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Domicile Issues in Contentious Probate Cases

By David Rose

Why Domicile can be Important

The importance of Domicile issues in cases dealing with the estates of deceased persons is often overlooked. The increase in immigration in recent decades means that it is increasingly frequent for lawyers to be dealing with cases in which there is some 'foreign element'. It is therefore important that probate lawyers should be alive to the potential importance of domicile issues when dealing with estates. At best, this might give their clients defences which might not be available where all persons involved are of English domicile. At worst, an estate could be distributed incorrectly or an otherwise arguable case fail due to a domicile issue which hadn't been foreseen before proceedings were issued.

The dangers can be seen in just a few examples. Thus, claims for financial provision under the Inheritance (Provision for Family and Dependants) Act 1975 are increasingly common, particularly by co-habitees. However, it is a fundamental jurisdictional requirement for making such a claim that the deceased person out of whose estate provision is being sought was domiciled in England and Wales at the time of his death (Section 1(1)). However, if the deceased person was born outside of England & Wales, or even perhaps was born here to parents who were themselves domiciled in another jurisdiction at the time of his birth, it is possible that this pre-requisite for making a claim might not be met even if the deceased had lived here for many years. Should that be the case then a claim under the 1975 Act would be bound to fail, no matter how strong it might be on its merits.

In general, where a person dies intestate the succession rules which govern his estate are those set out in Section 46 of the Administration of Estates Act 1925. However, that is not so in the case of a person who dies domiciled

in a different jurisdiction. In that case succession to moveable property is governed by the intestacy rules of the state of domicile; whilst succession to immovable property is governed by the law of the jurisdiction where it is situated. Thus, if an estate were in such a case to be distributed in accordance with the 1925 Act but the deceased person was domiciled elsewhere at his death, that could lead to claims against the administrators that they have improperly distributed.

In relation to marriage the relevance of domicile is perhaps even more complex. The formal validity of a marriage will be determined according to the law of the place of celebration; whereas capacity to marry is governed by the law of the respective party's domicile at the date of the marriage. This can again be important in probate cases – for example, the validity of a marriage may be relevant to intestate succession, and to the entitlement to capital provision under Section 1(2)(a) of the Inheritance (Provision for Family and Dependants) Act 1975.

Domicile is a complex area of law, which is still substantially based upon archaic principles developed in the era before mass migration and increasingly transient lifestyles became common. It is a topic which can confuse and wrong-foot even lawyers, and which frequently perplexes lay clients. It is very important to recognize the fundamental difference between the concepts of nationality and residence on the one hand, and domicile on the other hand. Domicile is not equivalent to either, and it is perfectly possible for an individual to be the national of and resident in one jurisdiction whilst simultaneously be domiciled in another – a real trap for the unwary. Whilst it is not possible to set out the relevant principles in detail here, it is relevant to emphasize that every person is assigned a "Domicile of Origin" at birth, which is determined not by his place of birth but by the domicile of one of his parents at the time of that birth. Moreover, although that can be later replaced with a "Domicile of Choice" this does not occur automatically on a change of nationality or place of residence. Rather, it depends upon the simultaneous existence of both a voluntary intention to reside in a different country and an intention that such residence will be permanent with no

intention to return to the previous country of domicile. This can pose problems, for example with asylum-seekers or dual-nationals. Domicile of Origin has been said to have an enduring character which is not easily shaken off (Winans v Attorney-General [1904] AC 290) and to determine the issue may require evidence of a wide range of matters (sometimes quite trivial) across the whole lifespan of the deceased person (Agulian v Cyganik [20056] EWCA Civ 129; Drevon v Drevon (1864) 34 LJ Ch 129). Evidence can therefore be crucial in such cases – with the obvious difficulty that one is trying to prove the intentions of a person who is no longer able to give the relevant evidence himself.

Hopefully the above will have illustrated why Domicile can be an important matter to consider in any case where there is a 'foreign element'. If you are interested in a more comprehensive introduction to this topic, then David Rose will be presenting this at Park Square Barristers' forthcoming Seminar on 11 October 2018 – further details to follow.