Domicile of Choice in English Law: An Achilles Heel?

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This article examines the conceptual and functional difficulties associated with the English common law conception of domicile. It outlines the judicial challenges involved in verifying a domicile of choice in cases varying from the legitimacy of a marriage, to the validity of a will in the law of succession. The article challenges the existing approach used in establish domicile on grounds that the prevailing domicile test is often illusive. Specifically, the test encourages sham domicile claims because domicile determinations are often difficult to predict. To improve the existing practice, the author argues against counting physical and personal points of connections between a person and another place on the grounds that checklist requirements are unduly mechanical and lead to unpredictable results. The article further proposes replacing domicile with a residence test based on a person's continued residence in a jurisdiction. It argues that such residency based test can include a person's subjective choices as a secondary line of inquiry. However, the primary inquiry should concentrate on that person's physical residence and not his/her choice of a domicile.

Keywords: domicile of origin, domicile of choice, habitual residence, , residency test, permanent home, English Law, Law Commission, EU Succession Regulation, EU Maintenance Regulation, Brussels II Regulation

A. Introduction

English courts routinely apply common law principles of domicile in determining important issues such as the validity of a marriage, the legitimacy of children, and the validity of a will.[1] However, despite the wide use of a domicile test in English law, there is uncertainty and divergence in its application to particular cases. Underpinning the conceptual challenge in assessing domicile claims is the legally complex process of distinguishing among and applying the different kinds of domicile and a person's physical and personal connections to one or another place.

Complicating these concerns is the fact that the English law of domicile diverges from the law of habitual residence adopted by most members of the EU. This divergence is evident, for example, under the EU Succession Regulation, to which the UK is not a signatory,[2] which seeks to ensure that:

- a given succession is treated coherently, under a single law and by one single authority;
- citizens are able to choose whether the law applicable to their succession should be that of their habitual residence or that of their nationality;
- parallel proceedings and conflicting judicial decisions are avoided;
- mutual recognition of decisions relating to succession in the EU is ensured.[3]

While the EU Succession Regulation does not attempt to alter substantive national rules,[4] it does try to establish coherence, *inter alia*, in the rules governing the law applicable to the shares of children and spouses in an inheritance and many other aspects of the private international law of succession.

Further concern arises over the extent to which England can retain a common law domicile of choice for some purposes, while adopting a different statutory domicile test for other purposes. The latter is used in relation to the EU Regulation 1215/2012 on jurisdiction

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[1] See eg L Collins *et al, Dicey, Morris and Collins: The Conflict of Laws* (London, Sweet & Maxwell,15th edn, 2014) part 1, ch 6; J Fawcett and J Carruthers, *Cheshire, North & Fawcett: Private International Law* (Oxford University Press, 14th edn, 2008), 159.

[2] See EU Regulation 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, (23) and (24) at http://ec.europa.eu/justice/civil/family-matters/successions/index_en.htm, preamble (82), accessed on 22 February 2015.

[3] *Ibid.*

[4] *Ibid.*

and the recognition and enforcement of judgments in civil and commercial matters (Brussels 1 Recast), which came into effect on 10 January 2015,[5] to which the United Kingdom is a party. However, it is clear that this Regulation seeks jurisdictional predictability, something which disparate laws of domicile may render somewhat illusive.

In central focus, therefore, is the extent to which the English common law of domicile should be modified, or ultimately abandoned. Rather than abandoning the existing framework, the article proposes accommodating a more pervasive habitual residence test which is determined primarily objectively, namely by a person's physical connection to a place. This approach is used in most EU member states and in international conventions worldwide.[6]

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[5] See EU Regulation 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, at http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32012R1215, accessed on 22 February 2015.

[6] The Court of Justice of the European Union (CJEU), in Case C-523/07 *A* [2009] ECR I-2805 at [44], defined the habitual residence of a child in the context of the Brussels IIa Regulation, as "the place which reflects some degree of integration by the child in a social and family environment. To that end, in particular the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances specific to each individual case." See further Case C-497/10 PPU *Mercredi v Chaffe* [2010] ECR I-14309 where the CJEU elaborated that: "As a general rule, the environment of a young child is essentially a family environment, determined by the reference person(s) with whom the child lives, by whom the child is in fact looked after and taken care of. That is even more true where the child concerned is an infant. An infant necessarily shares the social and family environment of the circle of people on whom he or she is dependent. Consequently, where, as in the main proceedings, the infant is in fact looked after by her mother, it is necessary to assess the mother's integration in her social and family environment. In that regard, the tests stated in the Court's case-law, such as the reasons for the move by the child's mother to another Member State, the languages known to the mother or again her geographic and family origins may become relevant." [54]-[55]; and Case C-376/14 PPU *C* ECLI:EU:C:2014:2268. On "habitual residence" in the preamble to the EU Succession Regulation, see *supra* n 2 (23) and (24). For a definition of 'habitual residence' as distinct from 'temporary residence' or 'stay' for the purpose of social security benefits. see EU Regulation EC/883/2004 on the coordination of social security systems as last amended by Regulation EU/465/2012, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:166:0001:0123:en:PDF, accessed on 22 February 2015. On the adoption of an habitual residence test worldwide including in United Nations Conventions, see Stephen Macedo, *University Jurisdiction: National Courts and the Prosecution of Serious Crimes*, University of Pennsylvania Press, 2006), 59..

In evaluating these proposals, the article questions whether a domicile of choice ought to be grounded pervasively in party autonomy in the conflict of laws, or whether significant objective evidence of habitual residence ought to be required in determining domicile. It concludes in favour of a movement towards a habitual residence test, partly in response to developments in European Union Law, which have embraced habitual residence as the main connecting factor in the Maintenance Regulation (4/2009), in the Brussels IIa Regulation (2201/2003) and in the Succession Regulation.

The article recognises that the law of residence does not depend entirely on a person's subjective choice. It also recognises that some subjective choice of the applicable law is appropriate to permit a person to influence the law applicable to her or his capacity to marry, or to her or his estate on death. The article contends that such subjective choices can be accommodated within a habitual residence test but should be treated as a secondary line of inquiry, as is the case in the EU Succession Regulation where habitual residence is based on a person's "close and stable connection" with a state, taking into account the duration, regularity, conditions, and reasons for staying in a country.[7] Subjective choices, such as those expressed through declarations of domicile, are only justified as evidence of a person's continuing residence in a place. If a domicile test is to survive, primary weight should be accorded to the physical fact of continued residence in a place in which subjective choices, such as for succession planning, operate within a predominant residence test. The article also criticises the rule that, on abandoning a domicile of choice, or residence without adopting another place, a person reverts back to a domicile or residence of origin.[8]

The proposed approach is advantageous because a person's place of residence is often easier to predict than a person's intention to make or change their domicile of choice; a continuing or habitual residence test can avoid over-reliance on declarations of domicile. Applying a residence test can also limit tedious, costly and potentially unsatisfactory judicial assessments of the materiality of a person's multiple points of connection to different places that arises under a domicile test that nevertheless continues to focus on a person's subjective intention.

The article concludes that the conceptual and functional deficiency in the English law of domicile is the law of domicile itself, notably in the priority it places on intentionality. A continuing residence test, operating beyond a domicile of choice, is clearer, more predictable in operation, and ultimately more sustainable than a vague domicile test.[9] In addition, abandoning domicile in favour of a habitual residence test would render English law more consistent with the rest of the EU.

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[7] See Preamble, Succession Regulation, *supra* n 2.

[8] See *supra* n 1..

[9] See *infra* Section F.

Section B identifies the principles of the law of domicile in relation to a domicile of choice. Section C criticises the revival of a domicile of origin on the abandonment of a domicile of choice. Section D evaluates the impediments associated with domicile in English law, focusing on a domicile of choice. Section E critiques this domicile of choice test on the account of its unpredictability. Section F considers a reformulated domicile test based on a balance between subjective intention and objective points of connection between a person and a place of domicile. Section G considers a residence test within a domicile test in English law, namely, the place of a person's permanent residence or the place of that person's "greatest interests". Taking all of these issues into consideration, Section H makes the case for the elimination of a domicile test in favour of an independent residence test.

B. Challenges in Defining Domicile

Traced back to Roman law, the English law of domicile is often revered for its ancient roots.[10] However, it can also be damned for being archaic, conceptually complex, inconsistently applied. Admittedly, much of the complexity and awkwardness in the development of the law is the result of more recent history, including efforts in the 19th century to keep the mantle of the common law (or very often Scots Law) over families who, for generations, lived in colonised nations, for example India. Thus, the concept of domicile is understood differently by various common law courts.[11] In order to better understand deficiencies in the law of domicile, it is necessary to explore the principles underlying it.

Historically, common law courts have recognised three types of domicile: a domicile of

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[10] See generally http://www.questia.com/SM.qst?act=adv&contributors=R.%20H.%20Helmholz&dcontributors=R.%20H.%20 accessed on 17 February 2015; R H Helmholz, *The Ius Commune in UK: Four Studies* (Oxford University Press, 2001) 173 http://www.questia.com/PM.qst?a=o&d=103967235 accessed on 17 February 2015, *Re Jones' Estate* 192 Iowa 78, 182 NW 227 (1921); Domicile Act 1982, s 7 (Australia); Domicile Act 1976, s 11 (New Zealand). For the Scottish (and indirectly European) influence on the English law of domicile see A E Anton, "The Introduction into English Practice of Continental Theories on the Conflict of Laws" (1956) 5 *International and Comparative Law Quarterly* 534; P Beaumont, "The Contribution of Alexander (Sandy) Anton to the Development of Private International Law" (2006) *Juridical Review* 1; and P Beaumont and P Bremner "Inter-regional conflicts within the United Kingdom relating to Private International Law of Succession - The development of the applicable law rule" (2010) Vol 54 *revista valenciana d'estudis autonomics* 238-271 (in English and Spanish).

[11] See eg Longmore LJ in *Agulian v Cyganik*, [2006] EWCA Civ 129, [2006] 1 FCR 406 [58] discussed *infra* n 41.

origin which, for a legitimate child, is its father's domicile at the time of birth,[12] a domicile of choice which is elected by a private person, and a domicile of dependence which is identified with a minor or other dependent person who assumes the domicile of a parent, or a guardian.[13] While the domicile of origin of legitimate children is ordinarily more straightforward in being associated with the domicile of a person's father at the time of birth, courts face major hurdles in verifying a domicile of choice. This issue is the main focus of this paper.

There are four primary principles underlying the domicile of choice. The first principle, applying to all types of domicile in general, is that a person can have only one domicile.[14] That single place of domicile is ordinarily either that person's domicile of origin or domicile of choice, both of which subsume a domicile of dependence.[15] This principle diverges from the law of residence in which a person conceivably can have more than one place of continuing residence.

The second principle relates to a domicile of choice in particular. A domicile of choice is determined by intentionality, namely, the choice of the domiciliary. That choice is established subjectively in the first instance, by considering a person's intention to remain permanently (which may include as evidence a person's formal declaration of domicile), and objectively in the second instance, such as by an array of personal and physical connections that person has to a place of domicile.[16]

The third principle is ordinarily contingent on the second principle. It is that, determining the intention of the domicile may include consideration of such connecting

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[12] *Udny v Udny* (1869) Lr 1 Sc & Div 441. On the significance of domicile of origin, and nationality in family law following the Family Law Reform Act 1987, see D Harris and S Joseph, *The International Covenant on Civil and Political Rights and United Kingdom Law* (Oxford, Clarendon Press, 1995) 518-21, 678-86. http://www.questia.com/SM.qst?act=adv&contributors=David%20Harris&dcontributors=David%20Harris" and http://www.questia.com/SM.qst?act=adv&contributors=Sarah%20Joseph&dcontributors=Sarah%20Joseph" accessed February 2015. L Collins *et al*, *supra* n 1.

[13] Historically, there were three kinds of domicile of dependence, involving: minor children, mentally incapacitated persons and married women. The Domicile and Matrimonial Proceedings Act 1973, s 1 has removed the dependent domicile of women. On a 'domicile of dependence', see Collins et al, *supra* n 1, p 163; *Forbes v Forbes* (1854) Kay 341, 69 ER 145; *Harrison v Harrison* [1953] 1 WLR 865.

[14] *Udny v Udny* (1869) Lr 1 Sc & Div 441, 457.

[15] On the attributes of a person's domicile of origin and of choice in England and Wales, see eg *Winans v A-G* [1904] AC 287; *Ramsay v Liverpool Royal Infirmary* [1930] AC 588; *IRC v Bullock* [1976] 1 WLR 1178; *Re Furse (decd)* [1980] 3 All ER 838. See also C V M Clarkson and J Hill, *The Conflict of Laws* (Oxford University Press, 4th edn, 2011), 71.

[16] See eg *Re Fuld* [1968] P 675, 684, *Winans v A-G* [1904] AC 287, 291; *Buswell v.IRC* [1974] STC 266.

factors as the place at which that person lives, has a home, is employed and educates her or his children. In its most concrete form, that place is identified as that person's "sole or chief residence", in effect, the place at which she or he lives "permanently or continuously".[17] The important presupposition, however, is that such residence serves primarily as evidence of the intention of the person whose domicile is in question. While residence, however brief it may be, is necessary to establish a domicile of choice, it does not displace the need to establish a person's intention to acquire a domicile there.

Employing these first three principles together, courts assessing a domicile of choice focus on the voluntariness of a person in electing a domicile, whether that choice is expressly made, or implied from words or expressive conduct evidencing that choice.[18]

Finally, the fourth principle is that everyone is deemed to have a domicile of origin.[19] As will be discussed below, this principle may have great implications for individuals who are electing a domicile of choice because according to the prevailing line of reasoning, if a person abandons a domicile of choice without choosing another domicile, that person automatically reverts to her or his domicile of origin.[20]

Domicile cases become challenging due to the emphasis that is placed on intentionality in determining a person's domicile of choice, in contradistinction to that person's substantial physical connections to another place. As Longmore LJ lamented, "… it [is] 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 UK should make provision for his dependants."[21] This view is reflected in the 2011 recommendations by the English and Welsh Law Commission that a habitual residence test should conceivably replace a domicile of choice in interpreting the Inheritance (Provision for Family and Dependants) Act 1975.[22]

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[17] *Plummer v IRC* [1988] 1 WLR 292; *IRC v Duchess of Portland* [1982] Ch 314. See *infra* Section E.

[18] See eg *Re Fuld* [1968] P 675, 684, *Winans v A-G* [1904] AC 287, 291.

[19] *Agulian & Anr v Cyganik,* [2006] EWCA Civ 129, [5], citing Scarman J in *Re Fuld* [1968] P 675. See also *Holliday v Musa,* [2010] EWCA Civ 335, [13].

[20] *Winans* v A-G [1904] AC 287, 290.

[21] *Agulian v Cyganik,* [2006] EWCA Civ 129, [2006] 1 FCR 406 [58].

[22] See the English and Welsh Law Commission's Report 331, 7.15-7.18 (2011). See also R Frimston, "Inheritance (Provision for Family and Dependants) Act 1975), the EU Succession Regulation and the Inheritance and Trustees' Powers Bill", (2013) *Private Client Business* 192–95; and J Holliday, "Characterisation within Private International Law: Maintenance or Succession?" in P Beaumont, B Hess, L Walker and S Spancken (eds) *The Recovery of Maintenance in the EU and Worldwide* (Hart Publishing, 2014) 443-458.

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Compounding the challenge to the law of domicile is unavoidable variance over the materiality of a person's subjective choice of domicile, the divergent significance of objective factors in determining that choice, and how courts weigh these subjective and objective factors *inter se*.[23] The result is that the scope of a domicile of choice in English law is neither universally accepted nor uniformly understood, notably in weighing subjective and objective measures of domicile in relation to each other.

The following section challenges the principles underlying the English law of domicile, starting with a domicile of origin, before focusing on a person's domicile of choice.

C. Issues Caused by the Reversion to a Domicile of Origin

A particular criticism of the common law of domicile, particularly in England, relates to the status of a person's domicile of origin. As the court held in *Agulian v Cyganik*, "Everybody has a domicile of origin, which may be supplanted by a domicile of choice".[24] The more controversial sub-principle is that, if a person abandons a domicile of choice without choosing another domicile, that person reverts automatically to her or his domicile of origin.[25] That reversion is doubtful not only if a person has abandoned a domicile of choice, but also when reverting to it is considered regressive, such as when the criminal law there offends international human rights standards such as in applying the death penalty expansively. The result is the perception that a domicile of origin is tenacious and more difficult to change than a domicile of choice and that reverting automatically to it may be arbitrary and even perverse.[26]

Illustrating reversion to a person's domicile of origin is the dated but often cited case of *Bell v Kennedy*.[27] There, the plaintiff was born in 1802 of Scottish parents domiciled by choice in Jamaica, rendering Jamaica as Bell's domicile of origin. However, Bell was taken to Scotland when he was two years old and received his education there. He returned to Jamaica

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[23] See *infra* Section C and D.

[24] *Agulian & Anr v Cyganik*, [2006] EWCA Civ 129, [5], citing Scarman J in *Re Fuld* [1968] P 675. See also *Holliday v Musa*, [2010] EWCA Civ 335, [13].

[25] *Udny v Udny* (1869) LR 1 Sc & Div 441, 458.

[26] On declining to apply the law of jurisdictions with allegedly regressive criminal law systems or to extradite persons to those jurisdictions, , *see* Macedo, *University Jurisdiction: National Courts and the Prosecution of Serious Crimes*, above n 9, 304 (n 39). The unreasonableness of a person reverting to a domicile of origin is distinct from cases in which a person intends to retain a domicile of origin despite residing elsewhere for most of his life. It that case, it is arguable that the person has not abandoned his or her domicile of origin. See *Winans v A-G* [1904] AC 287, 290. ,

[27] (1868) LR 1 Sc & Div 307.

on attaining majority to take ownership of an estate, which he had inherited. Furthermore, he married there and had three children. He even served in the local legislative assembly. In 1834, he and his family left Jamaica permanently because he strongly disapproved of the emancipation of slaves. Bell returned briefly to Jamaica in 1873 to sell his remaining estates. On the death of his wife, a dispute arose concerning their daughter's succession to property, which her parents held in common at the date of her mother's death. Due to the fact that a wife acquired the domicile of her husband's at that time, the court considered Bell's domicile at the date of his wife's death, and held that he had retained his domicile of origin. Lord Colonsey stated:

> 'I think it is very clear that Mr Bell left Jamaica with the intention of never returning ... [b]ut I do not think that his having sailed from Jamaica with that intent extinguished his Jamaica domicile [...] he could not so displace the effect which law gives to the domicile of origin, and which continues to attach until a new domicile is acquired animo et facto.'[28]

This reasoning raises questions about the operation of a domicile of origin, albeit arising from a dated case. The fundamental question is whether a domicile of origin ought to be permanently extinguished once a person abandons it, without adopting another domicile. The tenacity of a domicile of origin is accentuated by the ruling that the burden of proving the abandonment of a domicile of origin rests on the party purporting to establish a change of domicile.[29]

Reversion to a domicile of origin on abandoning a domicile of choice without adopting another domicile of choice has three advantages. First, it provides certainty and predictability to a person who wishes to renounce a domicile of choice, or who simply does so without adopting an alternative domicile of choice. Second, the resilience of a person's domicile of origin makes it easier to provide advice on the applicable law arising from the revival of that domicile of origin. Third, the failure to revive a domicile of origin on abandonment of a domicile of choice could lead to uncertainty, in giving rise to three possible domiciles: the continuation of the "abandoned" domicile of choice if that person maintains personal and physical connections there; the adoption of another domicile of choice such as a place to which that person has moved residence; or reinstating a domicile of origin. In summary, automatic revival of a domicile of origin provides clarity in choosing one among the three possible domiciles. It is also the last barrier in determining a single place of domicile should

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[28] *Id*, 323.

[29] *Re Fuld* [1968] P 675. But see *Winans v A-G* [1904] AC 287. See too *Holliday v Musa*, [2010] EWCA Civ 335, [13]; *Barlow Clowes International Ltd & Others v Henwood*, [2008] EWCA Civ 577.

all other manifestations of a person's intention fail. Indeed, "… if every such intention or expression of intention prevented a man having a fixed domicile, no man would ever have a domicile at all, except his domicile of origin."[30]

Nevertheless, there are countervailing arguments to a person automatically reverting to a domicile of origin. First, a domicile of origin serves as no more than a point of commencement from which a person, literally, may depart, although it does provide certainty in regard to domicile. Second, a domicile of origin ought not to be revived unless there is objective evidence that a person seriously intends to revive it. Third, a person's reversion to a domicile of origin ought to revive only if it is supported by renewed connections to that place. The overriding rationale against the automatic revival of domicile of origin is that we have passed the stage of territoriality in which a person is held to embrace a domicile of origin with which that person no longer has any reasonable affiliation.

Indeed, it is arguable that the revival of a person's domicile of origin on abandoning a domicile of choice is artificial because it treats a person's domicile of origin as dormant; reviving it at any subsequent time and regardless of whether that person intended, expressly or impliedly, to revert to it. As a result, in recent years, a recurring view is against the mechanical revival of a domicile of origin.[31] This view was espoused by the English and Scottish Law Commissions.[32] It is also the legal position in Australia, New Zealand, South Africa and the United States.[33]

Nevertheless, courts deciding domicile in English law remain reluctant to hold that a person has foregone a domicile of origin.[34] As Longmore LJ aptly observed in Forbes v Forbes, '[i]t is easier to show a 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.'[35]

In contrast, the adoption of a habitual residence test that is independent of domicile, proposed in Section H below, can address these problems, though not without avoiding them

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[30] *A-G v Pottinger* (1861) 30 LJ Ex 284, 292.

[31] In arguing for a balanced approach, this paper will challenge the automatic revival of a domicile of origin on the abandonment of a domicile of choice.

[32] See Private International Law Committee, First Report (1954) Cmd 9068, para 14; Law Commission Working Paper No 88; Law Commission Report No 168, Private International Law, The Law of Domicile (1978) 1.4; Scottish Law Commission Report No 107 (1978) 4.21- 4.24; Scottish Law Commission Consultative Memorandum No 63, 'Private International Law, The Law of Domicile' (1985, HMSO), para 5.22.

[33] Domicile Act 1982, s 7 (Australia); Domicile Act 1976, s 11 (New Zealand); Domicile Act 1992 (SA); *Re Jones' Estate* 192 Iowa 78, 182 NW 227 (1921).

[34] See *Harrison v Harrison* [1953] 1 WLR 865.

[35] (1854) Kay 341. See also *R (Davies and Gaines-Cooper) v HMRC* [2011] UKSC 47. See also L Collins et al, *supra* n 1, 140.

entirely. A test based on a prolonged and continuing period of residence, conceivably including a minimum period of residence, is more certain and predictable. Should a person abandon that residence, whether it is a residence of origin or not, that person will acquire a new residence by establishing residence elsewhere only by satisfying the physical requirements in order to acquire that new residence. However, if such requirements are not satisfied, a court may hold that that person retains the residence from which she or he has departed, particularly if that person maintains material personal and physical connections to the place of residence from which she or he has departed. If that person leaves a habitual residence permanently but does not establish a new one, habitual residence may be determined, as a question of fact, at that place at which that person has the most significant physical connections. While it is difficult to predict that place *ex ante*, it avoids artificially reverting to a domicile of origin at which that person may have little or no physical connections, and indeed no intention to revert to a domicile there.

D. Approaches to Deciding Cases Involving a Domicile of Choice

Further challenges arise when courts must decide cases involving a domicile of choice. A domicile of choice in English law does include habitual residence, but within an intentionality test, namely, subject to a person's intention to remain in a jurisdiction permanently or indefinitely. Furthermore, although courts measure these elements differently, judges tend to prioritize intentions of domicile over objective evidence. As Scarman J reasoned in *Re Fuld*, "a domicile of choice is acquired when a man fixes voluntarily his sole or chief residence in a particular place with an intention of continuing to reside there for an unlimited time."[36] In other words, "[it] is not only necessary that a man should be dissatisfied with his domicile of choice, and form an intention to leave it, but he must have left it, *with the intention of leaving it permanently*."[37] Ergo, a person who sets up a "permanent home" in England and who "voluntarily" treats it as a "sole or chief residence," has *prima facie* adopted a domicile there. Thus, in order to change a domicile of choice, a person is expected not only to depart, but to do so with the "intention of leaving it permanently".

The prioritisation of a person's subjective intention is illustrated in the case of *Agulian v Cyganik*, involving a domicile of origin and a domicile of choice.[38] There, a Greek Cypriot had

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[36] *In the Estate of Fuld, Decd. (No. 3); Hartley and Another v. Fuld and Others*, [1968] P 675, 682 citing *Udny v Udny* (1869) LR 1 Sc & Div 441. See also *Gaines-Cooper v HMRC* [2006] UKSPC 568, [118], citing L Collins, *Dicey and Morris on The Conflict of Laws* (Oxford, Sweet & Maxwell, 13th edn, 1999) Vol 1, 117. See generally, R H Graveson, "The Fuld Case" (1966) 15 *International & Comparative Law Quarterly* 837.

[37] *Re Marrett* (1887) 36 Ch D 400 (Cotton LJ). See also *Zanelli v Zanelli* (1948) 64 TLR 556, 557.

[38] *Agulian v Cyganik*, [2006] EWCA Civ 129, [49].

left Cyprus when he was 18 years old and had lived in the UK for over 40 years until his death. Nevertheless, the Court of Appeal identified Cyprus as his home. In upholding his domicile of origin, the Court emphasised his subjective choice of Cyprus, while also evaluating the deceased's physical connections to Cyprus during his lifetime: his frequent visits there; having sent his daughter to study there; having made plans to develop a business there; and that his parents had lived there.[39]

Courts that treat residence as no more than evidence of a person's intentionality face three major hurdles. First, they need to decide how much weight to accord to a person's residence when it contradicts a person's subjective choice, such as a declaration of domicile. Second, they need to determine the mix of subjective and objective factors in determining a domicile of "choice". Third, they need to adopt the standard of proof required to identify the choice of domicile, such as proof beyond a reasonable doubt that a person has abandoned a domicile of origin in favour of a domicile of choice elsewhere.[40]

The central problem is in courts deciding whether, when and how a person has, by words or conduct, evinced an intention to adopt a domicile of choice, including a variable mix of intentionality and objective conduct evinced in "leaving a place permanently."[41]

This inquiry is further complicated by the fact that, in addition to this difficulty in establishing a domicile of choice, the court must establish the standard of proof by which to determine that choice. For example, the standard of proof adopted may depend on whether a person is available to provide evidence of intentionality such as in determining the validity of that person's marriage, or upon third party evidence when a person is not available, such as in determining forced heirship.

The existing case law on domicile suggests that the standard of proof is generally quite high. As an illustration, in *Ramsay v. Liverpool Royal Infirmary*, the House of Lords adopted an almost irrefutable standard of proof in favour of a person's continuing domicile of origin, resembling the criminal law standard of "beyond a reasonable doubt".[42] Adopting a less exacting standard of proof, Scarman J in *Fuld's Estate (Deceased) (No 3)* nevertheless warned "against reaching too facile a conclusion upon a too superficial investigation or assessment of the facts of a particular case."[43] In determining whether a person had abandoned a domicile of origin for a domicile of choice, he elaborated: "All the elements of

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[39] *Ibid.*

[40] *IRC v Bullock* [1976] STC 409, 415.

[41] See *Re Marrett* (1887) 36 Ch D 400.

[42] *Ramsay v Liverpool Royal Infirmary* [1930] AC 588, 598.

[43] [1968] P 675, 685 G–686 ("The court must be satisfied as to the proof of the whole; but I see no reason to infer from these salutary warnings the necessity for formulating in a probate case a standard of proof in language appropriate to criminal proceedings.").

the intention must be shown to exist if the change is to be established … If one element is not prove[n], the case for a change fails."[44] Scarman J's test of domicile, despite being less exacting than the criminal standard of proof beyond a reasonable doubt adopted in *Ramsay v. Liverpool Royal Infirmary*, still imposes a heavy burden of proof upon the person claiming a change in domicile:[45]

> What has to be proved is no mere inclination arising from a passing fancy or thrust upon a man by an external but temporary pressure, but an intention freely formed to reside in a certain territory indefinitely.[46]

E. The Tension between Subjective and Objective Aspects of Domicile

A key problem with a domicile test lies in the primacy ascribed to subjective intentionality that is absent or doubtful, coupled with the unreliability of disparate physical and personal connections in identifying a person's intention objectively. Should a court stress a person's subjective choice of domicile, it may rely on a person's pronouncement to others about wanting to end his days in a particular place.[47] Should a court resist hypothecating a person's subjective choice, it may rely on a checklist of that person's varied connections to one or another place, such as by examining airplane tickets, passports and permanent resident cards, tuition payments, utility bills, etc.[48]

Consequently, whether a person is deemed to be domiciled in a particular place will depend on how a court assesses the intertwined elements of a person's subjective intention to elect a domicile and physical proof supporting that intention. Judges who highlight that person's subjective choice may identify the "true test [as being] whether he intends to make his home in the new country until the end of his days unless and until something happens to make him change his mind."[49] Those judges may deem that a person's intention to reside indefinitely in a particular place "exists and [that]… certain legal consequences follow from it, *whether such consequences are intended or not and perhaps even though the person in question may have intended the exact opposite*."[50]

As a result, courts that give greater weight to a person's objective conduct may focus

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[44] *Ibid*. See also *Buswell v IRC* [1974] STC 266, 273.

[45] *Ramsay v Liverpool Royal Infirmary* [1930] AC 588, 598.

[46] Scarman J in *Re Fuld* [1968] P 675, 685D.

[47] *Barlow Clowes International Ltd & Others v Henwood* [2008] EWCA Civ 577, [14].

[48] See e.g. *Agulian v Cyganik,* [2006] EWCA Civ 129, [49], discussed *infra*.

[49] *IRC v Bullock* (1976) All ER 353, 357.

[50] Emphasis added, see *Douglas v Douglas* (1871) LR 12 Eq 617, 644–645.

on whether a person's physical connections to another place gainsay her or his express domicile intention. The challenge, therefore, isin predicting whether, when and how a court may sublimate a person's subjective choice in favour of objective considerations, possibly undermining the intentionality that operates at the core of a domicile of choice test. The difficulty in so predicting is that the ultimate "choice" in each case is potentially arbitrary and uncertain.[51] Consider a person having a passport of a country as evidence of a domiciliary intention. In *Bheekhun v Williams*, the court held that a Mauritian who acquired a UK passport after Mauritius gained independence had affirmed at that time his long-standing intention to make the UK his permanent home.[52] In *F (F's Personal Representatives v IRC)*, the court held that a person who acquired a UK passport had not chosen a UK domicile primarily because he obtained the passport for the convenience of travel.[53] While the facts of the cases differ, it remains difficult to predict how judges will construe the issuance of a passport as evidence of intentionality.

Indeed, as was demonstrated by *Agulian v Cyganik*, choosing intentionality over objective conduct may completely alter the outcome of a case. In that particular case, the deceased's subjective choice of Cyprus led the judges to conclude that the UK was not his country of domicile. The logical inference is that, if a person strongly identifies with a country of origin, a court should vary from that choice of domicile only if there is convincing evidence, not only of that person residing permanently and indefinitely elsewhere, but intending to maintain their domicile there. This is notwithstanding that person having limited quantitative points of connection to Cyprus compared to forty years of continuing residence in the UK.[54]

The case illustrates that, if one accords significant weight to residence, the priority of intentionality over the objectification of a person's intention is not self-evident.[55] Had the Court of Appeal not ascribed such importance to evidence of the deceased's subjective choice to retain his domicile of origin in Cyprus, relying significantly on evidence of residence, it might have decided that England was the deceased's domicile of choice based on his extensive personal and physical connections there. In effect, it would have treated his personal and physical connections to England, cumulatively, as outweighing his intended and actual

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[51] See R H Graveson, "The Fuld Case", *supra* n 44, 837.

[52] [1999] 2 FLR 229, 239.

[53] [2000] STC (SCD) 1.

[54] *Ibid.*

[55] This was the case in *Udny v Udny* (1869) LR 1 Sc & Div 441. But see *Wahl v A-G* (1932) 147 LT 382; [1938] All ER 922.

connections to Cyprus.[56]

There are also some cases in which courts have accorded primacy to a person's continuing residence in a place, notwithstanding evidence of a subjective intention to the contrary. However, once again, significant uncertainty exists over how courts evaluate the evidence presented to them. For example, in *IRC v Duchess of Portland*,[57] the Duchess of Portland claimed that, by spending between 10 and 12 weeks each year in Quebec, Canada visiting relatives, she had maintained her domiciliary links with her country of birth, Canada, to which she hoped to return. However, she spent the remainder of the year living with her husband in England. In holding that her residence status in England prevailed over her subjective wish to return to Canada, Nourse J emphasised the nature and duration of her residence in England over her subjective intention to return to Canada:

> On those facts it appears clear to me that since 1948 the taxpayer has been physically present in this country [the United Kingdom] as an inhabitant of it. Her physical presence in Quebec has been for periods of limited duration and for the purpose of maintaining her links with the country to which it is her intention ultimately to return. That is not enough to have made her an inhabitant of Quebec. In my judgment it is clear that she was resident in England on 1 January 1974 and that that residence was not displaced when she went to Canada in July 1974 or at any other time during the material period.[58]

An overriding evidentiary problem is that both subjective and objective measures of a person's intention are potentially contradictory. A declaration of domicile may be a sham, particularly in the absence of evidence of a continuing or permanent residence in the place declared to be the domicile. Conversely, reliance on a person's physical connection to a place may be tenuous when that person has material physical connections to more than one place, as was illustrated in *Agulian v Cyganik*[59] Alternatively, priority may be given to a person's protracted residence in a place over her intention to return to a domicile of origin, such as the court held in *Re Clore (decd) (No 2)*.[60]

A related evidentiary problem arises in assessing a person's personal and physical connections in the absence of clear intentionality. As Lord Atkinson remarked in *Winans v*

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[56] A somewhat different conclusion was reached in *Re Clore (decd) (No 2)* [1984] STC 609 in which the decedent retained his domicile of origin in the UK to which he remained emotionally attached, despite having moved some years before to Monaco for tax reasons and dying there. See *Re Clore (decd) (No 2)*.

[57] [1982] STC 149.

[58] *Ibid* 149, 155–156.

[59] *Agulian v Cyganik* [2006] EWCA Civ 129, [2006] 1 FCR 406 [58].

[60] [1984] STC 609. See *supra* n 65.

A-G: "… [T]he tastes, habits, conduct, actions, ambitions, health, hopes, and projects of Mr Winans deceased were all considered as keys to his intention to make a home in England."[61] The difficulty is in assessing subjective emotive factors, such as 'ambitions' and 'hopes', contrasted against 'conduct', 'actions' and projects' that are subject to both subjective and objective measurement. Courts face further evidentiary challenges in according weight to evidence of a person's personal and physical connections to different places, *ex post facto*, such as in determining a testator's domicile intention after her or his death.[62]

The evidentiary responsibility to "exhaust the facts" in domicile cases, is also formidable when some factual evidence is absent, and when best evidence such as third party testimony from beneficiaries of a deceased is unreliable. For example, a court may hold that

> [to] entitle declarations [of domicile] to any weight, the court must be satisfied not only of the veracity of the witnesses who depose to such declarations, but of the accuracy of their memory, and that the declarations contain a real expression of the intention of the deceased [declarant].[63]

Such uncertainty over a person's domicile intention can have a significant legal effect on the governing law, such as in relation to forced heirship.

A related evidentiary quandary is whether courts should consider only adjudicative facts specific to a domicile of choice, or consider social fact evidence as well. Again, in a case like *Agulian v Cyganik*,[64] a court can limit itself to the adjudicative facts evidencing the deceased's domicile intention in determining the legitimacy of a marriage. It can decline to take account of social fact evidence as being extraneous to the actual or inferred choice of the domiciliary.

In support of courts considering social policy, in contrast, is evidence that the law of the place of domicile sanctions cruel and unusual punishment, legitimates child marriages, or is otherwise considered in breach of human rights or fundamental principles of justice.[65]

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[61] [1919] AC 145, 178.

[62] See eg *In re Liddell-Grainger's Trusts* [1936] 3 All ER 173.

[63] *Hodgson v De Beauchesne* (1858) 12 Moo PC 285, 325.

[64] [2006] EWCA Civ 129; [2006] 1 FCR 406 [58].

[65] On domicile in family law, see *supra* n 1. On the domicile of an illegitimate child, see *Udny v Udny* (1869) LR 1 Sc & Div 441, 457; N Lowe and G Douglas, *Bromley's Family Law* (Oxford University Press, 10th edn, 2007), 408.

F. Challenges in Balancing Subjective and Objective Measures of Domicile

It is arguable that English courts do no more than balance subjective against objective connections in verifying a domicile of choice on the facts of each case, something which they ought to do in a common law system. This entails them weighing, in a case like *Agulian v Cyganik*,[66] the deceased's "choice" of retaining his domicile of origin in Cyprus against his physical and personal connections to England.[67]

In reaching a judicial determination, the court in that case adopted a two-fold analysis. First, it considered whether the deceased's forthcoming marriage and inclusion of his fiancée in his will was supported by physical and personal evidence of his intention to retain a domicile of origin in Cyprus. Second, it evaluated whether that evidence outweighed the deceased's physical and personal connections to England.[68]

In adopting a balanced subjective-objective test, the court therefore required that the deceased's choice of domicile was supported by quantitative and qualitative evidence confirming the nature and extent of that choice. As articulated by Arden LJ, after citing different components of domicile in the 2006 edition of Dicey, Morris and Collins: 'Every independent person can acquire a domicile of choice … (vi) by the combination of residence and intention of permanent or indefinite residence, but not otherwise."[69]

A direct illustration of a court stressing the interconnectedness between a person's choice of domicile and his residence over the course of his life is evident in Mummery LJ's pronouncements in *Agulian & Anor v Cyganik*:[70]

> [T]he 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.[71]

Alternatively conceived, a person's domicile should be determined by objective conduct, which verifies that person's subjective choice. As the court held in *Ross v Ross*,[72]

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[66] [2006] EWCA Civ 129. See further *supra* Section E.

[67] [2006] EWCA Civ 129.

[68] *Ibid.*

[69] See *Barlow Clowes International v Henwood*, [2008] EWCA Civ 577, [8](vi). See [16]-[19], referring to Dicey and Morris (6th edn), 133-138.

[70] [2006] EWCA Civ 129.

[71] *Ibid*, [49].

[72] *Ross v Ross* [1930] AC 1, 6-7 [Emphasis added].

determining the materiality of a declaration of domicile necessarily requires "considering the person to whom, the purposes for which, and the circumstances in which they [such declarations] are made *and they must further be fortified and carried into effect by conduct and action consistent with the declared [intention]*."[73]

Nevertheless, a balanced subjective–objective approach leaves somewhat unresolved the potential polarity between a person's subjective choice and objective conduct evidencing or contradicting that choice. Thus, according to this framework, the easiest domicile cases to resolve are at the extremes. On the one extreme is a person's clearly expressed choice that is sustained over a lengthy period of time and reinforced by objective connections to a subjective domicile of choice. On the other extreme is the absence of a clearly expressed choice, or one that is not continuing, or one that is contradicted by objective connections to a place other than a subjective domicile of choice.

The problem lies between these extremes. The first problem arises from the very fact that a domicile of choice, by definition, is oriented to a person's "choice", not to her or his continuing place of residence. The second problem arises when there is little or no evidence of a person's express or clearly implied intention to acquire a domicile of choice. If the court "look[s] back at the whole of the deceased's life",[74] the evidentiary challenge is to sift through competing connections to different places during the course of the decedent's lifetime in order to identify those personal and physical factors it deems, qualitatively and quantitatively, are most material. Take the illustration of naturalisation. A court may consider a person's act of naturalisation as *prima facie* evidence of that person exercising a domicile of choice.[75] Alternatively, it may conclude that naturalisation is not determinative in the face of continued residence elsewhere. The evidentiary issue relates to the weight which a court accords to the act of naturalisation as evidence of a subjective choice of domicile against points of physical connection to places other than to that place of naturalisation. As Lord Atkin reflected in *Wahl v A-G*,[76] "It is not the law either that a change of domicile is a condition of naturalisation, or that naturalisation involves necessarily a change of domicile."[77] What is uncertain is how a court will resolve a person's "choice" between the two.

A similar judicial dilemma arises in according disproportionate weight to a person's subjective choice of domicile notwithstanding a lack of physical connections there, as occurred in *IRC v Duchess of Portland.*[78] For example, even a short period of residence may give rise to

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[73] *Ibid*.

[74] *Agulian & Anor v Cyganik* [2006] EWCA Civ 129, [49].

[75] See *IRC v Hobhouse* [1956] 1 WLR 1393.

[76] (1932) 147 LT 382.

[77] *Ibid*, 385.

[78] *IRC v Duchess of Portland* [1982] Ch 314.

a determination of domicile based on a person's subjective intention, "if the evidence is there, particularly perhaps where the purpose is the avoidance of taxes."[79]

One judicial quandary is for courts to weigh a potential multiplicity of connecting factors in determining a person's subjective and objective links to potentially competing places of domicile.[80] Another judicial quandary is in how to prioritise subjective and objective evidence, such as a person's domiciliary intention towards the end of her or his life compared to substantial physical links elsewhere during the earlier course of that life. The difficult question, As Lord Cairns articulated in *Bell v Kennedy*, is whether a person has "... determined to make, and had made, [a place] his home, with the intention of establishing himself and his family there, and ending his days in that country."[81]

A further dilemma relates to the question whether, as a matter of policy, judicial reliance on a person's subjective choice of domicile may, inappropriately, grant that party undue autonomy over the applicable law. For example, it may be inappropriate for a person who has chosen a foreign domicile to be able to avoid the mandatory requirements imposed by English law on those domiciled in England in determining the validity and legal effect of a marriage. Conversely, judicial reliance on a person's physical connections to a place over a subjective choice of domicile may, inappropriately, deny that party any autonomy over the applicable law, such as over the law governing marriages. In issue is not only the need to determine the limits of a person's autonomy over the law governing a marriage, but in appreciating that the validity of a marriage can impact, *inter alia*, on immigration, citizenship, income tax and social security benefits.[82]

The need to preserve the autonomy of a person over the applicable law in regard to personal aspects of life, or "personal law", will be considered in the analysis of a residence test that takes account of a person's subjective choices.

G. Permanent Residence as a Determinant of Domicile

As an alternative to the approaches discussed below, some courts presiding over domicile cases have emphasized specific points of connection at the main determinant of domicile. Rather than focusing on a checklist of various connections, these courts have placed greater weight on claimants' permanent or habitual residence.

A "permanent" or "habitual" residence requirement is sometimes incorporated into the English common law test of domicile, albeit primarily to verify a person's subjective

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[79] *Clore (Deceased) (No. 2), Official Solicitor v Clore and Others* [1984] STC 609, 615.

[80] See *supra* Section D.

[81] *Bell v Kennedy* (1868) LR 1 Sc & Div 307, 311.

[82] See *Vervaeke v. Smith* [1983] 1 AC 145 HL, 152-153.

domiciliary intention. For example, in *Barlow Clowes*, the Court held that a person "must … have a singular and distinctive relationship with the country of supposed domicile of choice. That means it must be his *ultimate home* or, as it has been put, *the place where he would wish to spend his last days*."[83] In effect, the court identified the decedent's subjective choice in "wanting to spend his last days in that place [Scotland]". The court also recognised the need for objective evidence in support of that subjective wish, namely, in having "a singular relationship with the country of supposed domicile of choice".[84]

There are three key problems with a habitual residence or permanent residence requirement which operates within a subjective domicile of choice test. First, insofar as criteria beyond residence, such as a subjective choice of domicile, are determinative, a habitual residence test becomes less certain.[85] For example, even "leaving a jurisdiction permanently and indefinitely" may not be determinant of domicile if the court is not persuaded of that person's choice to abandon a domicile there.[86] Similarly, residing continually in a place until death may not constitute a choice of domicile if that person demonstrates a contrary domiciliary intention, so as to retain a domicile of origin.[87]

The complicating factor, yet again, is the prioritisation of a person's subjective intention over physical connections where a habitual residence requirement is subject to strict intentionality. If a court adopts a strict intentional test, a person's "permanent home can exist only where he has no other idea than to continue there without looking forward to any event, certain or uncertain, which might induce him to change his residence."[88]

The second problem is that, if a person's subjective choice of domicile diverges from the place of habitual residence, the person's subjective choice may determine the applicable law, such as in relation to those areas of family law or succession in which subjective intention, as a matter of public policy, ought *not* to prevail.[89]

Thirdly, insofar as a person's domicile of choice is based on physical connections to a place, there is no exact period of time *a fortiori* after which residence leads to domicile, or

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[83] *Barlow Clowes International Ltd & Others v Henwood* [2008] EWCA Civ 577, [14] (emphasis added). See also *Bell v Kennedy* (1869) LR 1 Sc 307, 311: "the question to be considered was in substance whether the appellant had determined to make, and had made, Scotland his home" (emphasis omitted).

[84] *Ibid.*

[85] *Ramsay v Liverpool Royal Infirmary* [1930] AC 588.

[86] *R (Davies and Gaines-Cooper) v HMRC* [2011] UKSC 47, [37] (Lord Wilson), citing *R v HMRC* [2010] EWCA Civ 83, [2010] STC 860, [44] in the court below.

[87] See *Agulian & Anor v Cyganik*, [2006] EWCA Civ 129, [2006] 1 FCR 406 [58]. But cf *IRC v Duchess of Portland* [1982] STC 149, as cited *supra* n 75.

[88] *Moorhouse v Lord* (1863) 10 HL Cas 272, 285–286.

[89] Addressing this concern is central to the EU Succession Regulation. See *supra* n 2.

non-residence leads to the loss of domicile. Trying to detect a period of time may become conceptually complex and functionally difficult to navigate. For example, a court could require indefinite residence without qualification, such as residence that is "general and indefinite in its future contemplation," rather than "for a limited period or particular purpose.[90] Another court could require a person to demonstrate "a present intention to reside permanently", which "must be an intention unlimited in period, but not irrevocable in character."[91] Given their abstract nature, neither approach is particularly helpful in determining the conceptual or functional nature of habitual or permanent residence. Consequently, a habitual residence requirement operating within a domicile test may induce a court to hold that, "where the domiciliary divides his physical presence between two countries at a time ... it is necessary to look at all the facts in order to decide which of the two countries is the one he inhabits."[92] However, that test is neither conceptually nor functionally fulfilling.

A limited response is to avoid referring to a person's "permanent home", stressing a person's "settled or usual abode" in a place, as postulated in *Levene v IRC*.[93] This approach infers that a lesser degree of ongoing residence in a place than "permanence" can qualify as objective evidence of domicile that verifies or varies from subjective intentionality. However, this partial retreat from a permanent residence test does not resolve the tension a court may identify between a person's subjective choice of that "usual abode" and variable objective evidence which affirms or denies it as her or his domicile. It also does not resolve the issue of how courts should elect among residences or abodes in different places and among "duplicate" documents, such as a second passport or work permit in two or more places.[94] Moreover, if a court prioritises a person's subjective intention over points of connection to a "settled or usual abode", the choice of law rule may again be wholly or significantly subject to that person's choice of domicile.[95]

As a result, a common law domicile test in which habitual or permanent residence is deemed to be a material connecting factor is subject to a more determinative factor, namely, a person's subjective choice of a domicile. In effect, despite evidence of permanent residence in

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[90] *Udny v Udny* (1869) LR 1 Sc & Div 441, 458.

[91] *Gulbenkian v Gulbenkian* [1937] 4 All ER 618, 627.

[92] *IRC v Duchess of Portland* [1982] STC 149, 155.

[93] [1928] AC 217, 222 (here "residence" was based on the Oxford English Dictionary's definition of 'reside'). See also *IRC v Combe* (1932) 17 TC 405; *Reed v Clark* [1986] Ch 1, 17-18 (Nicholls J).

[94] On a person having more homes in different places, see *IRC v Duchess of Portland* [1982] STC 149, 155.

[95] See *Levene v IRC* [1928] AC 217, 222; *Ramsay v Liverpool Royal Infirmary* [1930] AC 588; *R (Davies and Gaines-Cooper) v HMRC* [2011] UKSC 47, [37] citing Moses J in *R v HMRC* [2010] EWCA Civ 83, [2010] STC 860 [44].

a place, a court may invoke a person's contrary domicile intention in declining to endorse that person's permanent home as her or his domicile.

The remaining problems with habitual residence operating within a domicile test are comparable to problems arising from a balanced subjective-objective domicile test outlined in the previous Section.

Firstly, the primacy of a domicile of choice leads to subordination of residence as a factor in determining that choice, relegating residence to one among a number of connecting factors in confirming that choice.[96]

Second, the greater the variety of a person's personal and physical connections to a place, the more difficult it is to predict the legal significance accorded to a person's residence. For example, if a person has residences in two places at the time of death, such as in France and England, with the intention to remain at each residence for half of each year, it is difficult to determine which residence is permanent or habitual. If a court identifies the residence in England as habitual, the result may be arbitrary insofar as the court discounts the decedent's residence in France. It is only by the court articulating the reasons for its domicile decision, such as based on that person's wishes, along with other connections to England or France that it can reasonably determine whether that person's "settled or usual abode" or "permanent home" is in England.

Third, habitual residence operating within a domicile test may make it difficult to predict the significance a court may ascribe to the duration of a person's residence in establishing domicile.[97] In particular, residence does not in itself create a clear presumption of domicile. "Prolonged actual residence" therefore may be important in establishing domicile, but courts sometimes require that residence be supplemented by "other facts and circumstances indicative of intention".[98] Moreover, as the law of domicile stipulates, the same person may have different residences, but only one domicile.[99] However, a court could identify a person's "habitual residence" as the determinative connecting factor.[100]

Fourth, a court may hold that residence for the purpose of establishing domicile prevails over an inconsistent domicile intention. As the court held in *IRC v Duchess of Portland*, an intention "ultimately" to return to a country of birth in Canada was contradicted by evidence of

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[96] See eg *Re Fuld* [1968] P 675, 684, *Winans v A-G* [1904] AC 287, 291; *Buswell v.IRC* [1974] STC 266.

[97] *Bruce v Bruce* (1790) 2 Bos & P 229; *Bempde v Johnstone* (1796) 3 Ves 198; (1869) LR 1 Sc & Div 441, 455.

[98] *Ramsay v Liverpool Royal Infirmary* [1930] AC 588, 598.

[99] *Mark v Mark* [2005] UKHL 42, [2006] 1 AC 98.

[100] *Udny v Udny* (1869) LR 1 Sc & Div 441, 455; *Anderson v Laneuville* (1854) 9 Moo PC 325; *Re Furse, Furse v IRC* [1980] STC 596.

continuing residence in England.[101]

As a result, a contest between competing subjective and objective connections, including a person's "settled or usual abode", "permanent home" or "residence", is unavoidably part of any discriminating conception of a domicile of choice.[102] The difficulty lies in appraising different physical connections, such as a owning a home and being employed in a place in light of a person's countervailing subjective intention. These limitations associated with a domicile of choice compared to an independent residence test are considered in Section H below.

Finally, a more expansive test of domicile than a "permanent home" within a domicile test is for courts to accord primacy to the place at which a person has "the greatest interests". As the court stated in *Gaines-Cooper v HMRC*, "a country which is of most importance to an individual, or is the centre of his interests, is likely to be the place of his chief or principal residence."[103]

The problem with this test lies in the prospect of a person's "greatest interests" encompassing an assortment of emotional and sentimental and not only physical attachments, to a place. Constantly talking about moving to an idealised paradise may demonstrate a person's "greatest interests" in that place, but such an emotional attachment is assuredly dubious as a determinant of domicile in the absence of having lived or being likely to live there continuously in the future.

Determining the place of a person's "greatest interests" also does not assist in prioritising a person's expressed or inferred state of mind against contradictory personal and physical connections elsewhere. Attempting to identify the place of a person's "greatest interest" is also likely to lead to unpredictability in determining the applicable law, such as for the purpose of marriage or estate planning.

A habitual residence test that is subordinated to a person's subjective choice leads, not only to party autonomy in determining domicile, but potentially to over-extending a person's autonomy in choosing the applicable law, such as beyond a person's legitimate autonomy over the law applicable to the succession to moveable property.[104]

Furthermore, the prioritization of intentionality over habitual residence can have doubtful consequences such as justifying a claim for maintenance on intestacy only if the deceased died while domiciled in England and Wales, attracting the Law Commission's concern in 2011 that "domicile is a difficult legal concept that can often become a significant

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[101] *IRC v Duchess of Portland* [1982] STC 149, 155-156.

[102] *Levene v IRC* [1928] AC 217, 222.

[103] [2006] UKSPC 568 [129].

[104] See e.g. L Collins et al, *supra* n 1, para 27-051 (on the English law of domicile impacting on the succession to moveable property, compared to other Commonwealth jurisdictions).

preliminary issue in litigation".[105] Once the habitual residence test is decoupled from the intention underlying a person's domicile of choice, it acquires greater certainty and sustainability.

H. A Residence Test Independent of Domicile

Common law courts ordinarily do not prescribe set time limits in determining domicile. However, limited cases suggest that regular and lengthy visits could lead a court to conclude that a person is resident in a place, such as in demonstrating that that place is the person's "principal" or "chief residence".[106] As a result, continuous or habitual residence in a place may be a factor in determining domicile under English law; however, time spent in a place is unlikely to determine domicile in the absence of qualitative substantiation, not limited to a subjective choice of domicile. This section proposes a habitual residence test that is independent of domicile, addressing its potential advantages as a substitute for a domicile test in the English common law, particularly a domicile of choice.[107]

1. *The Case for an Independent Residence Test*

An independent residence test accords primacy to a person's physical residence in a place, as distinct from his/her choice of domicile. A person's subjective choice of domicile may constitute a component of that residence, but does not prevail over it.

A habitual residence test operating independently of domicile has distinct conceptual and functional advantages over a domicile test which accords priority to a person's subjective

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[105] Law Commission Report No 331 (Summary), Intestacy and Family Provision Claims on Death Executive Summary, December 2011, p 4, at http://lawcommission.justice.gov.uk/docs/lc331_intestacy_summary.pdf, accessed on 22 February 2015. See also R Frimston, *supra* n 29, 192–95 and J Holliday, *supra* n 29.

[106] *Re Fuld's Estate (No 3)* [1968] P 675, 682.

[107] No attempt will be made to engage with the copious literature on habitual residence due to constraints of space. However, in addition to the decisions of the CJEU referred to *supra* n 9 the reader is referred to several recent UK Supreme Court cases on the meaning of habitual residence in the context of private international law (child abduction) in *A v A* [2013] UKSC 60; *In re L* [2013] UKSC 75; *In re LC* [2014] UKSC 1; and *AR v RN* [2015] UKSC 35. Habitual residence is of course fully discussed in the standard works, *supra* n 1, and inter alia by R Schuz, *The Hague Child Abduction Convention: A Critical Analysis* (Hart Publishing, 2013) 175-222 and J Holliday "Reconciling the European Union Succession Regulation with the Private International Law of the UK" in Bergé, Francq and Gardeñes (eds) *Boundaries of European Private International Law* (Bruylant, 2015) 287-298..

choice. Habitual residence does not prioritize intentionality over residence, but is based on the nature and the continuing duration of time a person spends in a place. However, a habitual residence test can include intentionality in proving residence, as is outlined in the section below.

In addition, a habitual residence test is already present in English law. Indeed, the UK confirmed its wish, under Protocol 3, to adopt and apply the Brussels IIa and Maintenance Regulations which subscribe to a habitual residence test. The UK has also adopted a time-based residence test, beyond the law of domicile, to determine a person's liability for the purpose of taxation, including income tax.[108]

The functional case for habitual residence to replace a domicile test in English Law is that, if a person has settled permanently in a particular jurisdiction, that person, in principle, should be subject to the laws of that jurisdiction. While intentionality may still assist to verify whether a person has settled permanently in a place, a person's choice of residence serves primarily as evidence confirming that residence not as a substitute for it. Nor is that residence dependent on a person's unarticulated, and sometimes fleeting, state of mind in choosing one place over another, in the absence of protracted and continued residence as can arise in principle under a domicile of choice.[109]

ii. The Conceptual and Functional Rationale for an Independent Residence Test

There are a number of conceptual and functional arguments in favour of common law courts adopting a residence test.

First, a habitual or permanent residence test, has the advantage of being more decisive than a domicile test in which the nature and duration of residence is accorded primacy.[110] A person's intention can provide evidence of residence, but that evidence does not substitute for a person's "prolonged actual residence". As such, intentionality can be used to verify residence, but not as a test that displaces residence.[111] As a result, potential over-reliance on subjective intentionality flowing from cases like *Re Fuld's Estate (No 3)*[112] is limited.[113] Objective evidence of both physical and personal connections to a place is determinative, not unlike the

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[108] See *HMRC, Guidance Note: Statutory Residence Test (SRT)* < *www.hmrc.gov.uk/international/rdr3.pdf*> accessed 26 August 2013.

[109] See *Ross v Ross* [1930] AC 1, 6-7.

[110] *Levene v IRC* [1928] AC 217, 222 (here "residence" was based on the Oxford English Dictionary's definition of 'reside'). See also *IRC v Combe* (1932) 17 TC 405; *Reed v Clark* [1986] Ch 1, 17-18.

[111] See *Ramsay v Liverpool Royal Infirmary* [1930] AC 588, 598.

[112] See *Re Fuld's Estate (No 3)* [1968] P 675, 678. See Graveson, *supra* n 44.

[113] [1930] AC 588.

emphasis Lord Macmillan placed on such connections in *Ramsay v Liverpool Royal Infirmary*.[114]

Second, given mobility across the EU, including to and from the UK, a more pervasive residence test that is not overridden by a person's choice of domicile would provide both more consistency across the region and a greater measure of certainty and predictability.

Third, evidence of habitual residence can include a person's choice of residence, such as in determining succession to property,[115] so long as that choice does not substitute for the physical fact of that person living continuously in a place.[116]

Fourth, a habitual residence test can avoid the tension between subjective and objective determinants of residence, by prioritising objective evidence of residence.[117]

Fifth, a habitual residence test can also avoid unsubstantiated choices of domicile, as common law courts already so recognise.[118] It may avoid relying on statements of domicile that are "taken at their face value […].They may be interested statements designed to flatter or to deceive the hearer; they may represent nothing more than vain expectations unlikely to be fulfilled…"[119]

Sixth, given that objective measures of residence are variable in nature and can lead to unpredictable decisions, a court applying a habitual residence test can avoid according primacy to the longer list of physical links a person has to one place over another. The purpose is not to require that common law courts weigh multiple and often peripheral points of connection to different places. The overriding purpose is to determine whether that person's physical conduct is consistent with residence, such as buying a home in a country, rearing and educating children there, and living there continuously for a prolonged period of time.[120]

Seventh, courts applying an independent residence test as distinct from a domicile test, are less likely to apply different standards of proof to establish habitual residence, such as the direct testimony of the person allegedly choosing domicile in determining the capacity to marry, the testimony of third parties in determining the deceased's residence for the purpose of inheritance.[121]

Eighth, a continuing residence test avoids extending the autonomy of a person to make

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[114] See infra n 123.

[115] See eg EU Succession Regulation, above n 2 (24) and (25.

[116] See eg above EU Regulation 650/2012 on Jurisdiction, n 2, Preamble (15).

[117] See *supra* Sections C and F.

[118] See *Ross v Ross* [1930] AC 1, 6-7.

[119] See G C Cheshire, *Private International Law* (Oxford University Press, 7th edn, 1963) 156.

[120] See *supra* text accompanying n 56.

[121] On standards of proof, see *supra* text accompanying n 50-53.

domicile choices into a potentially unfettered choice of the governing law as well.[122]

A habitual residence test also eschews the view that:

> Prolonged actual residence is an important item of evidence of ... *volition*, but it must be supplemented by other facts and circumstances *indicative of intention*. The residence must answer a qualitative as well as a quantitative test.[123]

Evidence of a person's physical residence, not evidence of volition, is determinative of habitual residence.

A person's choice of a habitual residence, therefore, is reasonably sustainable if it is verified quantitatively, by physical conduct confirming residence, even in the face of an intention to reside elsewhere. In support of this line of reasoning, some English courts have disregarded written declarations in a will and naturalisation papers as determinants of both domicile and residence, in the absence, *inter alia*, of substantiation by conduct including continuous living in a place.[124]

The primary obstacle to the application of a residence test therefore lies in the primacy that English courts sometimes accord to subjective measures of intentionality in determining the choice of domicile. The challenge is to progress from residence within a domicile of choice test, to a residence test that is independent of it.[125]

Certainly, implementing a residence test can increase, at least initially, challenges to widely used declarations of domicile. However, affirmations of domicile, not limited to declarations, are suspect if they are not materially substantiated, not least of all by a habitual or permanent residence.[126]

I. Conclusion

This article has challenged the central requirement underlying the law of domicile in the English law, namely, the priority accorded to a person's subjective choice of domicile over personal and physical connections elsewhere. It has argued instead for emphasis to be placed on a person's habitual or permanent residence, consistent with developments in the EU. It has also opposed the formal tabulation of points of connections to one or another place of

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[122] See *Vervaeke v. Smith* [1983] 1 AC 145 HL 152-153; Frimston, *supra* n 30, 192-5.

[123] *Ramsay v Liverpool Royal Infirmary* [1930] AC 588, 598. [Emphasis added.]

[124] See eg *Re Liddell-Grainger's Trusts* [1936] 3 All ER 173 (declaration in a will); *Wahl v A-G* (1932) 147 LT 382 (declaration in naturalisation papers).

[125] On declarations of domicile, see *supra* Section A.

[126] For a cautious adoption of a domicile of choice, see *Ross v Ross* [1930] AC 1, 6-7.

connection on grounds that such calculations are unduly mechanical in nature and unpredictable in effect.

A particular problem with the current English law of domicile lies in the prospect of courts microscopically examining every aspect of a person's life over a sustained time period in search of the true intention of the domiciliary. This leads to uncertainty over the scope of the law of domicile and *prima facie* to unsatisfactory decisions.

A surer test is to focus on a person's physical residence as distinct from domicile intention. In issue under such a test is the need for courts to determine a person's "habitual residence" or "permanent home" based primarily on that person's physical connections to a place. This does not eliminate subjective inquiry such as that person's intention to reside there or elsewhere; but that intention is directed primarily at verifying residence, not at subjecting residence to a person's domiciliary intention.

The judicial task is also to recognise a resident's personal connections to a place in determining the nature and application of that resident's "personal laws", such as apply to the validity of that person's marriage and succession to moveable property.

Ultimately, a person's habitual or permanent home is not a pair of shoes to be discarded at whim, or gratified by the instant purchase of a fancier new pair. Nor is continuing residence about wearing the same pair of shoes relentlessly, in disregard of the discomfort they cause. Residence is about the sustained use of a pair of shoes; it is about their comfort to the wearer, as well as about their durability for steady walking predominantly in the place at which the wearer lives habitually and continuously.

Habitual residence is a test which, as far as possible, ought to be certain in nature, predictable in operation, and not marginalized by a potentially contradictory domicile test that is grounded principally in intentionality as distinct from habitual residence.