PUMP COURT
CHAMBERS

INHERITANCE (PROVISION FOR FAMILY AND DEPENDANTS) ACT 1975

PRACTICAL CONSIDERATIONS INCLUDING BACKGROUND, PROOF OF DEATH & DOMICILE

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Introduction

The law in England and Wales enables a testator to have freedom to dispose of his estate as he so desires on his death by his Will, subject to certain statutory provisions relating to testamentary capacity and the formal requirements regarding the making of a valid Will. If the deceased's Will is proved to be valid, the deceased's estate will devolve in accordance with the terms of his last Will. If on the other hand a person has not made a valid Will, or made no Will at all, the estate will devolve in accordance with the law of intestacy. There may be cases where the residuary estate has not been disposed of by the terms of the Will, whereby the estate will be distributed under the terms of the Will in so far as it validly applies and the remainder will pass under the law of intestacy.

The above proposition was and remains the characteristic feature of English testamentary law - ***Ilott v Blue Cross [2017] 2 WLR 979.***

The Inheritance (Family Provision) Act 1938, provided for the maintenance of dependants out of the estate of the deceased, if reasonable financial provision was not made for them under the Will. Since the 1938 Act various statutes have encroached on testamentary freedom, empowering the court to make orders for financial provision out of the deceased's estate for a spouse of the deceased and other classes of persons identified as eligible to receive such provision.

The Matrimonial Causes Act 1965, made inroads into restricting the freedom of a testator where proper financial provisions had not been made for a former spouse, by virtue of Sections 26-28. It enabled the former spouse to apply to the court for an order for maintenance to be provided from the deceased's estate.

The Inheritance (Provision for Family and Dependants) Act 1975 ("*I(PFD)A*"), which came into force on 1st April 1976 (Section 27(3), repealed the 2 earlier enactments. It extended the category of persons who can make an application for financial provision out of the estate of a deceased person. It empowered the court to make wide ranging orders to meet the needs of the claimant where the criteria set out in I(PFD)A have been met.

Subsequent Amendments

The I(PFD)A has been amended by 4 further Acts of Parliament, namely:

i) The Law Reform (Succession) Act 1995;
ii) the Civil Partnership Act 2004;
iii) the Marriage (Same Sex Couples) Act 2013 and
iv) the Inheritance and Trustees' Powers Act 2014.

The Law Reform (Succession) Act 1995 extended the classes of person eligible to make claims for financial provision where the deceased died on or after 1st January 1996, to include any person (not the spouse or former spouse of the deceased) who during the 2 years immediately preceding the deceased's death, had been living with the deceased in the same household as the deceased as the husband or wife of the deceased.

The Civil Partnership Act 2004, which came into force on 5th December 2005, extended the category of those who have a right to make a claim, to include same sex couples in respect of deaths after 5th December 2005. Pursuant to Schedule 4 paragraph 6 of the Civil Partnership Act 2004 a surviving civil partner may be granted probate and letters of administration over the Public Trustee under the Public Trustee Act 1906. Schedule 4, paragraphs 7-14 also amends the Administration of Estates Act 1925, the Intestates' Estates Act 1952 and the Family Provisions Act 1966 so as to give the surviving civil partner the same status as a surviving spouse.

The Inheritance and Trustees' Powers Act 2014, took effect from 1st October 2014 although the provisions are not retrospective. Schedule 2 set out the amendments to the I(PFD)A. The most significant reforms relate to:

i) time limits for bringing claims for financial provision and in respect of Section 9 of I(PFD)A which allows the deceased's severable share in property held under a joint tenancy to be treated as part of the net estate of the deceased;
ii) the extension of Section 1(1)(d) to include single parent family;
iii) the removal in Section 1(3) of how the respective contribution of the deceased and the claimant is assessed in cases where the claimant is a person (not being a person included under any of the other categories set out in Sections 1(1)(a)–(d)) who immediately prior to the deceased's death was being maintained either wholly or partly by the deceased;
iv) the matters which the court must have consider under Section 3 when considering I(PFD)A claims.

Who can claim

I(PFD)A empowers the court to make orders for the taking out of the estate of a deceased person of provision for prescribed classes of persons. It is important to know who can make claims, thus it is necessary to consider the entitlement to claim conferred by S.1.

Section 1(1) provides that

1) Where after the commencement of this Act a person dies domiciled in England and Wales and is survived by any of the following persons—

(a) the spouse or civil partner of the deceased;

(b) a former spouse or former civil partner of the deceased, but not one who has formed a subsequent marriage or civil partnership;]

(ba) any person (not being a person included in paragraph (a) or (b) above) to whom subsection (1A) [or (1B)] below applies;]

(c) a child of the deceased;

(d) any person (not being a child of the deceased) [who in relation to any marriage or civil partnership to which the deceased was at any time a party, or otherwise in relation to any family in which the deceased at any time stood in the role of a parent, was treated by the deceased as a child of the family];

(e) any person (not being a person included in the foregoing paragraphs of this subsection) who immediately before the death of the deceased was being maintained, either wholly or partly, by the deceased;

that person may apply to the court for an order under section 2 of this Act on the ground that the disposition of the deceased's estate effected by his will or the law relating to intestacy, or the combination of his will and that law, is not such as to make reasonable financial provision for the applicant."

Thus, whether the Deceased dies testate or wholly or partly intestate, after his death, the court has power to order provision to be made out of the Deceased's net estate for certain applicants. The potential applicants are a) the deceased's spouse or civil partner, b) a former spouse or civil partner of the deceased who has not formed a subsequent marriage or civil partner, c) a cohabitant who has lived as such with the deceased for two years immediately before the deceased's death, d) a child of the deceased (including adult children), e) a person treated as a child of the family in relation to any marriage or civil partnership of the deceased; and f) a dependant of the Deceased.

Initial Preconditions

An application for financial provision may only be brought against the estate of a deceased person who is domiciled in England and Wales at the time of his death, by virtue of Section 1(1). Proof of death and domicile of the deceased are the initial preconditions, which a claimant must establish when applying for financial provision.

If the deceased died domiciled elsewhere than in England and Wales, a claim under the I(PFD)A cannot be entertained by the court. Issues may be taken by a defendant, who intends to resist a claim, as a preliminary issue.

Proof of death

Death is proved by the claimant producing a certified copy of the deceased's death certificate. A copy may be obtained from the registrar for the sub-district in which the death occurred or the body was found. It can be ordered online at www.gov.uk/order-copy-birth-death-marriage-certicate.

The applicant will need to provide the deceased's full name, place and date of his or her death and the usual address of the deceased if different from the place of death.

Where the death occurred overseas, death can be registered at a British Consulate or the British High Commissioner and the Foreign and Commonwealth office overseas registration unit.

A death certificate for a person who has died in active service with the Armed Forces is issued by the Ministry of Defence. This will be in the form of a notification of death or presumed death. In the event of the death of a merchant seaman, the Registrar General of Shipping and Seaman is responsible for providing a certificate of evidence of death.

The Presumption of Death Act 2013, which came into force on the 1st October 2015, confers upon the High Court the tight to grant a declaration, provided it can be established that the missing person is thought to be dead or has not been known to be alive for a period of at least 7 years. The Presumption of Death Act 2013 applies to England and Wales. The Civil Procedure Rules Part 57 provide the procedure to be followed, namely the issue of a claim form in accordance with Part 8 (Rule 57.19), in the High Court (Rule 57.18) either the Chancery or the Family Division.

The Presumption of Death Act 2013, Section 1(5) provides that: *"The court must refuse to hear an application under this section if—*
(a) the application is made by someone other than the missing person's spouse, civil partner, parent, child or sibling, and
(b) the court considers that the applicant does not have a sufficient interest in the determination of the application."
Accordingly, there will need to be good reasons for personal representatives, who are not within one of the categories, to make an application.

If the declaration is made, it will be served on the register general for England and Wales for registration, and once registered will serve as "*conclusive proof of the missing persons death and the date and time of death*". Certified copies of entries in the register issued by the registrar general will be treated as evidence of the missing persons death. The missing person's property will pass to others in the same way as if the missing person had died. When making the declaration, the court has power to determine any issue relating to an interest in any property and the domicile of the missing person at the time of his presumed death (Section 7)

Domicile

English law requires every person to have at all times a domicile – ***Udny v Udny [1869] LR 1.***

Domicile is a precondition to any claim under the I(PFD)A. Domicile is based on where a person has his permanent home. It is not the same as a person's ordinary residence or habitual residence. Freedom of movement between countries means that people now live, work and have homes and business in countries other than the county of their nationality.

The primary purpose of determining domicile is to identify which legal system, should be applied to the Deceased's estate. Domicile defines the legal relationship between the individual and that legal system which is invoked as his personal law - ***Henderson v Henderson [1965] 1 All ER 179*** *(at 180-181).* Sir Jocelyn Simon P held:

"Domicil is that legal relationship between a person (called the propositus) and a territory subject to a distinctive legal system which invokes the system as the personal law of the propositus and involves the courts of that territory in having primary jurisdiction to dissolve his marriage. (I use the male gender for convenience, though every person of either sex has a domicil.) The relationship arises either, on the one hand, from the propositus being, or having been, resident in such territory with the intention of making it his permanent home or, on the other, from there being, or having been, such a relationship on the part of some of other person on whom the propositus is for this purpose legally dependent. Thus, a wife is for this purpose legally dependent on her husband, and a legitimate child on his father. This type of domicil of the child and the wife is termed a domicil of dependence. The domicil that the child derives from the father is also known as his domicil of origin. Every person capable of acquiring an independent domicil will, on independence, retain his domicil of dependence, though it may be abandoned at any time thereafter.

Every individual is regarded as belonging, at every stage in his life, to some community consisting of all persons domiciled in a particular country. The principles of domicile are such that this legal idea may not correspond to social reality. Although a person may have no permanent home, the law requires him to have a domicile. He may have more than one home, but he can have only one domicile for any one purpose. He may have his home in one country, but be deemed to be domiciled in another.

Domicile has been criticised as a pre-condition to a claim under the I(PFD)A. The social changes, globalisation and freedom to move between countries, since the introduction of the I(PFD)A, serve to underline some of the criticisms. In ***Cyganik v Agulian and another [2006] EWCA Civ 129***, Longmore LJ held at para 58 that:

"*I find it rather surprising that the somewhat antiquated notion of domicile should govern the question whether the estate of a person, who was, on any view, habitually resident in England should make provision for his dependants. Now that many family matters are decided by reference to habitual residence, there may, perhaps, be something to be said for reconsidering the terms of s1 of the Inheritance (Provision for Family and Dependants) Act 1975. As Dr JHC Morris observed of the concept of domicile in the last (3rd) edition of his Conflict of Laws (1984), which he wrote before he died,*

> *"Originally it was a good idea; but the once simple concept has been so overloaded by a multitude of cases that it has been transmuted into something further and further removed from the practicalities of life."*

This observation has not been preserved by subsequent editors (6th edition (2005)) but it deserves to be."

Determining whether a person has acquired a domicile in a foreign county thus prohibiting an application under the I(PFD)A is determined in accordance with the law of England and Wales. No one factor is decisive - ***Cyganik v Agulian [2006] EWCA Civ 129; Morgan v Cilento [2004] EWHC 188 (Ch); Holliday v Musa [2010] EWCA Civ 335***.

There are three types of domicile – domicile of origin, domicile of dependency and domicile of choice.

Domicile of Origin

A domicile of origin is assigned to every person at his birth, which is that of his father, if he is legitimate and born in his father's lifetime (***Forbes v Fornes [1854] Kay 341***) and that of his or her mother if illegitimate (***Idny v Udny [1869] LR1*** and Dicey & Morris, The Conflict of Laws) or born after his father's death.

An adopted child will have the domicile of his or her adopted parents. That is because once the court makes an adoption order, the law regards the adopted child, as being born to the adopters. Section 67(1) Adoption and Children Act 2002 provides that "*An adopted person is to be treated in law as if born as the child of the adopters or adopte*r."

A domicile of origin is capable of persisting during the lifetime of a person or until he acquires a new domicile i.e. domicile of choice or a domicile of dependence. A child's domicile will change if his parents change their domicile.

A domicile of origin cannot be lost by abandonment (***Bell v Kennedy [1866-69] 1 Sc & Div 307)*** unlike a domicile of choice.

A person cannot have more than one domicile at the same time for the purposes of succession. The purpose of determining a person's domicile is to connect that person to the legal system of one particular country

In ***Barlow Clowes International Limited (In liquidation) v Hemwood [2008*]** **EWCA Civ 577** Arden LJ set out the general principles to determine domicile of origin at paragraph 8:

"(i) A person is, in general, domiciled in the country in which he is considered by English law to have his permanent home. A person may sometimes be domiciled in a country although he does not have his permanent home in it (Dicey, pages 122 to126).
(ii) No person can be without a domicile (Dicey, page 126).
(iii) No person can at the same time for the same purpose have more than one domicile (Dicey, pages 126 to128).

(iv) An existing domicile is presumed to continue until it is proved that a new domicile has been acquired (Dicey, pages 128 to 129)."

Re Flynn, Flynn v Flynn [1968] 1 All ER 45 determined that the place where a child is born is immaterial.

Olafisoye v Olafisoye (Jurisdiction)[2011] 2 FLR 553 was a family case where the husband was not domiciled or habitually resident in England. The wife was born in Scotland to parents who had settled in England and acquired a domicile of choice. She acquired her father's domicile, but while she was still a minor her father returned to live in Nigeria, therefore reviving his domicile of origin. Therefore she acquired his Nigerian domicile and this continued into her adulthood without her acquiring a new domicile elsewhere.

In ***Cyganik v Agulian and another [2006] EWCA Civ 129,*** the deceased was a born in Cyprus. The deceased a Cypriot-born man who had lived in the UK for over 40 years from the age of 19 until his death age 63. The deceased retained close links with Cyprus where he owned property. The deceased returned to Cyprus with the intention of permanently living there in 1972. On Turkey occupying Northern Cyprus, the deceased returned to England in 1974, although his intention to return to Cyprus remained. The Court of Appeal determined that having considered all the deceased's life events, his attachment to the land of his birth and his identity, outweighed all others, thus a change of domicile had not been established. **Mummery LJ held at paragraph** 52 that "*I would allow the appeal and declare that, at the date of his death, Andreas was domiciled in Cyprus*."

In ***CC v DD (Parental Order: Domicile)[2014] EWHC 1307 (Fam),*** Theis J relied upon the principles enshrined within ***Barlow Clowes International Limited (In liquidation) v Hemwood.*** Theis J held that:

"24. It is very much a question of fact based on the circumstances of each case. The court needs to consider the broad canvas of evidence in order to establish the intention of the relevant person."

Domicile by Dependency

Whilst a child acquires his domicile of origin at birth, a child is only capable to acquiring an independent domicile of choice on attaining the age of 16 – Section 3(1) Domicile and Matrimonial proceedings Act 1973.

A child under 16, or a person who lacks mental capacity, has a domicile of dependency, which is that of his parents. The domicile is that of the father when the parents are married and living together. Consequently, if the father acquires a domicile in another country the child automatically acquires a domicile of dependency in that country.

When parents are separated, the child's domicile or the domicile of the person lacking capacity is that of the parent with whom he has his home to the exclusion of the other. When the child's father and mother are alive but living apart, then Section 4 of the Domicile and Matrimonial Proceedings Act 1973 applies, namely, if living with mother and no home with father, then the child takes the mother's domicile.

Once a child attains the age of 16 he is able to acquire a domicile of choice independently of his parents, but until then his domicile will remain that which he acquired from his parents – ***Sekhri v Ray [2013] EWHC 2290***. That is so whether the child had a domicile of origin or a domicile of dependency.

A person who lacks mental capacity, probably retains the domicile which he had when he became incompetent. The Mental Capacity Act 2005 empowers the Court of Protection to make decisions on behalf of a person lacking capacity concerning his property and affairs (Sections 14 and 16). A decision as to where the person is to live in the immediate future is within the scope of that power. It is uncertain whether a decision as to permanent residence is within that power.

Domicile of Choice

A person acquires a domicile of choice when he leaves his domicile of origin and moves to live in a country of his choice with the intention of residing there permanently or indefinitely living there. Two requisites must be satisfied before a person acquires a domicile of choice, namely:

i) residence actually in the country of choice; and
ii) an intention to live there permanently.

Both requisites must be established for a domicile of choice to be acquired.

i) Residence

If a person intends to change his domicile of origin, then it is necessary for him to live in the country of his choice. Intention without residence is insufficient (***Harrison v Harrison [1953] 1 WLR 865***). The persons duration of residence or his motive for change is immaterial, provided that it is accompanied by the necessary intention to live in that country permanently or indefinitely. The intention of residence must be fixed and must be for the indefinite future.

Where there is no direct evidence of intention, length of residence is relevant to establishing what the intention was (***Re Grove [1888] 40 Ch 216***). Length of residence is not a decisive factor.

There is no reason in principle why a person whose presence in England and Wales is unlawful cannot acquire a domicile of choice in here: ***Mark v Mark [2005] UKHL 42***. Baroness Hale opined at paragraph 49 that:

> *"it seems to me that there is no reason in principle why a person whose presence here is unlawful cannot acquire a domicile of choice in this country. Although her presence here is a criminal offence, it is by no means clear that she will be required to leave if the position is discovered. Her position is in reality precarious in the same way that the aliens' presence was precarious in the Boldrini line of authority. In fact, it was always much less likely that this wife would ever be removed from this country than it was that the propositus in Cruh v Cruh [1945] 2 All ER 545 would be removed."*

ii) Intention

If an individual resides in a particular country but has not made up his mind as to which country is to be his permanent residence, he does not acquire a domicile of choice in that country (***Re Patience [1885] 29 Ch D 976***).

Cyganik v Algulian [2006] EWCA Civ 129 summarised the correct approach. Mummery LJ held *at [46] that:*
"the court must look back at the whole of the deceased's life, at what he had done with his life, at what life had done to him and at what were his inferred intentions in order to decide whether he had acquired a domicile of choice in England by the date of his death. Soren Kierkegaard's aphorism that "Life must be lived forwards, but can only be understood backwards" resonates in the biographical data of domicile disputes."

In ***Morris v Davies [2011] EWHC 1773*** it was held that a British citizen living in Belgium and working in France had not lost his domicile of origin, but had remained domiciled in England throughout. His connection with France was one of convenience for work. Whilst he had a more substantial connection with Belgium, the evidence did not establish domicile of choice. Mr Hollander QC (sitting as a deputy judge) concluded at [73] that the deceased "*would have been horrified to learn that after his death it would be suggested in open court that he had acquired a domicile of choice of Belgium*."
The reasons behind why a person decided to leave his original domicile are immaterial. Instead the applicable test is whether the person intended to make his or her home in the new country until the end of his existence or until something happens causing them to change his or her mind - ***IRC v Bullock [1976] 1WLR 1178***.

In IRC v Bullock [1976] 1WLR 1178 the Court of Appeal held, that although the establishment of a matrimonial home in a new country was an important factor in deciding whether that new country became the permanent home, it was not conclusive. The taxpayer had maintained a firm intention to return to Canada should he survive his wife, which was not merely a vague aspiration but amounted to a real determination, thus he could not have had the intention of establishing a permanent home in England and he had not acquired a domicile of choice in England.

In ***Barlow Clowes International Limited (In liquidation) v Hemwood [2008*]** **EWCA Civ 577,** Arden LJ also held at paragraph 8 that:

"(vi) Every independent person can acquire a domicile of choice by the combination of residence and an intention of permanent or indefinite residence, but not otherwise (Dicey, pages 133 to138).
(vii) Any circumstance that is evidence of a person's residence, or of his intention to reside permanently or indefinitely in a country, must be considered in determining whether he has acquired a domicile of choice (Dicey, pages 138 to143).
(viii) In determining whether a person intends to reside permanently or indefinitely, the court may have regard to the motive for which residence was taken up, the fact that residence was not freely chosen, and the fact that residence was precarious (Dicey, pages 144 to151).

(ix) A person abandons a domicile of choice in a country by ceasing to reside there and by ceasing to intend to reside there permanently, or indefinitely, and not otherwise (Dicey, pages 151 to153).
(x) When a domicile of choice is abandoned, a new domicile of choice may be acquired, but, if it is not acquired, the domicile of origin revives (Dicey, pages 151 to 153)."

If a person subsequently abandons his domicile and fails to acquire another domicile of choice, then he reverts to his domicile of origin. A person abandons his domicile of choice in a country if he i) ceases to reside thee, and ii) no longer has the intention of permanent or indefinite residence there.

In **Re Flynn, Decd; Flynn v Flynn [1968] 1 WLR 103** Megarry J held at 115 that
"Acquisition and abandonment are correlatives; in Lord Westbury's words, "Domicile of choice, as it is gained animo et facto, so it may be put an end to in the same manner." When animus and factum are each no more, domicile perishes also; for there is nothing to sustain it. If a man has already departed from the country, his domicile of choice there will continue so long as he has the necessary animus. When he no longer has this, in my judgment his domicile of choice is at an end, for it has been abandoned; and this is so even if his intention of returning has merely withered away and he has not formed any positive intention never to return to live in the country. In short, the death of the old intention suffices, without the birth of any new intention."

In **Qureshi v Qureshi [1972] Fam 173** Sir Jocelyn Simon P held at 191 that:
"a domicile of choice is less retentive, and therefore more easily abandoned, than a domicile of origin."

General

The relationship of domicile is between a person and a country, and never arises from membership of a group as distinguished from the country in which the group is domiciled. The municipal law of the country of domicile may itself distinguish between classes of those subject to it, and apply different rules according to the race, caste, creed or other characteristics of a particular person, so that even after the domicile has been ascertained it may also be necessary to inquire into the other characteristics of the individual before the particular rule applicable to his case can be known - ***Abd-ul-Messih v Farra (1888) 13 App Cas 431, PC; Maltass v Maltass (1844) 1 Rob Eccl 67; Casdagli v Casdagli [1919] AC 145 at 163, HL; Re Askew, Marjoribanks v Askew [1930] 2 Ch 259 at 270.***

Standard of Proof

The grant of representation to the deceased's estate may state that the Deceased died domiciled in England and Wales. However, such a statement is not conclusive.

It is for the claimant to establish that the deceased was domiciled in England and Wales to the civil standard of proof, namely, the balance of probabilities. The deceased's domicile, must be proved by the applicant - ***Mastaka v Midland Bank Executor and Trustee Co Ltd [1941] 1 All ER 236***.

Mastaka v Midland Bank Executor and Trustee Co Ltd concerned an application under the Inheritance (Family Provision) Act 1938, by Joan Patricia Mastaka, an infant, by her next friend, for reasonable

provision for maintenance out of the estate of her mother, the testatrix, Elizabeth Isabel White. Farwell J held that:
"it is an essential ingredient of an application of this sort that the plaintiff should prove that the dead person was domiciled in England at the date of the death. That evidence is not forthcoming. No doubt there is no direct evidence to the contrary, but there is sufficient in this case to make proof of the domicil of the testatrix necessary before the court can give the assistance for which the applicant asks. The evidence leaves the matter completely at large."

In ***Re Flynn, Decd; Flynn v Flynn [1968] 1 WLR 1013***, Megarry J held at 115:
"The standard of proof is, I think, the civil standard of a balance of probabilities, subject to the overriding consideration … that so serious a matter as the acquisition of a domicile of choice (or for that matter, I think, the abandonment of a domicile) is "not to be lightly inferred from slight indications or casual words."

In ***Re B (Care Proceedings: Standard of Proof) [2008] UKHL 35***, the House of Lords, dealing with a care case, determined that there was only one civil standard of proof, and that was proof that the fact in issue more probably occurred than not. There was no *'heightened civil standard*' and no legal rule that *'the more serious the allegation, the more cogent the evidence needed to prove it*'; common sense, not law, required that, in deciding whether it was more likely than not that something had taken place, regard should be had, to whatever extent was appropriate, to inherent probabilities (paras [12], [13], [15], [64], [68]–[70]).

In ***Re B (Care Proceedings: Standard of Proof)*** Baroness Hale opined at paragraph 72 that:
"As to the seriousness of the allegation, there is no logical or necessary connection between seriousness and probability. Some seriously harmful behaviour, such as murder, is sufficiently rare to be inherently improbable in most circumstances. Even then there are circumstances, such as a body with its throat cut and no weapon to hand, where it is not at all improbable. Other seriously harmful behaviour, such as alcohol or drug abuse, is regrettably all too common and not at all improbable. Nor are serious allegations made in a vacuum. Consider the famous example of the animal seen in Regent's Park. If it is seen outside the zoo on a stretch of greensward regularly used for walking dogs, then of course it is more likely to be a dog than a lion. If it is seen in the zoo next to the lions' enclosure when the door is open, then it may well be more likely to be a lion than a dog."

In ***Henwood v Barlow Clowes International Ltd (in liquidation) and o*****thers** (decided 3 weeks before ***Re B(Care Proceedings: Standard of Proof)***) *Arden LJ held that:*

"88. In essence there is no need for any higher standard of proof where more serious allegations are made in civil cases because the civil standard has the inbuilt flexibility to take the seriousness of an allegation into account. Accordingly the more serious an allegation the more substantial will need to be the evidence to prove it on a balance of probabilities."

Re B (Care Proceedings: Standard of Proof) has been taken to apply across the civil spectrum. By virtue of the seriousness of the allegation, clear and cogent evidence will be needed, to show that the balance of probabilities has been tipped. This approach is likely to be applied whether the question is one of the acquisition or loss of a domicile.

Evidence

The evidence must be clear, cogent and convincing - ***Re Fulds Estate (No 3), Hartley v Fuld[1966] 3 All ER 776.*** Scarman J held at 726 that:
"Two things are clear — first, that unless the judicial conscience is satisfied by evidence of change, the domicile of origin persists: and secondly, that the acquisition of a domicile of choice is a serious matter not to be lightly inferred from slight indications or casual words."

The deceased's written declarations, made during his lifetime or by Will as to his domicile are admissible in evidence (Civil Procedure Rules 33.3), but are not conclusive. Declarations must be analysed by considering factors such as the person to whom they were made, the purposes for which they were made, the circumstances in which they were made, and should be fortified by conduct consistent with the declarations.

The 2 following decisions show the contrasting outcomes to declarations.

In ***Re Lloyd Evans, Decd. National Provincial Bank v Evans [1947] Ch 695*** the testator born in Wales in 1864, whose parents were British subjects, went to Java in 1880 and lived there until 1917. He married a Dutch woman in 1888, and had three children by her. In 1917 he and his family returned to England, but remained there only a short time. He settled in Brussels with his wife and his son and in 1922 purchased a house and later carried on business there. His wife died in 1939, after which he tried to sell his house, but could not do so. On 10th May 1940, the German army invaded Belgium and he was persuaded with reluctance to leave the country and went temporarily to the South of France, before escaping to England in June, 1940. While in France he wrote to his notary saying that he was a Belgian citizen, domiciled in Belgium for the last 19 years, and had intended to make a new will, but had no time to do so. In London he occupied 3 furnished flats in succession, made a will in July 1943, and died in July 1944. Wynn-Parry J held that he never intended to remain in England longer than he was obliged and had not abandoned his Belgian domicile of choice and took the document into account. The testator's act in leaving Belgium was dictated by force of circumstances, and was not the result of a free choice.

In ***Re Liddell-Grainger's Will Trusts, Dormer v Liddell-Grainger [1936] 3 All ER 173*** the testator's domicile of origin was England, where he was born, but in 1897 he moved with his parents to Scotland, to Ayton Castle, which he subsequently inherited, and where he resided for 38 years until his death in 1935. The testator, wrote in his Will that: "*I have not relinquished and do not intend to relinquish my English domicil*." He had a great love for his property in Scotland and was anxious that after his death it should remain in his family and not be sold. At his own request, the testator was buried in Scotland. The executors of the will took out a summons to determine *inter alia* whether the testator was at the time of his death domiciled in England or in Scotland. It was contended that the declaration in the Will was ineffective, having been made to avoid Scottish law, which would have restricted the testator's power to dispose of personal property. Bennett J held that the testator had by various acts manifested an intention to live permanently in Scotland, and that his intention, together with his long residence in Scotland, was sufficient to discharge the burden of proof that he had acquired domicile of choice.

The courts have determined that if a person takes up residence in another county as a fugitive from justice (***Re Martin [1900] P 211***), a political refugee (***May v May [1943] 2 All ER 146***), or to avoid creditors (***Pitt v Pitt [1864] 12 WR 1089***), he does not acquire domicile in that country unless he forms the intention of residing there permanently or for an unlimited time. Likewise residence abroad to perform judiciary functions (***Attorney General v Rowe [1862] 1 H & C 31***), a member of the armed forces (***Re Macreight [1885] 30 Ch C 165***) or as a consul (***Sharpe v Chrispin [1869] 1 P & D 611***) have been held not to confer foreign domicile.

In ***Irvin v Irvin [2001] 1 FLR 178,*** the husband and wife argued over change of domicile in their divorce. The husband's links with friends in England, his British nationality and his limited assimilation into Dutch society provided the necessary convincing evidence to satisfy the court on the balance of probabilities that he did not abandon his domicile of choice in England and that his state of mind indicated a resolve to return to England to retire. Cazalet J concluded that the husband has not abandoned his domicile of choice either as an unequivocal act of abandonment or through unequivocal intention to abandon.

When determining a change of domicile, the court will consider all the circumstances from which the deceased's intention to change his domicile can be ascertained. The relevant factors, relating to the deceased, that may be considered include, but are not limited to:

i) the time he or she has spent in a country;
ii) his or her citizenship or nationality;
iii) any change in citizenship or nationality;
iv) his or her age;
v) business interests or commitments;
vi) where he or she may own property;
vii) choice of language;
viii) religious beliefs;
ix) the form and content of any Will that he or she may have made;
x) the degree of assimilation in a new country;
xi) what he or she may have said or written during their lifetime.

In ***Bheekhun v Williams [1999] 2 FLR 229*** the husband was born in Mauritius (then a Crown Colony) in 1931 and moved to England in 1960, followed in 1961 by his wife. In 1968, when Mauritius became an independent state, the husband and wife chose to retain British nationality. Thereafter the husband held a British passport, although he maintained strong business links with Mauritius, visiting most years, sometimes for months at a time, and owning property there. The wife left the husband in 1975 and issued divorce proceedings in England in 1977. Decree nisi was not pronounced until 1990, but in 1993, before the decree absolute and resolution of the wife's financial provision claims, the husband died. The husband under his Will, left his entire estate, consisting of property in England and Mauritius, to a niece who had been living with him in the former matrimonial property. The wife applied for reasonable financial provision. The wife was awarded £70,000, which represented 44% of the total value of the estate, but which consumed all but £2,000 of the husband's English estate. Chadwick LJ dismissed the personal representatives appeal against the decision that the husband had been domiciled in England at his death, and his treatment of foreign immovable property in Mauritius as part of the estate.

In ***Morgan v Cilento and others [2004] EWHC 188 (Ch)*** the deceased died in 2001. D1 was the deceased's widow, D2 was his former wife and D3 and D4 were his daughters. D5 had had a relationship with the deceased during the last years of his life. It was common ground that the deceased's domicile of origin was in England and Wales. The issue was whether the deceased was domiciled in England and Wales or in Queensland, Australia at the date of his death. D1 to D4 contended that the deceased had died domiciled in Queensland. D5 contended that the deceased had never lost his domicile of origin and in the alternative, if the deceased had acquired a domicile of choice in Queensland, he had abandoned it before he died and his domicile of origin had revived. Lewison J held that on the evidence the deceased had died domiciled in Queensland.

The 2 components necessary to establish a domicile of choice were voluntary residence as an inhabitant rather than as a casual visitor and an intention to remain indefinitely. A domicile of choice might be lost in circumstances where a propositus had ceased to reside in the territory in which he had a domicile of choice and the propositus had no intention to return to reside there (as opposed to an intention not to return). The absence of intention had to be unequivocal, so that a person who was in two minds did not have the necessary absence of intention. In addition the abandonment of a domicile of choice was not to be lightly inferred.

In ***Kearly v Kearly [2010] 1 FLR 619*** dispute arose over the courts jurisdiction to hear the divorce petition. The wife was an Australian, currently living in Australia; the husband was English, currently based in France, where he worked. Ryder J held that:
"[39] The hurdle is relatively high. Domicile of choice has to be established on clear, cogent evidence. A mere assertion as to being Australian is hardly sufficient. The husband lives in Paris, and has previously and recently lived elsewhere than Australia for significant periods. He seeks to liquidate his Australian assets and not preserve them. He declares his address for tax purposes in 2007 as being his parents' home in England. He did not declare himself to be domiciled in Australia on his Australian family application forms. Instead, he said he was ordinarily resident there. His best evidence is that he wants to be an Australian citizen, but has on two occasions given up the attempt. This is not clear and cogent evidence."

In ***Divall v Divall [2014] 2 FLR 1104*** the husband was born in England, the wife in China. They married in England, during a visit by the wife to the UK on a tourist visa. The wife returned to China when the visa ran out but she subsequently obtained UK residency, became a British citizen and obtained a British passport. She relinquished her Chinese nationality, and thereafter had to obtain a visa, using her British passport, when travelling to China. In 2008 they emigrated to the Netherlands, eventually purchasing a house there. Shortly afterwards the wife began a relationship with a Dutchman and the parties separated. The husband issued an English divorce petition. The wife responded that she was not domiciled in England. The key issue for the court was the domicile of the wife.

Moor J held that if the wife had acquired a domicile of choice in England and Wales, she had not retained it at the date of the husband's divorce petition, applying the principle that domicile of choice was much less adhesive than domicile of origin. A person abandoned a domicile of choice in a country by ceasing to reside there and by ceasing to intend to reside there permanently or indefinitely. Applying *Qureshi v Qureshi [1971] 1 All ER 325*, it was not necessary to prove a positive intention not to return: it was sufficient to prove merely the absence of an intention to continue to reside. The wife had left England for the Netherlands with the rest of the family on what had been intended to be a

permanent basis. By the time the marriage broke down, the wife had no intention of ever returning to England. The wife's definite intention was to spend the rest of her life in the Netherlands, and to acquire Dutch nationality. These facts were fatal to the husband's claim that she was domiciled in England and Wales on that date.

In ***Kebbeh v Farmer*** **[2015] EWHC 3927 (Ch)** the defendants contended that the deceased, who had an English domicile of origin, had died domiciled in Gambia. If that was correct, it was common ground that the claimant had no claim under the Act. Judge Purle QC concluded that there was overwhelming evidence that the conduct of the deceased was consistent with a settled intention to remain and live indefinitely in Gambia.

In ***U v J [2017] EWHC 449 (Fam)*** the court had to consider domicile in the context of divorce proceedings. J was born in India but moved to London in about 1957. In 1960, J's father became a naturalised British citizen. J completed his education, including university, in England. In 1972, J joined the civil service, where he worked for 23 years. In 1978, J purchased a house in Fulham. In 1995, J worked in Luxembourg. In 1997, J secured a job in Brussels, where he met his wife, U. In 2002, J was assigned to work in London and moved back there with U. Between 2003 and 2005, J spent extended periods with U in Albania, where she worked. U was a British and Irish dual national, having been born in England. In 1995, U applied for, and obtained, a British passport. After completing her education, U worked in Brussels until 2001. Thereafter, U moved with J to London where they lived in the Fulham property. In 2005, U was granted diplomatic status. U's permanent address was recorded as London, and her address that of the Fulham property. In August, U and J married in Italy. They entered into a pre-nuptial agreement in which it stated, amongst other things, that J and U were habitually resident in Italy. In 2006, J moved to live in Sarajevo, Bosnia having taken up a job there. In 2015, the marriage broke down and U issued her petition for divorce in London. U sought dissolution of her marriage from J and contended U was domiciled in England.

Cobb J held that:

i) Since 2000, at the latest, U had acquired a domicile of choice in England and Wales, which had not been lost notwithstanding her previous postings abroad (paras [61], [63], [64]); and

ii) At one time, as a man in early adulthood through to his early 50s, J probably had acquired a domicile of choice in England. His connections with England had been, at one time, strong. Since 1995, and more particularly in the last ten years, his connections had withered. Accordingly, at some point in the last ten years, J's domicile of choice in England had been lost or abandoned and his domicile of origin in India had revived (paras [65], [67], [68]).

Overview

The authorities demonstrate the fact specific nature of each case and the need to carefully consider the details.

The presumption that the domicile of origin will prevail, unless evidence strong enough to show that a domicile of choice has been acquired and retained by the deceased until his or her death.

A length period of residence, without evidence of the deceased's intention to abandon domicile of origin and remain in his or her country of choice, will not lead to the deceased acquiring a domicile of choice. Intention must be established.

Domicile of choice requires evidence of the deceased's intention to live permanently and indefinitely in England and Wales. The circumstance up until death ought to disclose no indecision on his or her part or that he or she had not made up their mind.

Other parts of the United Kingdom

The I(PFD)A does not extend to the Channel Islands,

By virtue of Section 27(2) I(PFD)A does not extend to Scotland or Northern Ireland.

In Northern Ireland the Inheritance (Provision for Family and Dependants) (Northern Ireland) Order 1979, SI 1979/924, applies to deaths of individuals domiciled in Northern Ireland on or after 1 September 1979 and is in large part identical to the I(PFD)A.

Courts that can determine applications

Section 25(1) I(PFD)A defines "the Court", as "*unless the context otherwise requires, means the High Court or where the County Court has jurisdiction by virtue of Section 25 the County Courts Act 1984, the county court".*

The County Court now has jurisdiction to hear and determine any application for an order under Section 2 of the IPFD)A (including any application for permission to apply for such an order and any application made, in the proceedings on an application for such an order, for an order under any other provision of that Act).

Julian Reed
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