The end of the non-dom tax status: time now to end family law domicile jurisdiction

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Overview

Domicile has been a fundamental basis of jurisdiction in English law including English family law. But it is intrinsically backward looking, archaic in its concepts, thoroughly unknown or at best misunderstood by the population, differently defined abroad and at odds with many other countries including the EU. With the non-domicile tax status being abolished as announced in the budget in late October 2024, is it not time now to end domicile as a family law basis of jurisdiction? Nationality is a far more straightforward, certain and modern basis.

Domicile

Domicile is a distinctly common law concept, primarily denoting a form of connectedness, a legal and factual relationship, between a person and a country, known by lawyers as a jurisdiction[1]. It is used significantly in matters of tax, inheritance and connectedness to form the basis of proceedings in courts. As part of its complexity, the general position as perceived by family lawyers and others is as follows:

- Everyone always has one domicile
- Everyone always has a domicile of origin at birth
- Domicile is of origin or choice or very occasionally of dependence
- No one can have 2 domiciles
- No one can have no domicile
- A domicile of choice cannot be lost without another domicile replacing it, alternatively the domicile of origin reverting

[1] Lawyers don't make it easy for themselves or the public! Jurisdiction has 3 meanings which in this context are easily confusable. Jurisdiction is a state or country which has a legal status e.g. England and Wales. Jurisdiction is a connectedness with a country e.g. England and Wales has jurisdiction because a party is domiciled in that country. Jurisdiction is a power e.g. the family Court of England and Wales has a power to make a lump sum order. This article tries to avoid these confusions by using other words. It recognises that a country may consist of several states which are their own separate jurisdictions. But reference is made to country to avoid using the word jurisdiction in this context

This shows some of the complexities. It is very historic and complex[2]. When family lawyers seek assistance on the complexities of domicile, they quite often look at tax and inheritance cases for guidance. Yet these cases are looking at quite different situations to connectedness for the purposes of family court proceedings.

It is a very backward looking concept. In *Cyganik v Agulian*[3], Mummery J commented that Soren Kierkegaard's aphorism that *life must be lived forwards but can only be understood backwards* resonates in the very nature of domicile disputes. To understand domicile of origin it is sometimes necessary to go back 2 or even 3 generations. The case law is replete with delving into family histories to understand connection at the point of birth. Amongst others, in *Sekhri v Ray*[4] it was necessary to review the movements of the husband's father and other generations between their then home country and England. In *Holliday v Musa*[5], a 1975 Inheritance Act application, the court had to look at the movements of the deceased who left Cyprus in 1958, making regular visits then from 1974 including attempting to stand as President, but unsuccessfully showing a Cypriot domicile. There are many other cases[6]

Naturally it doesn't help that definitions of domicile abroad can be different. In the civil realm, if domicile is used, it more often equates to habitual residence. It's far easier to acquire or lose domicile. So, a British citizen may have domicile in England and in a country abroad at the same time. To overcome this problem, legislation allowed a double domicile test[7] which although solving the problem also added to the complexity.

Before the UK joined the EU, specifically the Brussels Regulation in March 2001, divorce jurisdiction was domicile of either party or 12 months habitual residence. BII changed that for all national cases, substituting several jurisdictional bases, mostly based on residence and ordinary residence. Moreover where another basis was used, BII specified nationality e.g. joint nationality of both parties. The UK, along with the Republic of Ireland, negotiated an alternative to refer to domicile instead. This carried through to other EU family laws. So the UK was distinctly different. Moreover, with a broad interpretation often given to domicile, it meant that the UK would find available jurisdiction for proceedings in circumstances where nationality (in another EU country) may not necessarily have given connectedness. This was part of the several difficulties between the UK and the EU on family law jurisdiction, perhaps found most in the very different expectation of habitual residence. The post EU departure position is below

Domicile in the Lugano Convention, of which the UK is no longer a party after leaving the EU, is even more complicated, with the definition of domicile within the Convention looking far more like

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[2] See for example rules 4-16 of *Dicey, Morris and Collins on the Conflict of laws*, Sweet and Maxwell, 15th edition, 2012

[3] (2006) EWCA 129

[4] (2014) 2 FLR 1168, undertaken by my iFLG partner, Lucy Greenwood,

[5] (2010) 2 FLR 702

[6] See chapter 6, Domicile, residence and nationality, *The International Family Law Practice*, 6th edition, LEXIS-NEXIS

[7] Family Law Act 1986 s46.5

habitual residence than the UK expectation. This is perhaps not surprising given that it is essentially a civil law creation

There is then deemed domicile, a distinctly tax but not a family law concept!

Domicile is, probably primarily, a tax concept, especially inheritance tax

In this regard, practitioners have had to walk a very careful path when considering the use of domicile as a connecting feature. Asserting domicile in a divorce petition or other family law initiating process without checking with the client on the impact on any tax planning can be lethal for the client for tax and for the solicitor for negligence. It could destroy years, perhaps decades, of careful tax planning by the client and their financial advisers to assert a foreign domicile. It might pit the family law advisor, choosing England for the advantages of a family law settlement, against the tax adviser anxious about fiscal consequences of a domicile in England.

The end of the non-domiciliary status for tax purposes

Over the years, particularly perhaps the last couple of decades, there has been a perception that very many people including families living wholly or primarily in England but with foreign connections were asserting a foreign domicile for tax purposes. Being offered a peerage would come at a cost of having to review a domicile basis. But not, famously, being the wife of a prime minister. For the public, it seemed curious at best that anyone fully involved in English life could nevertheless avoid inheritance tax by asserting a continuing connection with another country. For the Treasury, it became an easy target. So it was that the previous Conservative administration announced plans in March 2024 to simplify the rules regarding tax breaks for non-domiciliaries. Predictably and as signposted by the incoming Labour administration, the Chancellor in her budget has stated that from April 2025, the non-domicile status will be abolished and replaced by a new residence-based system. It is expected to raise £12.7 billion over the next 5 years.

In some ways this makes it easier for family lawyers as there will be less risk in admitting domicile. But as a concept, it will very probably become far less pertinent. It will not be a matter of domicile tax planning any more, at least as far as the UK is concerned. Whereas family lawyers might ask a client whether they were engaging in any domicile tax planning, sometimes to be met with a very blank expression, it may now be more often.

This naturally raises the question of why should family law continue to adhere to this backward - looking, historic and previously tax absorbed complex concept? Is it not now time for family law to embrace more modern concepts of connectedness?

Domicile on leaving the EU

After the EU referendum, it was obvious that in family law the primary area where EU law had changed national law was divorce jurisdiction. The pre-March 2001 basis had been entirely replaced by Art 3 of Brussels II. So what should we have instead? A small group of us quickly formed ourselves to consider this question. Although some continuity with the jurisdictional basis from the EU was advantageous, there was a distinct feeling that we should not retain domicile any longer. Submissions were made to the Ministry of Justice. In the end, they created a new divorce jurisdiction law[8], which they said was Art 3 but had a distinct difference[9] although not relevant here. Indeed, by incorporating what was known as the residual basis, sole domicile, as an equivalent basis of connectedness they created a complete dichotomy because another basis of connectedness is joint domicile. Who would ever rely on joint domicile if sole domicile was (uncontentiously) available?

For jurisdiction under Part III Matrimonial and Family Proceedings Act 1984, financial provision after a foreign divorce, the connectedness has reverted to the pre-EU position which includes domicile of either party at the time of the application alternatively at the time of the foreign divorce. Scotland hasn't followed England and Wales in replicating the EU position but has also for divorce gone back to the position before joining the EU, again including domicile at the point of the divorce.

What could have been an ideal opportunity on leaving the EU to review and debate what should be the connectedness for family court proceedings was met by the single focus of getting alternative legislation in place as quickly and uncontentiously as possible. Opportunity of broader circumspection was limited. It was a great pity. But it means that yet again our connectedness for the family courts holds onto domicile.

With the huge upheaval in the non-domicile tax status, now is the opportunity to review and debate an alternative basis. The profession should do so and then encourage government to reform this law

An alternative basis: nationality

Instead of domicile, many countries use nationality. This is of course true across the EU apart from Ireland. But other countries also prefer nationality. It has many advantages:

- There is clear evidence, such as a certificate of citizenship, passport, national ID
- Where nationality has been acquired other than birth, there is a record of the specific date

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[8] New s5.2 Domicile and Matrimonial Proceedings Act 1973

[9] See article, *English EU Equivalent divorce jurisdiction clearly out of step with EU law*, by the author and Michael Allum of iFLG at https://financialremediesjournal.com/content/english-eu-equivalent-divorce-jurisdiction-clearly-out-of-step-with-eu-law.d77d9c9be89b474aa25e42ffb298a29d.htm?trk=public_post_comment-text

- Although a number of countries won't allow joint nationality, many do but again there is clear evidence
- Both spouses will invariably know the nationality of the other, which may not necessarily be the case with domicile as evidenced by the many case reports into complex family backgrounds
- It brings England and Wales into closer proximity with the EU and other countries
- It's a far more modern, clear, certain and discernible concept
- It removes the prospect, opportunity, of expensive, uncertain, backward -looking, nebulous litigation over domicile, particularly at a time when its tax status is now either irrelevant or less material

With the abolition of the non-dom tax status, the time has come for the family law of England and Wales to do the same, to abolish domicile as the basis of connectedness, jurisdiction, and replace with a far more up-to-date, modern, evidentially discernible, popularly understood and clear concept, that of nationality.

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