**Out with the Old and in with the New: Bringing the Law of Domicile into the Twenty First Century**

**Keywords:** Domicile – reform - same-sex relationships – determining a child's domicile – non-discrimination


# Abstract

Domicile is the preferred connecting factor in matters of personal status within the law of England and Wales particularly within family law, yet it is a concept that has been neglected for several years. While the Law Commission proposed reform over thirty years ago, the requisite developments never ensued. Meanwhile, society and other aspects of the law continued to evolve, adding to the already problematic area. This is particularly apparent when assessing the domicile of a child with same-sex parents. The current provisions assign a child's domicile based on the gendered roles of mother and father dependent upon the child's legitimacy, which, assumes that all children have parents of the opposite sex. This outdated approach means that a child of a same-sex couple has no way of ascertaining where they are domiciled. In proposing a holistic reform of the law on domicile, this author utilises the developments around same-sex relationships not previously discussed in the literature on domicile, to reignite the debate on domicile reform. With a focus on modern society this article considers the faults with the current common law concept of domicile, proposes policy sensitive reform, and considers habitual residence and nationality as an alternative, before concluding that a reformed version of domicile still has its place within the twenty-first century.


# I. Introduction

As the preferred connecting factor in matters of personal status within the law of England and Wales[1], domicile plays a vital role within areas such as; succession, taxation, jurisdiction in divorce proceedings and marriage validity. Regardless of this pivotal role within various aspects of the law, it is a concept that despite long-term criticism,[2] remains unchanged for many years. Amidst the criticism, there have been various calls for reform from academics and the Law Commission[3], but, as recognised by McEleavy, the response to the Law Commission reports demonstrate that political will for reform has been lacking,[4] and it has become somewhat of a forgotten area. This author however, asserts that modern developments within family life and family law make reform of the law on domicile a necessity. With the ability for same-sex couples to marry now, the law on domicile fails to provide appropriate rules for children of such couples. Likewise, the concept of the nuclear family has changed dramatically, as the way people choose to live their family life has evolved and so the rules as they

[1] Hereafter referred to as England.

[2] Such criticism can be evidenced by the calls for reform dating as far back as 1954 in Private International Law Committee, First Report of the Private International Law Committee (Cmd. 9068, 1954). Reform advised again by the Law Commission in Law Commission, *Private International Law the Law of Domicile* Law Com No 88 (1985). In addition, academics such as Carter (PB Carter, 'Domicile: The Case For Radical reform in The United Kingdom' (1987) 36 ICLQ 713) have also criticised the law in the area.

[3] Law Commission*, Private International Law the Law of Domicile* Law Com No 88 (1985).

[4] P McEleavy, 'Regression and Reform in the Law on Domicile' (2007) 56(2) ICLQ 453, 462.

stand do not always provide predictability and certainty for parties, nor meet their expectations when connecting them to a country.

In accordance with the common law rules on domicile, there are three types of domicile; domicile of origin, domicile of choice and domicile of dependency. However, despite there being three, a propositus can never have more than one domicile for a particular purpose, nor can they be without one. For matters of personal status it is important that a person's domicile is able to be determined at any given time, but problems with the law on domicile means that making such a determination may not be straightforward as a consequence of outdated rules to assign a domicile of origin, primordial importance attached to the domicile of origin through the doctrine of revival, and difficulties in assessing if, and at what point, a domicile of choice is acquired. Though many of these problems were identified many years ago, society's continued development and increased migration means that for policy reasons around certainty and party expectations reform is long overdue. In addition, this author considers that the problems faced by children of same-sex couples in ascertaining their domicile due to the gender based rules, poignantly demonstrates that developments now make reform a necessity. With the inability for a particular group of persons to ascertain their domicile, it could be considered an issue under Article 8 of the European Convention on Human Rights (ECHR), as a consequence of the role domicile plays within private life in England. This, and the resulting potential for a breach of Convention rights under Article 8 and 14, are, therefore, argued to be a catalyst for re-examining the law through a modern public policy lense.

This article analyses the law on domicile, before proposing appropriate reform. This analysis will, in addition to building on previously recognised areas of concern, discuss the impact of modern legal development on the area to provide a level of originality to this discussion. Then, in seeking to add to the literature on this area, this piece will consider whether habitual residence or nationality ought to be considered as a replacement for domicile in England, to ensure the need for any proposed reform. Consideration is also given to policy objectives around certainty and party expectations throughout the article, in a bid to ensure that modern life, and the more migrant nature of society, is not forgotten, whilst adding a further dimension to the overarching analysis.

## II. Allocation of the Domicile of Origin

A domicile of origin is acquired at birth, and is based on the domicile of the mother or father at that time, depending upon the child's status of legitimacy. The status of legitimate or illegitimate is now largely redundant within law, but is still significant within the law on domicile, and could be considered an early indicator of the outdatedness of the law on domicile. If the child is legitimate it will take the father's domicile at that time, and if illegitimate the domicile of the mother.[5] While on the surface this may appear relatively uncomplicated, it does in fact raise problems. These rules may contrast with the way in which a child's domicile of dependency may be assigned, depending upon the family's living arrangements, such rules around dependency will be discussed later, but it is important to note that this could result in the domicile of origin being immediately replaced with a domicile of dependency, which raises questions around the purpose of the domicile of origin, which will be looked at in further detail later. The rules assume that the couple are of the opposite sex, and makes no provision for the determination of the domicile of origin in instances where, for example a same-sex couple have

[5] *Udny v Udny* (1869) LR 1 SC & Div 441, 457.

adopted a child, or where a child is born to a woman who is either party to a same-sex marriage or a civil partnership.[6] In both of these situations, the child is regarded as a legitimate child of that couple,[7] but the outdated rules set out above in relation to the domicile of origin, that assume a child will have a mother and a father, provide no answers on how the domicile of origin would be determined. In addition to the outdatedness of such a provision, it can cause wider, and more ongoing issues. It leaves a child of a same-sex couple unable to determine their domicile of origin. For example, if we consider a child who is born to a woman in a same-sex marriage, that child will, as mentioned, be considered a legitimate child. Under the current rules for determining the domicile of origin, the domicile would follow that of their father at the time of the child's birth, which, in the given scenario is not applicable, and leaves no appropriate method of determining the child's domicile of origin. Where children are part of a same-sex family, the reference to one's 'mother' and 'father' does not provide for, or incorporate their family unit. The law, as it stands discriminates against them as a class of people and violates Convention rights. Article 14 of the ECHR prohibits discrimination in the application of human rights on various grounds, some of which are enumerated within Article 14 itself, whilst many fall under the 'other status' banner. In suggesting that the current legal position of the domicile of origin is discriminatory and a breach of human rights in an effort to insight change, it is important to note that Article 14 is not a free standing right to non-discrimination, and its need to be used alongside one of the other Articles of the Convention. This is often referred to as the 'ambit requirement', [8] as it is sufficient to demonstrate that the facts of the case fall within the ambit of one of the Convention rights. [9]

When looking at the failure to provide rules to ascertain a child's domicile it is argued that this could fall within the 'private life' aspect of Article 8. In the case of *Geneovese v Malta,*[10] a child who had been born out of wedlock sought Maltese citizenship that he had been denied as a consequence of the non-marriage of his parents despite his father being Maltese. The court held that, 'citizenship' could fall within the ambit of Article 8, allowing the applicant to utilise Article 14 on the basis of discrimination of his status in the denial of issuing him citizenship. Though Article 8 does not guarantee a person the right to acquire citizenship in a particular place, previous case law has demonstrated that the denial may raise issues within Article 8:

> Although right to a citizenship is not as such guaranteed by the Convention or its protocols … the court does not exclude that an arbitrary denial of citizenship might in certain circumstances raise an issue under Article 8 of the Convention because of the impact of such a denial on the private life of the individual.[11]

This same logic was used in *Genovese v Malta*, where the court recognised that while the denial of citizenship did not in itself result in a breach of Article 8, 'its impact on the applicant's social identity was such as to bring it within the general scope and ambit of that Article.'[12] This is as a result of the

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[6] J Hill & M Ni Shuilleabhain, *Clarkson & Hill's Conflict of Laws* (Oxford University Press, 5th Edn, 2016) 321.

[7] S.67(2) Adoption and Children Act 2002 provides that an adopted person is the legitimate child of the adopters if they are adopted by a couple. Likewise s.42 Human Fertilisation and Embryology Act 2008 sets out that a civil partner or female spouse of a woman giving birth to a child is deemed to be the child's parent, provided they were married or in the civil partnership at the time of insemination. Under s.48(b) such child 'is the legitimate child of a child's parents.'

[8] R O'Connell, 'Cinderella Comes to the Ball: Art 14 and the Right to Non-Discrimination in the ECHR' (2009) 29(2) LS 211, 215.

[9] *Abdulaziz, Cabales and Balkandali v UK* (1985) 7 EHRR 471 [71].

[10] (2014) 58 EHRR 25

[11] *Karassev and Family v Finland* (1999) 28 EHRR CD 132.

[12] *Genovese v Malta* (2014) 58 EHRR 25, [43].

court's recognition that 'private life' can incorporate a person's social identity. This author raises the same argument in relation to domicile. The arbitrary discrimination faced by children of same-sex couples who are unable to ascertain their domicile of origin could fall within the 'private life' aspect of Article 8. England primarily uses domicile as the connecting factor when dealing with personal status, and it therefore plays an important role within social identity. Indeed, Jonathan Hill and Máire Ni Shúilleabháin refer to connecting factors as being about a test of 'belonging' and acknowledge that in England and most common law countries, that connecting factor is domicile,[13] meanwhile recognising that in civil law systems like Continental Europe that connecting factor is often nationality.[14]

This assimilation of domicile in common law countries with citizenship or nationality in civil law countries, so as to extend the argument of breach of human rights to domicile is furthered by looking at Kerry Abrams' works. Like England, as a common law country, the US also utilises domicile as a key connecting factor and Abrams states that 'Domicile is a form of state citizenship',[15] furthermore, in analysing the previous stance around a married woman's domicile being dependent upon her husband, she states that 'a married woman's *citizenship* followed her husband's under the rule of "derivative domicile".'[16] Abrams' interchanging use of 'citizenship' and 'domicile' is a consequence of the parallel role domicile plays within a person's social identity, that nationality or citizenship plays within civil law countries. Thus, alongside Hill and Ni Shúilleabháin's distinction between civil law and common law countries approach to connecting factors, it supports the argument that if matters of citizenship can fall within the ambit of Article 8 in relation to civil law countries like Malta in the case of G*enovese,* so can domicile for common law ECHR contracting countries like England.

Upon falling within the ambit of Article 8, it could be determined that there is a breach of human rights when Article 14 is read in conjunction with Article 8. Article 14 'is an "autonomous" provision [that] can be violated even where the substantive Article relied upon to invoke Art 14 has not been violated.'[17] Consequently, It need only be shown that the situation would fall within one of the grounds covered by Article 14. The current law fails to provide rules to allow the domicile of children of same-sex couples to be determined, thus the status in question is children of same-sex couples. While this is not a status listed within Article 14, it is apparent from 'any other status' that the list is open-ended, and various statuses have become apparent throughout case law.[18] Although at present there is no case law supporting such a status under Article 14, it is often widely interpreted by the European Court of Human Rights, and it appears 'that almost any distinction within the ambit of a Convention right can trigger an Article 14 inquiry.'[19] With examples of free masons and other non-secret organisations,[20] and different types of fathers[21] it is submitted that it is interpreted widely enough to include children of same-sex couples.

Discrimination only occurs when there is no objective and reasonable justification.[22] The non-provision of rules to determine the domicile of children of same-sex couples is arbitrary, with no reason other

[13] Hill & Ni Shúilleabháin (n 6) above 316.
[14] Ibid 339.
[15] K Abrams, 'Citizen Spouse' (2013) 101(2) *California Law Review* 407, 413.
[16] Ibid 408, italics added for emphasis.
[17] O'Connell (n 8) above 215.
[18] For instance, *JM v UK* (2011) 53 EHRR 6 demonstrates sexual orientation would fall under this heading, as would health as seen in *VAM V Serbia* (Application No 39177/05) 13 March 2007.
[19] O'Connell (n 8) above 222.
[20] *Grande Oriente d'Italia di Palazzo Giustiniani v Italy* (Application No 26740/02) 31 May 2007.
[21] *Paulik v Slovakia* (2008) 46 EHRR 10.
[22] See (n 12) above [43].

than the law's failure to keep up with other legal and societal developments, making it apparent that there is no objective or reasonable justification for the difference in treatment between them and children of heterosexual couples. With no such justification, upon falling within the ambit of Article 8, the current position could be deemed discriminatory against a relevant class of persons under Article 14, leading to a breach of Convention rights. With this in mind, it is evident that the law surrounding the domicile of origin is in need of reform to reflect modern society and ensure that the domicile of all children is able to be ascertained. This is particularly imperative because currently, as a consequence of the doctrine of revival, a person's domicile of origin can, even when replaced by a domicile of choice, resurface later in life. The use of domicile as a connecting factor in areas such as marriage validity and succession means that the problems outlined above may cause uncertainty for people, and lead to a loss of rights unexpectedly and unknowingly later in life when their unknown domicile of origin revives. The doctrine of revival and its associated problems will be analysed in the next section, however, exploration of the domicile of origin in itself demonstrates that the law surrounding the domicile of origin is no longer fit for purpose, and should be the catalyst not only to reform the domicile of origin but for a holistic reformulation of the law on domicile. In addition to the well documented problems with the law within the domicile of origin,[23] as propounded herein, there should be a clarion call for reform, primordially identifying the impact the current rules may have on the many same-sex couples and their children in today's society.

## III. Doctrine of Revival

The doctrine of revival means that whenever a domicile of choice is abandoned the domicile of origin steps back into place until a new domicile of choice is acquired.[24] It ensures that a propositus is never without a domicile by acting as a stop gap while another domicile of choice is ascertained. However, despite fulfilling the requirement that a person is never left without a domicile, it is a concept that has been criticised: 'The doctrine of revival of the domicile of origin can, however, operate crudely, and is difficult to defend in modern times.'[25] The doctrine can create results that seem highly artificial as it may mean that a person is domiciled in a place they left many years ago, or worse, owing to the way a domicile of origin is assigned, a place they have never been.[26] Though this may have once reflected the desires of British colonists who 'rather like elephants … return to their birthplace to die.'[27] It is archaic and completely out of touch with today's migratory world. It also means that the problems faced by children of same-sex couples in determining their domicile of origin discussed in the previous section, can resurface at a later and maybe, crucial, time in their lives, as it gives the domicile of origin a tenacious characteristic not common amongst the other types of domicile.

This potential for the domicile to resurface despite no real connection was recognised by the Law Commission when they set out the below scenario demonstrating such concerns:

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[23] Such problems include the doctrine of revival connected to the domicile of origin, and its resulting tenacity as will be discussed, and the potential for immediate replacement by a domicile of dependency as discussed by Carter (n 2) and R Fentiman , 'Domicile Revisited' (1991) 50(3) CLJ 445.

[24] *Tee v Tee* [1973] 3 All ER 1105.

[25] Carter (n 2) above 716.

[26] R Fentiman, 'Domicile Revisited' (1991) 50(3) CLJ 445.

[27] Hill & Ni Shuilleabhain (n 6) above 323.

> 'A is born in India to English domiciled parents, and thus receives at birth a domicile in England. He remains in India after reaching the age of 16 and acquires a domicile of choice there. Later, in middle life, he leaves India intending to settle in the USA. At that point, A's domicile of choice in India ceases and his English domicile revives, although he has never even visited, let alone lived in England. If A dies intestate before acquiring a domicile in one of the States of the Union, the succession to his moveable estate would be governed by English law.'[28]

Similar concerns were raised by Fawcett and Carruthers when they set out a scenario involving X who has a domicile of origin in Scotland but lived all of his life in England. Having developed a dislike for the UK, X moved to Peru, and having gained a domicile of choice therein remains there for 40 years. Having amassed a fortune, X then decides to leave Peru for good and takes up temporary residence in New York while he thinks about whether to settle in Virginia or California.[29] Fawcett and Carruthers then go on to recognise that having abandoned his domicile of choice in Peru, during his period of indecisiveness living in New York, a personal law must be applicable to X, and as a result of the doctrine of revival it would be Scottish Law.[30] Fawcett and Carruthers, go on to recognise the potential impact such laws would have on X and his family life: 'The country that determines his personal law is one that he has never visited and for which he feels a repugnance. Nevertheless, if he wishes to marry, his capacity will be determined by reference to the law of Scotland.'[31] This fails to uphold any policy objectives around party expectations, as it seems unlikely that X, or his family would have expected a country X had never visited to determine important legal issues.

The potential for nonsensical decisions are also evidenced in *Henwood v Barlow Clowes International Ltd.*[32] In this case, the propositus had a domicile of origin in England, but disliked the country, and so moved to the Isle of Man where he set up his business and gained a domicile of choice there. Upon the collapse of his business he was ostracised from the community and felt it necessary to move. With no desire to return to England he spent most of his time split between a house he owned in France and one he rented in Mauritius, yet the court held that his domicile of origin revived and that he was domiciled in a place he had actively abandoned many years before and had no intention of returning to. This again is problematic when considering policy objectives like upholding party expectations. It also fails to reflect changes in society around migration, as will be discussed below. The US abolished the doctrine of revival and replaced it with the rule of continuance, on the basis of ease and frequency of movement around the US,[33] however this has also been true of English society for a number of years. Whether it be the current ability to move freely around the EU, or seeking visas in search of a better life, or to be with spouses abroad, the archaic sentiments of the doctrine of revival are no longer reflective of English society, and highlights that the tenacity such a doctrine further promotes in relation to the domicile of origin is counter intuitive.

Problems with the doctrine can also be evidenced by calls for reform in the First Report of the Private International Law Committee[34] and the Law Commission Working Paper No.88.[35] In the former it was suggested that a domicile should continue until another domicile is acquired;[36] in essence replacing

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[28] See (n 3) above [5.18], example 1.
[29] J Fawcett, J M Carruthers & Sir P North, *Cheshire, North & Fawcett: Private International Law* (Oxford University Press, 14th edn, 2008) 173.
[30] Ibid.
[31] Ibid 174.
[32] [2008] EWCA Civ. 577, [2008] BPIR 778.
[33] Hill & Ni Shúilleabháin (n 6) above 324.
[34] Private International Law Committee, *First Report of the Private International Law Committee* (Cmd. 9068, 1954)
[35] See (n 3) above.
[36] See (n 34) above Appendix A.

the doctrine of revival with a continuance rule. The idea of continuance was then, further explored by the Law Commission. Although initially concerned that the Committee had not considered the artificiality behind prolonging a connection between a person, and a country which they have abandoned, the Commission went on to recognise that this is at least the place with the most recent connection, and that imposing the domicile of origin runs the same, if not greater risks, of producing results which are artificial: 'it can be argued that a person is more likely to remain connected to the country of his most recent domicile than to his country of birth'.[37] With fears around the artificiality of suggesting a connection with a country abandoned many years previously, and the recognition that the propositus may never have even visited their domicile of origin, the Law Commission suggested a move to the rule of continuance.[38] Whilst not a perfect rule, such an approach would at least guarantee some connection to the most recent country for at least a period of time.

Additional support for the continuance rule can also be seen in other jurisdictions. For instance, in the US in accordance with *Re Jones' Estate,*[39] New Zealand as a result of section 11 of the Domicile Act 1976, Australia under section 7 of the Domicile Act 1982 and South Africa as a consequence of section 3(1) of the Domicile Act 1992. Despite demonstrating clear support for the continuance rule, there is, as always the opposing side of the argument. Though recognising some of the artificial results created by the doctrine of revival, Fentiman maintains that it has its place within the law,[40] citing the 'footloose propositus'[41] who has no real connection to a particular place in support of its value. Fentiman asserts that 'what the domicile of origin and the revival doctrine need is careful handling'.[42] Previous case law demonstrates that careful handling is not used by the judiciary when determining whether the domicile of origin should be applied, as demonstrated in cases such as *Ramsay v Liverpool Royal Infirmary*[43] and the previously discussed *Henwood v Barlow Clowes International Ltd*. In both of these cases the deceased were found to be domiciled in their domicile of origin despite having left there many years previously and had no intention of returning. In *Ramsay*, the propositus had left Scotland to live in Liverpool with his family for the last thirty six years of his life and had even made arrangements to be buried in England. Likewise, in *Henwood v Barlow Clowes* the propositus had, due to his dislike for England, left and set up his business in the Isle of Man, before living between Mauritius and France. Yet over seventeen years later he was deemed domiciled in England. While the judiciary may have had good reason for coming to their conclusions in respect of the outcomes that were achieved, for instance in *Ramsay* it meant that his will that was created in Scotland was valid, they certainly do not demonstrate careful handling of the domicile of origin, but instead highlight the adhesive nature of the domicile of origin. Likewise, even the most careful of handling does not remove the problem of the revival doctrine reinstating a domicile in a country that the person has never visited or left many years previously when a propositus elects to abandon their domicile of choice. This is an issue with the design of the doctrine, contrasted with societal developments. Careful handling equally cannot resolve policy concerns around party expectations and changing cultural infrastructures, all of which would be better provided for under the rule of continuance.

[37] See (n 3) above [5.20].
[38] This was then affirmed in the Law Commission's final report on the matter; Law Commission, *Private International Law the Law on Domicile* Law Com No 168 (1987) [5.25].
[39] 192 Iowa 78; 182 N.W 227 (1921).
[40] Fentiman (n 26) above.
[41] Ibid 452.
[42] Ibid 453.
[43] [1930] A.C. 588 (HL).

# IV. The Domicile of Choice

A domicile of choice is acquired *animo et facto,* meaning it is acquired by taking up residence in a country with the intention of permanently or indefinitely remaining there.[44] For the most part the residence element is undisputed, as it is not really concerned with the length of residence, but instead, the quality of the residence,[45] it is the intention element that is often contentious, and is where the law lacks clarity. It was even suggested by Lord Chelmsford in *Bell v Kennedy* that if the animus exists before arrival in the country, that 'any residence, however slight or temporary in its character following upon that intention, and in pursuance of it, will be sufficient to establish the domicile.'[46] This would in turn suggest that what is actually needed is presence in that country, and for the purposes of completeness any reform should also address this by replacing 'residence' with 'presence'. Indeed such an approach was suggested by Torremans and Fawcett[47] and appears to gain support from the Law Comnmission[48] and in Moor's J reference to presence in *Divall v Divall*: 'The acquisition of a domicile of choice … requires physical presence, although it need not be long'.[49] This is furthered by case law demonstrating that staying with friends[50] or in a hotel[51] is sufficient to satisfy the factum, as the word 'residence' has connotations of a period of time and arguably home ownership, or at least renting a property. However, whilst 'presence' may more accurately reflect judicial attitude in respect of the importance attached to the length of time one has been present in a country when determining domicile, the use of the word 'presence' in the alternative would not reflect the possibility of a person being domiciled in a place that they are not physically present in at the time of determination. This would for instance apply where a person has multiple residences, domicile would be established in their chief residence and may not be where they are at the point of reference.[52] On that premise, it is thought, that replacing 'residence' with 'presence' would not be an appropriate reform as it is bereft of the needs of the individual cases, whilst residence has wider connotations and is able to be stretched more appropriately.[53]

## *A. Satisfying the Requirement of Intention*

Common law varies on what is required from an intention to remain permanently, to one to remain indefinitely. In *Ramsay v Liverpool Royal Infirmary*[54] it was made clear that no length of time in itself would be sufficient to prove intention, but while the case went on to discuss needing to remain permanently,[55] in *the Estate of Fuld (No 3),* Scarman J referred to an intention to remain indefinitely.[56]

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[44] Hill & Ni Shúilleabháin (n 6) above 328.
[45] *Bell v Kennedy* (1868) 6 M. 69 (HL).
[46] Ibid 77.
[47] Paul Torremans (ed), *Cheshire, North & Fawcett: Private International Law* (Oxford University Press, 15th edn, 2017) 150.
[48] Law Commission, *Private International Law the Law on Domicile* Law Com No 168 (1987) [5.7].
[49] *Divall v Divall*[2014] EWHC 95 (fam) [28].
[50] *Stone v Stone* [1958] 1 WLR 1287.
[51] *Levene v IRC* [1928] A.C. 217 (HL).
[52] Anthony O. Nwafor, 'The Requisite Intention for the Acquisition of Domicile of Choice: Permanent or Indefinite – A Comparative Perspective' (2013) 21(3) African Journal of International and Comparative Law 327.
[53] Ibid 336.
[54] [1930] A.C. 588 (HL).
[55] Ibid 588.
[56] *In the Estate of Fuld (No 3)* [1966] 2 WLR 717, [1968] P. 675, 684.

In these two cases we can see a shift from 'permanent' to 'indefinite', however this is dealt with in more modern times by referring to an intention to reside 'permanently or indefinitely'.[57] The problem, therefore, lies not with that shift, but with the grey area, which may see a propositus with thoughts that a move may occur should a particularised event happen. These vagaries of the law around contingencies have been cogently articulated by Scarman J:

> If a man intends to return to the land of his birth upon a clearly foreseen and anticipated contingency, e.g. the end of his job, the intention required by law is lacking; but, if he has in his mind only a vague possibility, such as making a fortune (a modern example might be winning a football pool), or some sentiment about dying in the land of his fathers, such a state of mind is consistent with the intention required.[58]

This does not deal with those grey areas, as a vague chance of leaving or a 'pipe dream'[59] will not prevent a domicile from being acquired, and instead, the contingency must be assessed in order to determine whether the intention is satisfied. In addition to such concerns, difficulties may also arise as a consequence of the inherent challenges associated with determining a person's intentions and the potential for self-serving declarations of intent. The *animus* may consequently prove ethereal and illusory.

### *1. The Contingency*

In the *Estate of Re Fuld (No 3)* it was considered that a contingency is assessed by asking whether it is 'clearly foreseen and reasonably anticipated'.[60] Yet, in *IRC V Bullock*,[61] the court held that the propositus had not gained a domicile of choice in England as he intended to return to Canada if his wife died before him, and they held that there was a 'sufficiently substantial possibility of the contingency happening.'[62] In turn, the courts have provided two different tests; A 'sufficiently substantial possibility' of the contingency, or one that is 'clearly foreseen and reasonably anticipated'. Whilst there may have been a sufficiently substantial possibility that in *Bullock* his wife would die before him, it seems unlikely that he would have reasonably anticipated or expected his wife who was three years his junior to die before him.[63] Therefore, it is likely that had the test from *Fuld's Estate (No 3)* been applied in *Bullock*, that the propositus would have been deemed to have gained a domicile of choice in England.[64] This shows a lack of clarity in the area, and despite the test of 'clearly foreseen and reasonably anticipated' from *Fuld's Estate* being affirmed recently,[65] there is still no real certainty in the area. The fact that there could be a contingency, and the propositus still gains a domicile of choice, would suggest a relaxation in the law from a strict approach of absolute permanency being required, but there remains uncertainty surrounding whether contingencies would prevent a change in domicile. The law, as it stands, is determined by personal perception, thus providing the judiciary with broadened discretion and enhanced flexibility, and individuals with uncertainty and a lack of predictability. This uncertainty is problematic for families when considering the areas which may be impacted. For instance, given the role of domicile within marriage validity, where a person is domiciled

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[57] This is evident within more recent case law such as *Mark v Mark* [2005] UKHL 42 [39], [2006] 1 AC 98 and *Cyganik v Agulian* [2006] EWCA Civ 129 [45] but also more recent literature, see for example Hill & Ni Shúilleabháin, (n 6 )above 330.

[58] See *In the Estate of Fuld (No3)* (n 56) 684-685.

[59] *Sekhri v Ray* [2014] 1 FLR 612 [29]

[60] See *In the Estate of Fuld (No3)* (n 56) 684.

[61] [1976] 1 WLR 1178.

[62] Ibid 1186.

[63] Hill & Ni Shúilleabháin (n 6) above 331.

[64] Ibid 331.

[65] *Perdoni v Curati* [2012] WTLR 505 [27].

may impact upon whether their marriage is valid which could be of vital importance for migration purposes, a party dying intestate or indeed seeking divorce. The law as it stands does not succeed in achieving the policy objective of certainty, nor does it reflect the more migratory society, in which it is crucial to understand when a contingency may or may not effect a person's domicile.

Interestingly, Fawcett[66] argues that the rule selection that is able to occur under the present law allows the courts to select the domicile that will provide the desired result. He admits that, 'this could be read as an admission of the preparedness to manipulate the facts in order to reach the desired result.'[67] He states that such discretion and flexibility allows the courts to achieve policy aims, but argues that while they may be criticised for doing so, it assists in achieving the correct results. While the 'correct' result may be the ability to uphold the validity off a marriage or the validity of a will, thereby achieving such policy aims, this approach fails to achieve policy objectives around certainty and predictability, uniformity of results and upholding party expectations surrounding the country they are deemed to be connected to. Therefore, a judge's thoughts on what the correct outcome is, may not necessarily coincide with what others would deem the correct result. Similar concerns are also mirrored in the court's requirement to appropriately assess a person's intentions.

### *2. Determining a Person's Intention*

Further to the grey areas caused by contingencies, and whether a particular contingency may or may not prevent the ascertainment of a domicile of choice, determining a person's intentions is inherently difficult: 'the ascertainment of a person's intentions are fraught with difficulty.'[68] Assessing what a person intended in respect of there permanent living arrangements is not easy, and is often made more challenging by the propositus being deceased when the issue arises. However, even in cases where a declaration of intention has been provided by the propositus to assist in the determination, they are often treated with suspicion due to the advantageous position a person may be in if deemed domiciled in a particular place:[69]

> 'They may be interested statements designed to flatter or deceive the hearer; they may represent nothing more than vein expectations unlikely to be fulfilled; and the very facility with which they can be made requires their sincerity to be manifested by some active step taken in furtherance of the expressed intention.'[70]

Where no such declaration is provided, it is for the courts to assess the parties' intention. As suggested above, this is no easy task and it has long been established that in doing so 'the court must look back at the whole of the deceased's life … to decide whether he had acquired a domicile of choice.'[71] It has been stressed how essential it is that no act or circumstance in a person's life should be ignored when determining whether they intended to change their domicile[72], and that a chronological examination of the life should be completed. This stance has, however, been criticised by Carter.[73] He states that it

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[66] Fawcett, 'Result Selection in Domicile Cases' (1985) 5(3) OJLS 378.
[67] Ibid 380.
[68] Fawcett, Carruthers & North (n 29) above 154.
[69] *Ramsay v Liverpool Royal Infirmary* [1930] AC 588 which has also been recognised in more recent case law including *M v M (Divorce: Domicile)* [2010]EWHC 982 (Fam) 7.
[70] Fawcett, Carruthers & North (n 29) above 166. See also *M v M (Divorce: Domicile)* [2010] EWHC 982 (Fam) [7] 'I am aware that any person seeking to establish his/her own position before this court may be inclined to make self-serving statements. I am alert to this possibility and I have taken that factor fully into account when analysing the evidence.'
[71] *Agulian v Cyganik* [2006] EWCA Civ 129 (CA) [46(1)].
[72] *Drevon v Drevon* (1864) 34 LJ Ch 129.
[73] Carter (n 2) above.

produces absurd results and suggests that instead the focus should be on 'the situation as it existed at the very moment in time to which the enquiry relates, and asking directly what was then his home, which was the community with which he was then most closely connected, which is the community to which it would be most reasonable to say that he then belonged.'[74] In addition to Carter's concerns it is propounded that a historic analysis may not be needed in every case, and that such examinations are time consuming and thus costly. It is therefore submitted that, whilst focusing on where the propositus currently lives, or lived at the time of death, is a useful starting point. It shifts the onus away from the more challenging questions of intent and instead focuses on the question of residence which can be answered objectively. In the more simple cases this will complement the presumption of intent discussed further below, and can be departed from for a more analytical examination in appropriate cases, such as those where a propositus has multiple residences or is living in a place for a defined period. It is propounded that such an approach offers more cost effective and timely solutions in appropriate cases whilst providing the ability for much deeper analysis as set out in previous case law in the more complex decisions..

### *3. Creating A Presumption?*

One of the strengths of domicile as a connecting factor is that it looks to the person's intentions, as opposed to establishing more tenuous links, such as those used within habitual residence,[75] but it is that element of intention that is in much need of reform. The reform needs to address the concerns raised above around a propositus having a contingency which may, upon its happening, cause them to leave, and whether this prevents a domicile of choice from being acquired, alongside the natural difficulties with determining what a person intended. It is, however, important that any such reforms are policy sensitive by creating greater certainty in the law, as opposed to providing further discretion for the courts. This need for certainty was also identified in the First Report of the Law Committee[76] and the Law Commission Working Paper No 88,[77] as both recommended reform within the area. The Committee made the point that they are aware that the courts have had a tendency to apply a more modern and less strict approach to the cases, but asserts that the law is in need of amendment. They suggest a proposal in which presumptions of intent form part of the suggested legislation. The key presumption suggested is that, 'Where a person has his home in a country, he shall be presumed to live there permanently.'[78] The Law Commission, on the other hand, suggested that when a person has been habitually resident for seven continuous years since reaching the age of sixteen, they will be presumed to be intending to make it their home indefinitely, unless evidence is shown to the contrary.[79]

In considering the route to reform, the Law Commission took issue with the Committee's presumption of intent on the basis that 'home' would be no easier to resolve than an investigation into where a person is domiciled.[80] This statement is contentious. Admittedly, an investigation would have to be undertaken to determine where a person had his 'home' however, 'home' is a concept that is understood by the layman, lawyers and society as a whole and has in fact been utilised successfully in other areas of law. For example, Article 8 of the ECHR refers to 'home' and has been recognised and understood within case law dealing with Convention matters.[81] There is also domestic support for the

[74] Ibid 722-723.
[75] C M V Clarkson & J Hill, *The Conflict of Laws* (Oxford University Press, 4th edn, 2011) 341.
[76] See (n 34) above.
[77] See (n 3) above.
[78] See (n 34) above, Appendix A, Article 2(2).
[79] See (n 3) above [5.17].
[80] Ibid [5.12].
[81] *Qazi v Harrow London BC* [2003] UKHL 43 and Buckland v UK (2013) 56 EHRR 16.

use of the term 'home' in housing legislation[82] which has again been interpreted and understood even where there has been multiple homes.[83] For that reason, the use of the term 'home' by the Law Committee is not as problematic as has been suggested, and is something many people would be able to understand and predict.

Instead, the Commission suggested a presumption of intent where there has been habitual residence for seven continuous years, though this is also open to criticism. Like 'home', a person's place of 'habitual residence' would have to be investigated, and it is a term that is not used as widely by laymen, as 'home' is popular everyday terminology. When considering habitual residence as an alternative to domicile, it has been argued to be an underdeveloped concept that 'has proved to be a source of uncertainty'.[84] Though developments have continued since Carter's criticisms, and cases surrounding the meaning of habitual residence have come before the Supreme Court,[85] this focus has predominantly been around the habitual residence of children. The reality of determining habitual residence is that the meaning of habitual residence varies according to the context[86] and that the habitual residence of an adult under domestic law still comes back to the test set out in *Shah v Barnet London Borough Council.*[87] The test in *Shah* requires the concurrence of residence and a 'settled purpose' of remaining there, which may not always be easy to apply, and has been pulled in different directions by differing case facts.[88] With the requirement to have habitual residence in the said place for seven continuous years, the proposal appears arbitrary, burdensome and incompatible with the more modern approach to habitual residence. When analysing the reason behind the seven years it would seem there is little justification for this figure and it could be said to be onerous. It is significantly higher than the three month requirement under the Civil Jurisdiction and Judgment Order 2001,[89] which is used when determining domicile under the Brussels I Regulations, for jurisdictional purposes. The Commission believed it to be about the right balance but has admitted that there is 'no magic in seven years'.[90]

The presumption proposal by the Commission lacks thorough forethought and proper consideration. These particular problems are highlighted by Carter, who criticises the proposal for the time scale not commencing until the propositus attains the age of sixteen, as this could mean that whilst a person has been living in a particular country since they were twelve, they will not be presumed to have the intention to live their indefinitely until they reach the age of twenty three, an onerous hurdle to jump.[91] He also questions the age of sixteen on the premise that if a child can be found criminally responsible and able to have intent in relation to criminal proceedings from the age of ten, it seems illogical to state they cannot form intention regarding where they wish to live until six years later. He goes on to stress that the fact that in most cases a child may not be able to carry out his intentions is besides the point.[92] Finally, Carter states that there is a lack of clarity in what is meant by 'subject to evidence to the contrary'. He questions the amount of evidence required and whether the presumption is one of fact or law.[93] These are interesting arguments, and it is clearly problematic to

[82] The Housing Act 2004.
[83] *Uratemp Ventures Ltd v Collins* [2001] UKHL 43 and Crawley BC v Sawyer (1988) 20 HLR 98.
[84] Carter (n 2) above 720.
[85] *A v A and Another (Children: Habitual Residence)* [2013] UKSC 60, [2014] AC 1.
[86] *Mark v Mark* [2006] 1 AC 98.
[87] [1983] 2 AC 309.
[88] The law on habitual residence will be analysed further later in this article..
[89] Civil Jurisdiction and Judgement Order 2001, SI 2001/3929, sch 1, para 9(6)(b).
[90] See (n 3) above [5.14.]
[91] Carter (n 2) above.
[92] Ibid, 721.
[93] Carter (n 2) above.

think that a domicile of choice would not, under the Commission's proposal, be presumed to apply until the adult reaches the age of twenty three. If a child moved to the country in question at the age of thirteen, while they may not have had the ability to carry out an alternative intention at that age, only a few years later this would be possible. The very fact that they then continue to live there surely demonstrates that they then have an intention to remain there, and so it means that the decision not to have the clock start ticking from when they moved there seem illogical. This problem also adds to the criticism that a seven year period is too onerous given that it means a presumption can never apply to those under the age of twenty three. Lastly, it ignores Article 12 of the United Nations Convention on the Rights of the Child by simply casting aside the views of the child, and the mature thoughts they may have on where they intend to live.[94]

With careful consideration of the precise nature of any presumptions of intent, it is apparent that the use of a presumption would, in many cases, eliminate the inherent difficulty of trying to decipher a person's intentions, and, could also prevent historical examinations of a person's life which can lead to lengthy and expensive court cases. As a presumption rather than a rule, it would also mean that it could be rebutted, allowing for the chronological analysis of a propositus' life where necessary, and could be used in tandem with a set rule on contingencies, such as the one in *Re Fuld's Estate*. This approach would better handle a more migratory society by providing certainty, and allowing for resolutions outside the courtroom in the more straightforward cases, but leaving a mechanism for adversarial challenge when needed. For that reason presumptions of intent will be a consideration when proposing reform.

### *B. Changing One's Domicile, but to what Standard of Proof?*

At present, any assertions of a change in domicile must be proved by the person asserting it. The general rule is that it must be proved on a balance of probabilities; thus the civil standard, however, such a statement is contentious. When looking at cases such as *Ramsay v Liverpool Royal Infirmary* and *Winans v AG* the propositus' had left their domicile of origin many years previously but were still held to be domiciled there. Furthermore, it has been stated in some cases that a higher standard of proof is needed, something 'beyond a mere balance of probabilities'.[95] This higher standard of proof has pertained to a change from a domicile of origin, to one of choice,[96] and further demonstrates the tenacity of the domicile of origin discussed earlier. This tenacity is as a result of some members of the judiciary perceiving the domicile of origin to have more paramountcy than its counterparts: 'it is easier to show change from one domicile of choice to another domicile of choice than it is to show a change to a domicile of choice from a domicile of origin.'[97] This approach was disapproved of in *Henwood v Barlow Clowes*, and the normal civil standard was held to apply but, 'tradition dies hard'[98] and there are clear contrasts in the standard that has been applied. This is problematic when the aim of this reform is to provide certainty for couples and to ensure their expectations are upheld.

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[94] While this is not an argument that this author will explore in depth, it is worth bearing in mind when thinking about the rules for determining domicile.

[95] *Henderson v Henderson* [1965] 2 WLR 218, [1967] P.77, 80.

[96] For instance in *Re Fuld's Estate (No 3)* (n 56) above. It was suggested that a standard of proof approaching the criminal standard was needed.

[97] [2006] EWCA Civ 129 [56].

[98] Carter (n 2) above 718.

In providing a holistic reformulation of the law on domicile, it is imperative that the standard of proof required when asserting a change or rebutting a presumption is covered. This is supported by the Law Commission who in their suggestion for reform provided that, the normal civil standard of proof; the balance of probabilities should apply to all domicile disputes.[99] This article will, therefore, in its suggestion for reform, propose a fixed rule stating that it is the balance of probabilities to ensure certainty and consistency in respect of the standard of proof that must be met when alleging a change of domicile. Enforcing the civil standard will not only reflect more recent case law such as *Kenwood v Barlow Clowes,* but will, alongside other changes help thwart the judiciaries' overuse of the domicile of origin.

# V. Domicile of Dependency

## *A. Children*

In accordance with the Domicile and Matrimonial Proceedings Act 1973, children under the age of 16 have a domicile of dependency.[100] As with the rules of a domicile of origin, a legitimate child's domicile of dependency follows that of their father, and an illegitimate child that of their mother. In an attempt to create greater flexibility, section 4 of that same Act states that where the parents are living apart and the child has a home with the mother and not with the father, the child will take the mother's domicile. The use of 'living apart' means that the parents need not be separated, they may be living apart for other reasons such as work. This provides a step in the right direction in beginning to reflect some of the more modern familial arrangements, yet it still appears artificial.[101] The Act does not consider the position when the father is dead, nor does it apply equally to the domicile of origin. Therefore, a child may still have a domicile of origin in a country with which they have no connection, and may, as mentioned earlier, immediately have their domicile of origin replaced by a domicile of dependency. This would suggest that in such situations the domicile of origin's only role is to lay in abeyance for the purpose of the doctrine of revival, a doctrine which has already been criticised for being outdated and no longer fit for purpose. With the desire to tackle some of this artificiality, the Law Commission recommended reform in the area.[102]

The suggested reform was that where a child's parents have the same domicile it will change with them, but where they have different domiciles, but live together, that the child's should change with that of the mother. Then when considering when the child has a home with one of the parents the domicile is the same as, and changes with that parent. As with the domicile of origin, there is again no provision for a child of a same-sex couple. These recommendations were altered in the Law Commission's final report.[103] The Commission introduced the idea of the child's domicile being determined by looking at the place they are most closely connected with, thereby focusing more on the child and their connections, rather than viewing the child solely through the lens of the parent's domicile, albeit aided by presumptions. These presumptions were based on the parent or parents the child lives with, and their domiciles: so for instance where the child lives with both parents, and they

[99] See (n 3) above [5.17].
[100] S.3(1)
[101] Clarkson & Hill (n 75) above 30.
[102] See (n 3) above [4.18].
[103] See (n 38) above [4.12-4.20].

both have the same domicile, there will be a rebuttable presumption that the child is most closely connected to that place, and therefore domiciled there.[104] Alternatively, where the child lives with both parents, but they have different domiciles, no presumption should be applied, and instead the test of closest connection should be applied solely.[105] The report never materialised within the law in England, as it was rejected by the UK Government,[106] but it is possible to see how such recommendations in their avoidance of stipulating the mother or father's domicile, could offer the versatility needed in the modern day to ensure the law on domicile reflects legal developments around same-sex relationships.

When analysing the potential for success of such a reform, the Family Law (Scotland) Act 2006 offers vital insight. Though not introduced in its entirety, or in the exact manner set out in the Law Commission report, similarities can be seen between the report and section 22 of the Act in relation to the domicile of dependency. Section 22 provides that where the parents of the child are domiciled in the same country as each other, and the child has a home with a parent or a home/homes with both of them, the child shall be domiciled in the same country as their parents. Alternatively, under section 22(3), where the child does not have a home with their parents, or their parents are not domiciled in the same country as each other, the child shall be domiciled in the country which the child has, for the time being, the closest connection. The key difference between the legislation and the Law Commission recommendations in their final report, is the use of a rules based approach where there is a common parental domicile, as opposed to the presumption that was recommended. On paper this may not appear a dramatic shift, but it could make an important distinction in practice. With a rule in place, a child's domicile is wherever their parent's are domiciled at that time, regardless of whether the child is living, or, has ever lived, in that country; it keeps in place the ability for domicile to work in a more arbitrary way. On the other hand, the use of the presumption allows the courts to avoid such arbitrary decisions in the rarer, more complex cases.[107] It is therefore important, when proposing any reforms within the domicile of dependency, that they are not only inclusive of the various modern family makeups, such as those where parents are of the same-sex or whereby the children are living with their father and not with their mother, but that they also operate in the most appropriate way; lessons should be learned from the old before developing the new.

In addition to the aforementioned proposals, the Law Commission in both the initial consultation document,[108] and their final report,[109] expressed that there was no desirable reason to keep the two categories of domicile for children, and that it had only been necessary for the purposes of the doctrine of revival, which they had recommended be abolished. Consequently, they also recommended the abolition of the domicile of origin. In making such recommendations, the Law Commission recognised that the rules they were proposing worked for children right from birth, up until the ability to acquire a domicile of choice. Such a reform, further to being relevant to other concerns around the domicile of origin's tenacity, and the difficulties in gaining a domicile of choice, would also address the criticism that a domicile of origin can, at present, be immediately replaced by a domicile of dependency. Likewise, with the right measures in place for determining a child's domicile of dependency, problems currently faced by children of same-sex couples would be removed from the

[104] Ibid [4.15].
[105] Ibid [4.17].
[106] Law Commission, *Thirtieth Annual Report* Law Com No. 239 (1996) [1.5 n. 24.]
[107] This point was discussed in McEleavy (n 4) above.
[108] See (n 3) above [4.22].
[109] See (n 38) above [4.21-4.23].

outset, as would the potential for their unascertainable domicile to revive at a later, and potentially crucial time of their lives.

### *B. Mental Capacity*

In addition to children, those with a mental incapacity to form the necessary intent required for a domicile of choice, are also assigned a domicile of dependency. Their domicile remains the same as it was immediately before becoming impaired.[110] The Law Commission recommended reform on the basis that the domicile be based on the country which they are most closely connected to,[111] however, this could mean that a propositus was deemed to be domiciled in a country they never intended to live in, but may have been moved there by a carer. For that reason, it is submitted that the law as it stands is the best provision for those not able to form the necessary intention, as at least a connection to that country or state can be seen prior to the mental impairment. Consequently, reform is deemed unnecessary within this aspect of the domicile of dependency.

## VI. Domicile: the Plan for Reform

Analysis of the law on domicile leads to a clarion call for reform. The areas of main concern surround the doctrine of revival in relation to the domicile of origin, the rules to determine a child's domicile, and the intention element of the domicile of choice. This section will critically evaluate how each of these should be reformed.

Turning first to the doctrine of revival of the domicile of origin. It is evident from analysis of case law and academic comment herein, that it can produce artificial results, and as a concept is outdated: 'In the modern world, where people are much more ready to cut all ties to their country of birth, it is no longer justified to resort to the domicile of origin to fill a gap between two domiciles of choice.'[112] For some, they may have left their domicile of origin many years prior, and others may have never even visited, making the doctrine of revival somewhat illogical. It is, therefore, submitted, that the doctrine of revival should be abolished and replaced by the continuance rule. This would mean that a previous domicile of choice would continue until a new one had been acquired. Such reform was suggested by the Law Commission in the previous century,[113] and this author argues that such reformulation is therefore not only supported, but its need is ever greater, given the continuous growth of international families and migration since that time.

When analysing the way in which a domicile of origin is assigned, it is apparent that children of same-sex couples were not in contemplation when the rules were formulated. The continuation of gender based rules, however, now fail to reflect the rights obtained by same-sex couples, and are discriminatory towards such couples in their roles as parents, and their children, in not providing a

[110] *Urquhart v Butterfield* (1887) 37 Ch.D. 357 (CA).
[111] See (n 3) above para 6.9.
[112] S Harder, 'Domicile of Children: The New Law in Scotland' (2006) 10(3) *Edinburgh Law Review* 386, 396.
[113] See both (n 3) above [5.20] and (n 38) above [5.25].

way in which they can be assigned a domicile, making reform a necessity. Furthermore, while the general rules around domicile of origin and domicile of dependency are the same, the Domicile and Matrimonial Proceedings Act 1973 can lead to some children having a domicile of origin in one place, to which they have no connection, which is then immediately replaced by a domicile of dependency in another, with the domicile of origin merely laying in waiting for the purpose of revival. This, in addition to the problems faced by children of same-sex couples in determining their domicile of origin demonstrates the need for reform for two reasons. Firstly, to address the potential artificiality created by the current rules, and secondly, with the above proposal for the abolition of the doctrine of revival, there is no distinction between the domicile of origin and the domicile of dependency. Instead, upon the abolition of the doctrine of revival, the domicile of origin should also be removed, and focus should turn to assessing the appropriate rules for determining a child's domicile. While this research offers an original insight into the problems faced by children of same-sex couples, and therefore intensifies the need for change, other more long-standing problems with the law around the domicile of origin and the doctrine of revival remain relevant today, and have been discussed to further support the need for change. Such need for change was also recognised by the Law Commission, [114] and though they were not in contemplation of the legal developments around same-sex relationships, it demonstrates support for the reforms proposed herein.

In establishing the optimal rules for the allocation of a child's domicile, it is important that the rules do not repeat the problems caused by the utilisation of the current gender based roles of mother and father. Instead, any rules must be inclusive of various familial arrangements, and lead to a domicile that best reflects the child's actual connection to a country, whilst still providing certainty wherever possible. It is therefore propounded that the most suitable solution would be based on determining the country to which the child is most closely connected, assisted by a presumption in certain circumstances, as advocated in the Law Commission's final report.[115] This would mean that the general rule was that a child is domiciled in the country with which they have the closest connection. Running alongside the rule, it is proposed that there would be rebuttable presumptions for some of the less complex cases. These cases would be where the parents are domiciled in the same country and the child has a home with either or both of them. In such cases the child will be presumed to be most closely connected to their country of domicile unless evidence to the contrary is shown.[116] Likewise, where the parents are not domiciled in the same country as one another, and the child has their home with one of them, it will be presumed that the child is most closely connected to the country in which the parent they have a home with is domiciled, unless evidence to the contrary is shown.[117] In all other instances, such as where the parents have different domiciles and the child lives with them both, no presumption will apply, and instead the country of closet connection would need to be established,[118] taking into consideration all of the circumstances of the case. The Law Commission were of the opinion that the test and presumptions, as laid out, were suitable for determining a child's domicile from birth right up until the age of sixteen,[119] and while it differs to the way the law was implemented in Scotland, it is argued that the fixed rules used in section 22 of the Family Law (Scotland) Act 2006 still has the potential to create arbitrary results in cases when they could be avoided.

In addressing the requisite intention to establish a domicile of choice, judicial comment highlights that there is a grey area when determining whether a particular contingency, that would make a propositus

[114] See (n 38) above [4.24].
[115] Ibid [4.15 - 4.17].
[116] Ibid [4.15].
[117] Ibid [4.16].
[118] Ibid [4.17].
[119] Ibid [4.23].

leave the country in question, will prevent a domicile of choice from being acquired. Furthermore, difficulties arise as a result of the tenacity of the domicile of origin as identified in cases such as *Ramsay*, and the inherent challenges of ascertaining a person's intentions, thus reform by way of presumptions is proposed. Like the Private International Law Committee, it is promulgated that there be a rebuttable presumption of 'where a person has his home in a country, he shall be presumed to live there permanently'.[120] In suggesting this as an appropriate reform, it is recognised that this is not without its own challenges. In the straightforward cases of domicile, a presumption is unlikely to be needed as it will be apparent where a person has his permanent home, and in the more complex cases, despite there being a presumption, it is more likely that a rebuttal will be raised, thereby leading to the same point of contention within court.

Regardless, it is opined that such a reformulation still holds merit. In the more straightforward cases it will encourage a move away from the archaic position of the tenacity of the domicile of origin, which is still evidenced in court discussion in recent times,[121] whilst also tackling the potential problem of the courts being able to determine domicile so as to achieve a particular result, as may have been the case in *Ramsay*. This may in turn lead to more consistency within the area, as the presumption would require a rebuttal if the propositus is no longer living in their domicile of origin in order to state they are still domiciled there. Likewise, this would also mean that in cases that seem more straightforward, but are still litigious, the presumption would switch the burden of proof, again acting as a barrier to old habits of applying the law of the domicile of origin. Meanwhile, in the more complex cases, or those which involve more frequent relocation, although the presumption would not provide an easy decision for the courts, it would provide a clear starting point, again providing some clarity and consistency for the courts.

Though some of these problems around the tenacity of the domicile of origin might be addressed by the abolition of the domicile of origin as a distinct category of domicile, it must be accepted that such proposals may not be heeded, and thus for a reformulation to be as effective as possible regardless of the existence of the domicile of origin, the presumption plays an important role. Furthermore, the use of a presumption would also appropriately address the problems encountered as a result of vague or uncertain contingencies by presuming there is an intention to remain, in addition to tackling the inherent problems with attempts to determine a person's intentions. For instances where evidence will be shown to the contrary, the legislation should also state that in respect of a contingency it is the 'clearly foreseen and reasonably anticipated' test from *Re Fuld's Estate*, and the standard of proof required is the civil standard regardless of the domicile being replaced; preventing a heavier burden being applied to the domicile of origin in the event that it is not abolished as a separate domicile.

# VII. An Alternative to Domicile?

## *A. Habitual Residence*

When considering how the law on domicile might be reformed to ensure it reflects modern society and achieves policy objectives, it is pertinent to analyse whether domicile as a connecting factor ought

[120] See (n 34) above, Appendix A, Article 2(2).
[121] See for instance *Cyganik v Agulian* [2006] EWCA Civ 129.

to be abolished, and instead replaced by a more appropriate option.[122] As a consequence of its resounding use within the conflict of laws, the primary connecting factor that will be considered is habitual residence. The concept was initially developed by the Hague Conference on Private International Law,[123] and is now used within domestic legislation[124] as well as being the main connecting factor in EU Regulations such as Brussels II bis,[125] Rome I[126] and Rome II.[127] It was also considered as an alternative to reforming the law on domicile by the Law Commission, and despite their conclusions that habitual residence was unsuitable for general choice of law purposes,[128] the possible advantages and disadvantages of the connecting factor will be analysed to determine whether that conclusion is still accurate over 3 decades later, baring in mind societal developments.

One of the primary threads running throughout this article has been the fact that we have become a more migratory society, and the need for the law on domicile to reflect this factorisation. Currently, the difficulties in changing a domicile to one of choice, and the doctrine of revival are not consistent with this element of modern society and may be an area that would benefit from the use of habitual residence. Habitual residence under domestic law, requires the concurrence of physical residence and the mental state of having a 'settled purpose' of remaining there.[129] A 'settled purpose' need not mean permanent or indefinite, and can be satisfied by planning to stay for a fixed period of time[130] examples might include residence for the purposes of a fixed term contract[131] or a period of study.[132] Without the focus on a person staying in the country permanently, habitual residence may offer a test that better reflects the increased mobility across the likes of the EU[133] and provide people with a connecting factor that better suits a more transient lifestyle rather than clinging onto a connection they may have had to a place many years ago. Furthermore, with less focus on the subjective element of intent, and a greater interest in the objective fact of residence,[134] habitual residence may sidestep the difficulties previously discussed in relation to determining a person's intentions when assessing whether a domicile of choice has been ascertained. It would, therefore seem, that habitual residence may offer an approach that can provide greater certainty by avoiding a heavy focus on a person's

[122] Such a question is not new and was considered as long ago as 1965 by Russel J Weintraub, 'An Enquiry into the utility of "Domicile" as a Concept in Conflicts Analysis' (1965) 63 Mich. L. Rev. 961, 961 when he sought to conclude whether 'domicile is a useful concept which assist proper analysis or is an albatross around our necks that we would be better to be quit of.'

[123] Hill & Ni Shúilleabháin (n 6) above 341.

[124] Examples include; Domicile and Matrimonial Proceedings Act 1973, Family Law Act 1986 and Wills Act 1963.

[125] Council Regulation (EC) 2201/2003 of 27 November 2003 concerning Jurisdiction and the Recognition of Enforcement of judgments in Matrimonial Matters and the Matters of Parental Responsibility, repealing Regulation 1347/2000 (Brussels II bis) [2003] OJ L338/1.

[126] Council Regulation (EC) 593/2008 of 17 June 2008 on the Law Applicable to Contractual Obligations (Roe I) [2008] OJ L177/6.

[127] Council Regulation (EC) 864/2007 of 11 July 2007 on the law applicable to Non-Contractual Obligations (Rome II) [2007] OJ :199/40.

[128] See (n 3) above [2.5].

[129] Shah v Barnet London Borough Council [1983] 2 AC 309, 344.

[130] Peter Stone, 'The Concept of Habitual Residence in Private International Law' (2000) 29 Anglo-American Law Review 342.

[131] Re R (Abduction: Habitual Residence) [2003] EWHC [2004] 1 FLR 216.

[132] Kapur v kapur [1984] FLR 920.

[133] Leon Trakman, 'Domicile of Choice in English Law: An Achilles Heel?' (2015) 11(2) Journal of Private International Law 317, 341 and Ruth Lamont, 'Habitual Residence and Brussels II bis: Developing Concepts of European Private International Family Law' (2007) 3(2) Journal of Private International Law 261, 263.

[134] Clarkson & Hill (n 75) above 332 and Mo Zhang, 'Habitual Residence v Domicile: A Challenge Facing American Conflicts of Laws' (2018) 70 (1) Maine Law Review 161.

intentions, which has been identified as challenging, whilst being better equipped for a more fluid society.

It has also been suggested, that the more factual decision described above, rather than the legally complex rules seen within domicile allow for a more pragmatic and common sense based approach.[135] Finally, with its prominent use in a number of other jurisdictions, particularly across the EU, adopting habitual residence as England's connecting factor, and abolishing domicile could provide a greater uniformity in our judicial decisions. In removing domicile as the connecting factor in areas such as marriage validity, succession and jurisdiction in divorce, people moving in and out of England would have greater consistency in the law applied to them, which may in turn satisfy the policy objective of greater certainty.

Advantageous as the above may seem, habitual residence is not without its faults. Though a lesser focus on the subjective element of intent may make changing one's domicile easier, in addition to making the determination of a person's habitual residence easier than that of determining domicile, the route is not problem free. Without the role of intention, habitual residence as a connecting factor could be based on tenuous links: 'the subjective arguments of a lack of connection with the country or a wish to leave will not prevent habitual residence from being acquired.'[136] This can be evidenced in cases such as Re B[137] in which the family's intention when moving to Germany in an attempt to resolve their differences was to 'wait and see' resulted in them being deemed habitually resident there after only six months, and more shockingly in cases such as *M v M*[138] and *Re A*[139] where families were there not through choice, but necessity caused by financial and work commitments. This problem was also recognised by the Law Commission in their assessment of habitual residence as a replacement for domicile, and formed part of the reason for setting the idea of replacement aside.[140] With a difficulty to 'identify a really settled purpose to remain in a country, the habitual residence so found has an air of artificiality.'[141] Amidst these precarious links it is difficult to suggest that habitual residence would, as an alternative to domicile, fulfil policy objectives such as certainty and upholding party expectations, in fact it has the potential to do the exact opposite.

Likewise, whilst Zhang recognised that the lack of definition of habitual residence within the Hague Convention allowed the courts to make factual decisions based on individual cases,[142] it leaves the position surrounding ascertaining a person's habitual residence vague and uncertain. While residence is required and appears to be the focal point when determining habitual residence, the length of residence required is unclear, and in some cases contradictory. For example, in *Re F*,[143] it was suggested that a month may be deemed an appreciable period of time, which was supported in *Marinos v Marinos* in which is was recognised that weeks rather than months was sufficient,[144] however, in *A v A (Child Abduction)*[145] eight months was considered insufficient. 'There are obviously deeper unexpressed considerations at work that might explain the more contradictory cases',[146]

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[135] Zhang (n 134) above 177.
[136] Pippa Rogerson, 'Habitual Residence: The New Domicile? (2000) 49(1) ICLQ 86, 94.
[137] (Minors) (Abduction) (No. 2) [1993] 1 FLR 993.
[138] [1997] 2 FLR 263.
[139] [1996] 1 FLR 1.
[140] See (n 3) above [2.3].
[141] Rogerson (n 136) above 93.
[142] Zhang (n 134) above 177.
[143] (Child Abduction) [1992] 1 FLR 548.
[144] [2007] EWHC 2047, [2007] 2 FLR 1048.
[145] [1993] 2 FLR 225.
[146] Rogerson (n 136) above 88.

however this demonstrates that the law on habitual residence is far from problem free. When shorter periods of residence present themselves, the parties intentions have an enhanced influence in establishing habitual residence, arguably depriving habitual residence of its factual focus, and the associated advantages.[147] Similarly, though habitual residence is used in other jurisdictions, which was thought to lead to greater consistency and certainty for couples, particularly as they moved across the EU, this is not the case. Aside from the domicile of children which England has harmonised inline with the EU test,[148] the application of habitual residence varies depending upon its context. Under EU law, habitual residence has an autonomous meaning, however this meaning can change depending upon the EU instrument and context. Thus, the Borras Report that acts as an explanatory report on the Brussels II Convention sets out what is meant by habitual residence, and case law within particular areas has built on this.[149] England then has its own understanding of habitual residence under domestic law, which varies to that of the EU, and can result in a person having more than one habitual residence at any one time unlike the EU concept.[150] Again, this appears to counter any suggestions that the adoption of habitual residence over domicile would provide greater unity in decisions and consistency for people crossing state borders. Notwithstanding suggestions that habitual residence bears the same meaning in all cases, 'on further inspection it becomes apparent that habitual residence is not so uncomplicated.'[151] This all highlights that actually employing habitual residence in place of domicile may not remove some of the problems faced, they are simply veiled.

As suggested above, in accordance with domestic law, it is possible for a person to be habitually resident in two places at the same time. For jurisdictional purposes this may not prove problematic as the court of either jurisdiction would be able to hear the case, however, it would cause much greater difficulties in instances of choice of law that require a determination of the applicable law and should be predictable ahead of litigation.[152] A similar problem can also arise due to the potential gaps in habitual residence. Without the doctrine of revival or something akin to the rule of continuance it is possible that having abandoned one habitual residence, a propositus may have a period without a habitual residence before settling in a new country. Such a situation would not only be problematic for choice of law purposes, if no court is able to claim jurisdiction 'the claimant cannot vindicate his rights and the defendant can act with impunity.'[153]

It is, therefore, apparent that the law on habitual residence is no quick fix to overcome the issues with domicile as a connecting factor. Regardless of its merit, the disadvantages in its use demonstrate that it cannot and should not be used to replace domicile. Its tenuous links, potential gaps, or the ability to have multiple residences, alongside the lack of stable definition and clarity mean that it would not always provide the certainty sought or meet party expectations. Like the Law Commission, it is concluded that 'domicile if amended… is better suited … than is habitual residence.'[154] It is time to recognise that both connecting factors have their place within English Private International law rules. Domicile plays an important role and over three decades on, and countless changes in law and society,

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[147] Ruth Lamont, 'Habitual Residence and Brussels II bis: Developing Concepts of European Private International Family Law' (2007) 3(2) Journal of Private International Law 261, 263.
[148] A v A 9n 85) above.
[149] Swaddling v Adjudication Officer [1999] ECR 1 – 1075 in which factors likely to effect habitual residence in social security cases was set out.
[150] Zhang (n 134) above 187.
[151] Rogerson (n 136) above 89.
[152] Ibid 102.
[153] Ibid 101.
[154] See (n 3) above [2.5].

it is time reform was actioned to make the connecting factor of domicile fit for purpose, rather than employing habitual residence as a square peg to fit what may be a round hole.

### *B. Nationality*

Having considered habitual residence in some detail, nationality as the 'longstanding test of "belonging"'[155] to a country in most civil law countries will, also be briefly analysed. Like habitual residence, the Law Commission also considered whether nationality could replace domicile as a connecting factor.[156] In concluding that it could not, the Law Commission recognised that problems mays arise where a person is stateless or has dual nationality, and would be particularly problematic in a composite state like the UK, as further rules would be needed to connect a person to a particular country within the overarching group of states.[157] Moreover, given the concerns raised in relation to domicile's suitability in a migratory society due to current difficulties in establishing a domicile of choice, nationality would not offer an enhanced position in this regard. Whilst changing one's nationality cannot be done without the individual and the state's permission, which provides a degree of certainty that is beneficial,[158] it also creates inflexibility which is problematic particularly in a migratory society. Similarly to the criticism levelled at the tenacity of the domicile of origin, it can mean that a person continues to be subject to the laws of a country they left many years ago if they have failed to become naturalised in the country they have been residing in. It fails to cater for an individual's wishes[159] and in turn, party expectations. It is therefore submitted that despite its use in England in some choice of law rules[160] and the degree of certainty it offers, the additional rules it would need to operate in the UK and the lack of flexibility it would offer in a society where the demand for such flexibility has risen, means that nationality is not appropriate as a replacement for domicile. Alternatively, it is important that the reforms proposed for domicile are heeded.

## VIII. Conclusion

Domicile, as the preferred connecting factor in matters of personal status in England and Wales plays an important role in the law, but it is an area of law that has been subject to neglect. Though calls for reform were made in the last millennium, they have gone unheeded. In the time that has lapsed, the problems have been added to by further developments within the law, making reform now a necessity to ensure compliance with human rights principles on non-discrimination. With children of same-sex couples unprovided for by the current rules for assigning a person's domicile of origin, a complete recast of the law on domicile is propounded as the appropriate response, as opposed to reform on a piecemeal basis. The problems faced by children of same-sex couples, brings the inadequacies within

[155] Hill & Ni Shúilleabháin (n 6) above 339.
[156] See (n 38) above [3.9]
[157] Ibid [3.10].
[158] As discussed Ibid [3.9].
[159] Ibid [3.10].
[160] Such examples include, when determining the formal validity of a will under the Wills Act 1963, s.1 and one of the basis for recognising a foreign divorce under the family Law Act 1986, s.46 (1)(b)(ii).

the law on domicile out of the shadows of private international law, and reigniting the need for reform in this area.

In considering legal and societal developments such as recognised same-sex relationships and the increased desire and ease to move from one country to another, this article offers new insights and motive for reforming the law on domicile. The proposed reforms around the creation of new rules for establishing the domicile of a child, replacing the doctrine of revival with the continuance rule, and creating presumptions of intention reflect those developments, and the relevant public policies around certainty and party expectations. In doing so, this article offers a new and distinctive contribution to the debate on domicile. Furthermore, in order to appropriately conclude that the reform proposed offers the most pertinent solution, habitual residence and nationality as alternatives to domicile are also considered. However, concerns around tenuous links, long forgotten countries of nationality, multiples residencies and dual nationality, and the potential for gaps in residency demonstrate that habitual residence or nationality alone, could not ensure certainty and the meeting of party expectations when determining the applicable law. Though both options have their place as connecting factors within rules on private international law,[161] so too does a reformulated domicile. It is therefore promulgated, that the law on domicile should be reformed in accordance with the proposals contained herein to ensure that when called upon, domicile can appropriately, and in line with modern developments connect a person to a country.

[161] See for instance Brussels II or domestic legislation such as the Domicile and matrimonial Proceedings Act 1973.