26] Certainly there are situations where abolition of the distinction could lead to strange results. Can it reasonably be said that the domicile of origin of an illegitimate child should now be that of its father (as with a legitimate child) in circumstances where the parents never lived together and where the father exercises no jurisdiction over the child? On the other hand, the retention of discriminatory rules dependent on whether or not a child was born in wedlock seems inconsistent with the spirit of the 1974 legislation. Perhaps now in view of a married woman's equal status conferred by an independent domicile, together with the fact that she will in the ordinary course of events have primary responsibility for the care and control of the child at birth, the domicile of origin of all children should henceforth be that of their mother at birth? Were this rule to be adopted it would logically follow that the domicile of dependency of a child should henceforth be the domicile of its mother except in the circumstances set out in section 8(2). Where a child does not have its principal home with either parent (the *Re Beaumont* situation) it should perhaps take a domicile dependent on the person having actual care and control of the child unless it is emancipated, in which case it should be conceded the capacity to acquire an independent domicile. Were this view not to be accepted, the general rule would simply apply and it would take a domicile dependent on its mother.

ATTACHMENT OF EARNINGS LEGISLATION: ENFORCEMENT WITHOUT PAIN

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A COMMENT ON:
The Supreme Court (Attachment of Earnings) Rules (1978)
The County Court (Attachment of Salary) Rules (1977)
The Magistrates (Summary Proceedings) Act (1975), Part XIII

One of the most frustrating results that can be produced by any system of law is that which occurs when substantive rights are eroded by difficulties in their enforcement. This is an effect which is commonly seen in the Australian legal system, where decisions not to sue are as often predicated upon the likelihood that the defendant would be unable to pay damages or costs than on any inherent weaknesses in the plaintiff's case. In this context it is obvious that the means available for the enforcement of judgment debts are of paramount importance. In a system where a judgment creditor (a person in whose favour a judgment or order for the payment of money has been made) can only enforce the judgment debt by distraining the judgment debtor's property, there can be little point in

[26] See Neave, "The Position of Ex-Nuptial Children in Victoria" (1976) 10 *M.U.L.R.* 330, 333, fn. 17.

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