REFORM OF THE LAW RELATING TO THE DOMICILE OF CHILDREN: A PROPOSED STATUTE

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The domicile of children is a subject that has attracted little judicial or academic attention.[1] While there has been recent legislation in Ontario[2] and Prince Edward Island,[3] many important questions remain unresolved. Moreover, the recent change in attitude towards discrimination between the sexes has led to the call for a radical reformation of the basic principles regarding the domicile of children.

The concept of domicile is of fundamental importance to the issues that arise in the conflict of laws. While it has been supplemented to a limited extent by residence and nationality as "connecting factors", in many respects it still dominates the law in Canada. The validity of a person's marriage or divorce, his property relationships, the rights of succession to his estate, are all matters governed, at least in part, by his domicile.

In the present article an attempt will be made to set out the type of legislation that would meet the main criticisms that have been made of the principles relating to children's domicile. Before doing this, however, it will be necessary to refer briefly to the main features of the present law, discussing first, the position in those provinces where no legislation has been enacted and secondly, the changes brought about by statutory reform.

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[1] *See generally* J.-G. CASTEL, CANADIAN CONFLICT OF LAWS 130-32 (1975) [hereinafter cited as CONFLICTS]; J.-G. CASTEL, CONFLICT OF LAWS, CASES, NOTES AND MATERIALS 3-53-3-54 (4th ed. 1978) [hereinafter cited as CASES, NOTES AND MATERIALS]. DICEY AND MORRIS ON THE CONFLICT OF LAWS 115-22 (9th ed. J. Morris 1973) [hereinafter cited as DICEY]; R. GRAVESON, CONFLICT OF LAWS 208-13 (7th ed. 1974); P. NORTH, CHESHIRE'S PRIVATE INTERNATIONAL LAW 183-86 (9th ed. 1974) [hereinafter cited as CHESHIRE]; M. WOLFF, PRIVATE INTERNATIONAL LAW 108-10, 117-20 (2d ed. 1950); Clive, *The Domicile of Minors*, [1966] JUR. REV. 1; Spiro, *Domicile of Minors Without Parents*, 5 INT. & COMP. L.Q. 196 (1956); Duncan, *The Domicile of Infants*, 4 IR. JUR. (N.S.) 36 (1969); Tarnopolsky, *The Draft Domicile Act — Reform or Confusion?*, 29 SASK. B. REV. 161, at 166, 173-74 (1964); Rafferty, *Domicile — The Need for Reform*, 7 MAN. L.J. 203, at 204-05, 207, 211, 214 (1977). The position in the United States is analyzed by R. LEFLAR, AMERICAN CONFLICTS LAW 23-26 (1968); R. J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 9 (1971); W. REESE & M. ROSENBERG, CASES AND MATERIALS ON CONFLICT OF LAWS 48 (6th ed. 1971). *See also* THE AMERICAN LAW INSTITUTE, 1 RESTATEMENT (SECOND) OF CONFLICT OF LAWS s. 22 (1971) (adopted and promulgated May 23, 1969), and, for classical analyses, J. BEALE, SELECTIONS FROM A TREATISE ON THE CONFLICT OF LAWS 210-23, 227 (1935) and J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS 43-45 (6th ed. I. Redfield 1865).

[2] The Family Law Reform Act, 1978, S.O. 1978, c. 2, s. 68.

[3] Family Law Reform Act, S.P.E.I. 1978, c. 6, s. 61.

I. THE POSITION AT COMMON LAW

The domicile of a child under the age of majority is a domicile of dependency: that is to say, it is determined by the domicile of the person upon whom the child is regarded by the law as being dependent. It is well established that the domicile of a child born in wedlock, during the lifetime of his father, is determined by that of his father,[4] and that of a child born out of wedlock or in wedlock posthumously is determined by that of his mother.[5] There is no authority on the domicile of a foundling, but the commentators are unanimous[6] that it should be that of the place in which he is found. The domicile of an adopted child (in the absence of legislative provisions clarifying the position) is a matter of some uncertainty.[7]

While it would appear that the domicile of a child will change with any alteration in the domicile of his father, the position of a child of a widowed mother or of a child born out of wedlock is less certain. In *In re Beaumont*, which involved the child of a widow, Mr. Justice Stirling considered the better view to be that:

> the change in the domicil of an infant which . . . may follow from a change of domicil on the part of the mother, is not to be regarded as the necessary consequence of a change of the mother's domicil, but as the result of the exercise by her of a power vested in her for the welfare of the infants, which in their interest she may abstain from exercising, even when she changes her own domicil.[8]

The commentators are of the view that the same rule applies to the mother of an out-of-wedlock child,[9] and one has gone so far as to suggest that "as the authorities stand, there would be no real objection to holding that an

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[4] Kilpatrick v. Kilpatrick, 42 B.C.R. 88, [1929] 3 W.W.R. 463, [1930] 1 D.L.R. 288 (S.C.); Baker v. Baker, 49 Man. R. 163, [1941] 2 W.W.R. 389, [1941] 3 D.L.R. 581 (C.A.); *Re* Duleep Singh — *Ex parte* Cross, 6 T.L.R. 385 (C.A. 1890); Gulbenkian v. Gulbenkian, 158 L.T. 46, [1937] 4 All E.R. 618 (P.D.A.); Udny v. Udny, L.R. 1 Sc. & Div. App. 441, at 457 (H.L. 1869) (*per* Lord Westbury); Forbes v. Forbes, Kay 341, at 353, 69 E.R. 145, at 150 (V.C. 1854). There is no authority on the domicile of a legitimated child: DICEY, *supra* note 1, at 119-20, submits that upon legitimation, "at any rate if the legitimation is due to the marriage of the minor's parents" (*id.* at 120), the child's domicile becomes dependent on that of his father. CHESHIRE, *supra* note 1, at 183, is in accord, but without the DICEY qualification regarding marriage. *See also* WOLFF, *supra* note 1, at 118-19.

[5] Potinger v. Wightman, 3 Mer. 67, at 79, 36 E.R. 26, at 30 (Ch. 1817); Johnstone v. Beattie, 10 Cl. & Fin. 42, at 138, 8 E.R. 657, at 694 (H.L. 1843) (*per* Lord Campbell); *In re* Wright's Trust, 2 K. & J. 595, 69 E.R. 920 (V.C. 1856); Udny v. Udny, *supra* note 4, at 457. *See also* Children's Aid Society of Eastern Manitoba v. Rural Municipality of St. Clements, 6 W.W.R. (N.S.) 39 (Man. C.A. 1952).

[6] DICEY, *supra* note 1, at 93; GRAVESON, *supra* note 1, at 195; CHESHIRE, *supra* note 1, at 183.

[7] DICEY, *id.* at 119, 121; GRAVESON, *id.* at 211, WOLFF, *supra* note 1, at 119-20. *See also* CASTEL, CONFLICTS, *supra* note 1, at 131.

[8] [1893] 3 Ch. 490, at 496-97, 62 L.J. Ch. 923, at 926.

[9] DICEY, *supra* note 1, at 120; CHESHIRE, *supra* note 1, at 186; WOLFF, *supra* note 1, at 118. *See also* GRAVESON, *supra* note 1, at 208-209, from which the application of this rule to an illegimate child may be inferred.

infant may, with his father's permission, acquire a domicile separate from that of his father".[10]

There is considerable uncertainty regarding the domicile of the children of divorced or legally separated parents. In the Scottish decision of *Shanks v. Shanks*,[11] Lord Fraser stated that the general rule that the father's domicile controls "does not suffer exception" where there has been a divorce and the child is in his mother's custody.[12] In the Northern Ireland decision of *Hope v. Hope*,[13] however, Lord McDermott L.C.J. came to a different view, stating:

> On principle, it would seem that this rule [that the father's domicile controls] must be based on the authority and responsibility that a father has to act for his child; and it is, I think, clear that on the death of the father his capacity to change the child's domicil will ordinarily pass to the surviving parent. This recognises the rule as a manifestation of parental authority and responsibility. But why should it apply to tie the domicil of the child to the will of a father who has abjured his responsibility by walking out of his child's life and by so conducting himself that his marriage is dissolved by a competent court which grants custody of the child to the mother? In such a case the status and position of the father to which the rule is related have gone, and the mother has become the parent in charge and responsible for the welfare of the child.[14]

This qualification of the general rule that the father's domicile controls has been welcomed by many commentators.[15] The language in which it is expressed, however, would hardly command widespread support in view

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[10] Duncan, *supra* note 1, at 43. The authorities discussed by Mr. Duncan do not, however, afford strong support for this proposition, which has not been endorsed by any of the leading commentators. (It should be noted that as a statement of the law in Ireland, Mr Duncan's view is to be preferred, but this is because of the constitutional provisions relating to equal protection: *see* de Burca v. Attorney General, [1976] I.R. 38, at 57 (S.C. 1975); Gaffney v. Gaffney, [1975] I.R. 133, at 147 (S.C.); and *see generally* Binchy, *New Vistas in Irish Family Law*, 15 J. FAM. L. 637, at 656-57, 663-65 (1976-77).

[11] [1965] Sc. L.T. 330 (Outer House). For criticism of *Shanks*, *see* A. ANTON, PRIVATE INTERNATIONAL LAW 171 (1967).

[12] *Id.* at 332.

[13] [1968] N.I. 1 (Q.B. (Matrimonial) 1967). This case was analyzed by Carter, *Domicil, Infancy and Hope v. Hope*, 20 N.I.L.Q. 304 (1969). Carter refers (at 306) to an Indian decision of similar effect, Rashid Hasan v. Union of India, [1967] A.I.R. (Allahabad) 154 (H.C.). In the United States, the RESTATEMENT (SECOND) OF CONFLICTS OF LAW, *supra* note 1, s. 22, comment *d*, takes broadly the same position as that adopted in *Hope*. The decisions of most courts are in accord: *see, e.g.*, McMillin v. McMillin, 114 Colo. 247, 158 P. 2d 444 (Sup. Ct. 1945); Latham v. Latham, 223 Miss. 263, 78 So. 2d 147 (Sup. Ct. 1955); Evans v. Evans, 136 Colo. 6, 314 P. 2d 291 (Sup. Ct. 1957); MacWhinney v. MacWhinney, 248 Minn. 303, 79 N.W. 2d 683 (Sup. Ct. 1956); State *ex rel.* Larson v. Larson, 252 N.W. 329 (Sup. Ct. Minn. 1934) (criticized in Recent Cases, 18 MINN. L. REV. 591 (1934); Simonds v. Simonds, 154 F. 2d 326 (D.C. Cir. 1946). *See further* Beale, *The Progress of the Law, 1919-20: The Conflict of Laws*, 34 HARV. L. REV. 50, at 58-59 (1920).

[14] Hope v. Hope, *supra* note 13, at 4-5.

[15] *See, e.g.*, DICEY, *supra* note 1, at 119; R. GRAVESON, CONFLICT OF LAWS 214 (6th ed. 1969). *See also* Hannon v. Eisler, 13 W.W.R. 565, at 572, [1955] 1 D.L.R. 183, at 189 (Man. C.A. 1954), where Coyne J. A. stated that "a child's domicile is that of the father, at least until he permanently loses custody".

of the rapid changes in outlook towards matrimonial behaviour and the criteria for awarding custody.[16]

Whether the domicile of a child without living parents can be changed by his guardian is "an open question".[17] The "safest view"[18] appears to be that the child's domicile in such cases cannot be changed and that the same rule "probably holds good" for a child born out of wedlock whose mother is dead but whose father is alive.[19]

It is clear that the domicile of a female minor who marries is the same as, and changes with, that of her husband;[20] but if the husband dies, the position is less clear. In the view of one commentator, the minor widow's domicile "probably remains that of her deceased husband until she changes it by her own act . . ."[21] but a recent Australian decision has held that her domicile reverts to that of her father.[22]

As may be seen, the domicile of children at common law is in a state of considerable uncertainty and, in so far as there is a reasonable degree of certainty, some of the policies given effect by the law are of questionable desirability.

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[16] A growing antipathy towards concentration on the fault of either spouse in divorce, property and custody proceedings is widespread not only in Canada, but also in the United States, England, Australia and continental Europe. The literature is enormous; some of the leading discussions are Mendes da Costa, *Divorce*, in STUDIES IN CANADIAN FAMILY LAW 359, particularly at 520-42 (D. Mendes da Costa ed. 1972); Hahlo, *Reform of the Divorce Act, 1968 (Canada)*, in LAW REFORM COMMISSION OF CANADA, STUDIES ON DIVORCE 3 (1975); Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32 (1966); Goldstein & Gitter, *On Abolition of Grounds for Divorce: A Model Statute & Commentary*, 3 FAM. L.Q. 75 (1969); Bodenheimer, *Reflections on the Future of Grounds for Divorce*, 8 J. FAM. L. 179 (1968); Zuckman & Fox, *The Ferment in Divorce Legislation*, 12 J. FAM. L. 515 (1973); Foster, *Divorce: The Public Concern and the Private Interest*, 7 WESTERN ONT. L. REV. 18 (1968); Finlay, *Reluctant, But Inevitable: The Retreat of Matrimonial Fault*, 38 MODERN L. REV. 153 (1975); Finlay, *Fault, Causation and Breakdown in the Anglo-Australian Law of Divorce*, 94 L.Q.R. 120 (1978).

It is interesting to note that Lord MacDermott L.C.J. strongly opposes the introduction into Northern Ireland of legislation that is similar to that of England. Referring to the five year separation provision in the Matrimonial Causes Act 1973, U.K. 1973, c. 18, s. 1(2), he stated in a letter to the Belfast Telegraph:

> Many think this unjust. It does not respect the innocent spouse's scruples. It can inflict pain and misery on the partner who has tried to uphold the marriage. It can make cruelty, unfaithfulness or deliberately unconscionable behaviour the means whereby the party at fault can dissolve his own marriage bond.

The Telegraph (Belfast), Feb. 12, 1977, at p. 11, col. 4.

[17] DICEY, *supra* note 1, at 120.

[18] *Id.* at 121.

[19] *Id.*

[20] *Id.* at 121-23. For the purposes of divorce jurisdiction, s. 6 of the Divorce Act, R.S.C. 1970, c. D-8, recognizes that a married woman who is a minor may acquire a domicile of choice as if she were unmarried and had attained her majority.

[21] GRAVESON, *supra* note 15, at 216.

[22] Shekleton v. Shekleton, [1972] 2 N.S.W.L.R. 675, 19 F.L.R. 493 (S.C.). This case is discussed in Carter, *Conflict of Laws*, [1974] A.S.C.L. 534, at 541-42.

II. Statutory Reforms in Ontario and Prince Edward Island

Recent legislation in Ontario and Prince Edward Island has modified the position of the domicile of a minor. Section 60 of Ontario's Family Law Reform Act, 1978[23] provides as follows:

(1) Subject to subsection 2, a child who is a minor,
   (a) takes the domicile of his or her parents, where both parents have a common domicile;
   (b) takes the domicile of the parent with whom the child habitually resides, where the child resides with one parent only;
   (c) takes the domicile of the father, where the domicile of the child cannot be determined under clause *a* or *b*; or
   (d) takes the domicile of the mother, where the domicile of the child cannot be determined under clause *c*.

(2) The domicile of a minor who is or has been a spouse shall be determined in the same manner as if the minor were of full age.

Section 61 of Prince Edward Island's Family Law Reform Act is identical.[24]

The effect of this provision is that where the family is united the father's domicile will continue to control but where the parents are living apart (or where one parent has died) the child's domicile will follow that of the parent with whom he "habitually resides". The section does not attempt to resolve any other aspects of the subject, many of which, as has been mentioned, are in a state of considerable uncertainty.

III. Outline of a New Law

What follows is an attempt to analyze the main features of legislation that would bring some degree of certainty and a sound social basis to the law relating to the domicile of children. Unlike with other aspects of conflicts of law,[25] it would be folly to expect that the courts could on their own perform this task. Moreover, it would appear that the legislatures are not as yet interested in introducing comprehensive reforms, being content to remove in part the most glaring elements of sexual discrimination. The far larger question of whether domicile is an appropriate connecting factor in Canadian conflict of laws[26] will not be discussed; the proposals in this

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[23] S.O. 1978, c. 2.

[24] S.P.E.I. 1978, c. 6.

[25] *E.g.*, the recognition of divorce decrees, where the courts have made considerable progress in developing a comprehensive code: *see* Castel, Cases, Notes and Materials, *supra* note 1, at 7-11 to 7-180; Castel, *Canadian Private International Law Rules Relating to Domestic Relations*, 5 McGill L.J. 1, at 15-20 (1958). *See also* note 29, *infra*.

[26] *See* Castel, Conflicts, *supra* note 1, at 144-75, Grayson, *supra* note 1, at 194; Cheshire, *supra* note 1, at 188-93; Dicey, *supra* note 1, at 97, Hall, *Cruse v Chittum: Habitual Residence Judicially Explored*, 24 Int. & Comp. L.Q. 1 (1975)

article are made on the basis that in the foreseeable future domicile will continue to have a role. A draft Model Act is appended, setting out the legal principles that appear to have the most to commend them.

The most desirable law regarding the domicile of children would, in the author's view, be one that achieved four goals:

(a) to protect the interests of the child;
(b) to act as a realistic connecting factor between the child and a particular legal system;
(c) to avoid discrimination on the basis of sex; and
(d) to avoid undue complexity in its practical application.

A strong argument can be made that in many cases common law — and, indeed, the recent statutes on the subject — fails to meet each of these desired standards.

The most obvious change needed in the present law is the elimination of discrimination between father and mother. While many countries have abandoned the domicile of dependency of married women[27] and although

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[27] In England the uncertainty surrounding the dependent domicile of married women was finally dispelled through the abolition of this concept by the Domicile and Matrimonial Proceedings Act 1973, U.K. 1973, c. 45, s. 1. For commentary on the Act, *see* Hartley & Karsten, Comment, 37 MODERN L. REV. 179 (1974); GRAVESON, *supra* note 1, at 214-21; CHESHIRE, *supra* note 1, at 184-86; Carter, *supra* note 22, at 537-39.

The New Zealand Domicile Act 1976, STAT. N.Z. 1976, No. 17, s. 5 also abolished the wife's domicile of dependency. This Act is analyzed in Webb, *The New Zealand Domicile Act 1976*, 26 INT. & COMP. L.Q. 194 (1977); Webb & Webb, *The Domicile Act 1976*, [1977] N.Z.L.J. 375.

In the United States the state legislatures and courts in recent years have been rapidly thinning "the forest of confusion which has grown up around this concept in American law". Graveson, *Boardman v. Boardman Through English Eyes*, 23 CONNECTICUT B.J. 173, at 175 (1949). In a number of states legislation has conferred an independent domicile on married women for all purposes. *See, e.g.*, ALASKA STAT. ANN. tit. 25, ch. 15, s. 110 (Michie 1962); ARK. STAT. ANN. Vol 33, tit. 34, ch. 13, ss. 7-9 (Bobbs-Merrill 1947, 1962 Repl.); DEL. CODE ANN. tit. 13, s. 1702 (West 1953), conferring an independent domicile except that the wife's domicile is dependent if the husband has a Delaware domicile; MD. ANN. CODE Vol. 2A (1973 Replacement), art. 16, s. 29 (Michie 1957, 1978 Cum. Supp.); N.Y. DOMESTIC RELATIONS LAW c. 14, s. 61 (McKinney 1976); WIS. STAT. ANN. s. 246.15 (West 1978-79). Conversely, the repeal in 1973 of s. 5101, CAL. CIVIL CODE tit. 8 (West 1970) and in 1974 of s. 3103.02, OHIO REV. CODE ANN. (Page 1977 Supp.) have been interpreted as implicitly conferring an independent domicile on married women in those two states, since the wife is no longer required to conform to the husband's choice, as head of the family, of "any reasonable place or mode of living".

Married women have from an early stage been recognized by the courts as having an independent domicile for divorce purposes. Other factors, such as desertion or misconduct by the husband, have also been widely recognized as entitling a wife to acquire an independent domicile. Moreover, some courts have held that even where the spouses are living amicably together the wife may have an independent domicile. *See, e.g.*, Virginia v. Rutherfoord, 160 Va. 524, 169 S.E. 909 (Sup. Ct. App. 1933), *noted in* 19 CORNELL L.Q. 82 (1933), 47 HARV. L. REV. 348 (1933), 18 MINNESOTA L. REV. 476 (1934); Younger v. Gianotti, 176 Tenn. 139, 138 S.W. 2d 448 (Sup. Ct. 1940), *noted in* 16 TENNESSEE L. REV. 746 (1941), 21 NEBRASKA L. REV. 330 (1942); McCormick v. United States, 57 Treas. Dec. No. 4, at 11 (Customs Court 1930), *noted in* 9 OREGON L. REV. 393 (1930), 78 U. PENNSYLVANIA L. REV. 780 (1930). Developments in constitutional law relative to equal protection as well as Equal Rights Amendments at both federal and state

some limited progress in this direction has been made in Canada,[28] it is interesting to note that Ontario and Prince Edward Island have adopted a compromise upon which they do not stand alone. The recent legislation in England[29] and New Zealand[30] also mitigates, but does not remove, the discrimination between the sexes in relation to the domicile of children by providing in effect that where the family is united the father's domicile controls, but that where the parents are living apart the child's domicile follows that of the parent with whom he has his home.

The simplest solution would appear to be to use the criterion introduced by the legislation in Ontario, Prince Edward Island, England and New Zealand, not merely in cases where there has been a divorce and the child "habitually resides" or "has his home with" one of the parents, but in *all* cases, even where the parents are living together in harmony. It will be seen, however, that this solution is not so simple as it first appears.

Before considering the difficulties, the principal advantages of the proposed criterion should be noted. It is free of sex discrimination. In the overwhelming majority of cases it would provide a simple and appropriate standard, since most parents will have the same domicile. Moreover, the notion of "having one's home" with a particular person is a more readily

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levels have had the effect of rendering obsolete the sexual discrimination inherent in the law of domicile, although decisions on point are few. *See* Binchy, *The American Revolution in Family Law*, 27 N.I.L.Q. 371, at 371-79 (1976).

[28] S. 6(1) of the Divorce Act, R.S.C. 1970, c. D-8, confers on a married woman the capacity to acquire a domicile separate from that of her husband: *see* CASTEL, CONFLICTS, *supra* note 1, at 129. Outside this limited context, however, the domicile of dependency continues to apply in all provinces except Ontario, where it was abolished by The Family Law Reform Act, 1978, S.O. 1978, c. 2, s. 65(3)(c), and Prince Edward Island by the Family Law Reform Act, S.P.E.I. 1978, c. 6, s. 60(3)(c).

In 1961 the Conference of Commissioners on Uniformity of Legislation recommended for enactment a Draft Model Act to Reform and Codify the Law of Domicile. *See* 1961 PROCEEDINGS OF THE ANNUAL MEETING OF THE CONFERENCE OF COMMISSIONERS ON UNIFORMITY OF REGULATION IN CANADA 139 (1961). (This Act now appears with renumbered sections as the Uniform Domicile Act, CONSOLIDATION OF UNIFORM ACTS OF THE UNIFORM LAW CONFERENCE OF CANADA 13-1 (1978)). The Draft Act is analyzed by Tarnopolsky, *supra* note 1; Counter, *Reform of the Law of Domicile*, 2 MAN. L.J. 245, at 250 (1967); Rafferty, *supra* note 1, at 203, 212-15. Significantly, the Draft Act contains no special provisions regarding married women or infants, leaving them to be governed by the general provisions for "persons". A married woman thus has the capacity to acquire an independent domicile except that in the absence of a contrary intention a person is "presumed to have his principal home [*i.e.*, in the ordinary case be domiciled] in the state and subdivision where the principal home of his spouse and children (if any) is situate", s. 5(2)(b), *now* s. 4(2)(b) in the CONSOLIDATION.

The Act also implicitly provides for children having an independent domicile. Two criticisms may be made of this proposal. First, it does not appear to provide a satisfactory workable criterion in respect of very young children who may be incapable of forming any domiciliary intention: *see* Rafferty, *supra* note 1, at 214. Secondly, it would appear to allow a minor to establish a domicile in defiance of his parents' wishes, and perhaps contrary to his own welfare, by leaving home and living in another jurisdiction: *see* Tarnopolsky, *supra* note 1, at 173-74.

[29] Domicile and Matrimonial Proceedings Act 1973, U.K. 1973, c. 45, s. 4(1).

[30] Domicile Act 1976, STAT. N.Z. 1976, No. 17, s. 6(3).

understandable concept and easier to determine by the facts of each case than the ambiguous word "residence".[31]

The difficulties are, however, also of some importance and are not easy to circumvent. Parents living harmoniously together may have *different* domiciles: in such a case the problem arises as to whether the law should continue to make a sexual preference (which, of course, affords a solution to the problem), or should attempt to find an alternative criterion. While it might be argued that a sexual preference on such a small scale would be tolerable,[32] it might perhaps be more strongly argued that, if sexual preference is undesirable as a general principle, an exception should not be tolerated in the law relating to children, a law which affects every person at some time during his life.

Accordingly, it would appear to be highly desirable that some rule be formulated for these cases, unless this would be totally impracticable. A possible rule which would likely solve most cases in this minority category would be that where (a) parents who have different domiciles reside together with their child, and (b) the jurisdiction in which they reside is that in which one of the parents is domiciled, then the child will be domiciled in that jurisdiction. To take a straightforward case: a man domiciled in New York marries and subsequently resides in Ontario with a woman who is domiciled in Ontario. According to the proposed rule, their child would be domiciled in Ontario. The fact that his father may retain such an attachment for New York as to amount to a retention of his New York domicile ought not, it is submitted, to be allowed to prevail over the two important factors of his wife's domicile and the place in which his child is being brought up in a united family unit.

Where, however, the domiciles of parents differ and they are living together with their child, *but in a jurisdiction in which neither parent is domiciled*, it is not so clear what rule should apply. Here the *factum* of united family residence is not reinforced by the domicile of one of the parties. For example, in a country like Canada, with a significant immigrant population, there may well be spouses with different domiciles neither of whom acquires a new domicile despite extended residence. One solution would be to provide that in such a case the place of habitual residence of the family (where the child has his home) should constitute the

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[31] FIRST REPORT OF THE PRIVATE INTERNATIONAL LAW COMMITTEE 7 (Cmd. 9068, 1954).

[32] This would appear to have been the attitude of both the English and New Zealand legislatures. *But see* the statements of Mr. S.C. Silkin, M.P., who commented that "we certainly have a movement towards the concept of sex equality but we certainly do not go all the way in the Bill" (850 H.C. DEB. (Eng.) ser. 5, col. 1668 (1973)) and Baroness Elles, who said, "[I]t seems to me that if the purpose of the Bill is to remove discrimination then it does not wholly succeed because it is retained in Clause 4 with regard to children". (342 H.L. DEB. (Eng.) ser. 5, cols. 947-48 (1973)). Hartley & Karsten, *supra* note 27, at 180, state in relation to the English provision: "Whose domicile should the child follow? Perfect equality between husband and wife in this situation might be rather hard to attain. The basic rule therefore remains: the children follow the domicile of the father [save where otherwise provided by the Act]."

child's domicile. This provision, while introducing a qualification to the domicile concept,[33] has some clear advantages, the most obvious being that it draws the concept of domicile in Canada closer to that concept as it is understood in many other countries. Since the habitual residence criterion would not work in respect of the child's domicile of origin, it is suggested that the place where the child was born should determine that issue.[34]

Another possible criterion, considerably more flexible than that of habitual residence, would be to provide that, in cases to be covered by the rule, the jurisdiction with the most significant "real and substantial connection" to the family or, more specifically, to the child, should determine the child's domicile. Such a solution has the familiar advantages (primarily flexibility) and disadvantages (primarily uncertainty and the consequent necessity for litigation in some cases) associated with the "real and substantial connection" criterion in the context of divorce.[35] On balance, it seems that the simple habitual residence criterion for this limited number of cases is to be preferred.

Another aspect requiring resolution concerns guardians or other persons with whom, or institutions in which, the child may be sent to live.

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[33] It may be noted that the legislation in Ontario and Prince Edward Island introduces the concept of the child's habitual residence in relation to cases where the child's parents have separated or where one parent has died.

[34] A strong argument can be made in favour of stripping the domicile of origin of its distinctive legal attributes. One of these attributes is the revival of the domicile of origin when a person abandons a domicile of choice without having acquired a new domicile. The second is the attitude that it is more difficult to abandon a domicile of origin than any other category of domicile. This was done in the recent New Zealand legislation and was proposed by the Conference of Commissioners on Uniformity of Legislation in their Draft Model Act, *supra* note 28. Tarnopolsky, *supra* note 1, at 170-71, welcoming that proposal, stated:

> Because Canada is a federation, and because such a substantial proportion of our population is composed of immigrants, and because there is such mobility between provinces, it is time we dropped the nineteenth century English concept of domicile, which has been likened to that of nationality. . . . It is to be hoped that Canadians would not have the same innate sense of superiority over other legal systems as to presume that one who chooses to leave Canada to go to a foreign land is not prepared to accept the legal system of the country which he has chosen as his new home.

See also, to similar effect, Rafferty, *supra* note 1, at 210-11.

[35] Indyka v. Indyka, [1969] 1 A.C. 33, [1967] 2 All E.R. 689, [1967] 3 W.L.R. 510 (H.L.); Kish v. Director of Vital Statistics, [1973] 2 W.W.R. 678, 10 R.F.L. 71, 35 D.L.R. (3d) 530 (Alta. S.C.); Rowland v. Rowland, 2 O.R. (2d) 161, 13 R.F.L. 311, 42 D.L.R. (3d) 205 (H.C. 1973); Bevington v. Hewitson, 4 O.R. (2d) 226, 47 D.L.R. (3d) 510 (H.C. 1974); Wood v. Wood, [1974] 5 W.W.R. 18, 15 R.F.L. 197 (Alta. S.C.); La Carte v. La Carte, 23 R.F.L. 112, 60 D.L.R. (3d) 507 (B.C.S.C. 1975); Powell v. Cockburn, [1977] 2 S.C.R. 218, 22 R.F.L. 155, 68 D.L.R. (3d) 700 (1976); Holub v. Holub, [1976] 5 W.W.R. 527, 26 R.F.L. 263, 71 D.L.R. (3d) 698 (Man. C.A.); Keresztessy v. Keresztessy, 14 O.R. (2d) 255, 73 D.L.R. (3d) 347 (H.C. 1976). CASTEL, CASES, NOTES AND MATERIALS, *supra* note 1, at 7-152 to 7-180; Bale, Comment, 46 CAN. B. REV. 113 (1968); Mann, Note, 84 L.Q.R. 18 (1968); Sammuels, Comment, 6 ALTA. L. REV. 129 (1967-68); Bissett-Johnson, Note, 9 OTTAWA L. REV. 676 (1977).

It is considered desirable that where these other persons stand *in loco parentis* to the child, the child's domicile should follow theirs, provided the child has his home with them. Nevertheless, one could argue that this would not be a desirable rule in a case such as the following: a child living in Ontario, with parents who are domiciled in Ontario, may be sent to live with a third person who is also living in Ontario but is domiciled in Florida. It might be argued that a child with such strong Ontario connections should not be held to be domiciled in Florida. The issue may be perceived as being, in part, one of the extent to which the family unit should be taken into account when *de facto* it has either ceased to exist or has been temporarily suspended. In this context it may be remarked that the question of domicile of children might appear to be concerned with the *rights* of parents. In favour of this approach one could argue that control over the child's domicile is one aspect of the general rearing functions of parenthood. In rebuttal one might counter with the argument that, unlike other aspects of parental upbringing, domicile has no educative or formative aspects. It is merely a factual phenomenon which, so far as possible, should be determined in the best interests of the child,[36] but which ultimately has the somewhat modest aim of connecting the child with the most appropriate legal system. Whichever view may be correct, it is suggested that "parental dimension", in a case where a third person stands *in loco parentis* to the child, is not sufficiently strong to defeat the proposal that the child's domicile should be determined by the domicile of that third person.

In a comprehensive code on the domicile of children, rules would be included to cover cases where the persons standing *in loco parentis* to the child are married to each other and have different domiciles or are not married to each other and have different domiciles. The draft Model Act (in sections 6 and 7) attempts to provide such rules, broadly in line with those which would apply if the persons *in loco parentis* to the child were in fact his parents. It may be considered, however, that these rules introduce too great a complexity and that one must ultimately leave such questions to the good sense of the court. Accordingly sections 6 and 7 in the Model Act are included on a provisional basis only. The other sections of the Act would not be affected by their deletion.

The next problem is a major one and difficult to resolve satisfactorily. Assuming that the domicile of the child is to follow that of the parent or third party with whom he has his home, should the child's domicile change *automatically* with the change of that person's domicile or should that

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[36] *But see* Carter, *supra* note 13, at 306:

> The domicil of an infant, like the domicil of anyone else, should connote the law which is most appropriate to govern certain questions. The range of these questions perhaps requires . . . that the definition of domicil should be an accommodating one. It is, however, hard to see why the interests of the infant, as such, should be worthy of particular consideration in this context.

See also, in the same terms, Carter, *Private International Law*, 43 BRIT. Y.B. INT. L. 239, at 241 (1968-69).

person, while changing his own domicile, be permitted *not* to change that of the child, or conversely, to change the child's domicile while not changing his own? In what cases should such a difference between parent and child be permitted? And how should such an intention be manifested?

These problems raise issues of considerable complexity as regards both social policy and the best method of resolution in practice. It should, however, be acknowledged that in neither respect does the present law afford a satisfactory, or indeed, readily discernible solution. It is suggested that a model law regarding the domicile of children would provide that a person with whom the child is living, when changing his own domicile, should be permitted (a) not to change that of the child where to do so would be to the child's detriment, and (b) having not changed the child's domicile when changing his own, subsequently to change it to his own present domicile at any time thereafter, provided that to do so would not be to the child's detriment. What is recommended in clause (a) goes no further than what would appear to be the present law in relation to changes of domicile by widows and mothers of children born out of wedlock; what is recommended in clause (b) simply removes the rigid implications of leaving the child's domicile frozen until adulthood if the person with whom the child is living changes his domicile. It is likely that even under present law a court would hold that a widow or mother of a child born out of wedlock has this power, since the welfare of the child is the basis of the primary rule.

A further question arises as to how the intention of the parent or other person with whom the child is living not to change the child's domicile upon changing his own (or, as the case may be, to change it subsequently) may be manifested. Under present law, there is no specified procedure whereby the widow evinces this intention. This means, in effect, that the court, in purporting to interpret the intentions of the widow, makes an objective decision as to the merits of recognizing a change of domicile on the facts of the case. Since one issue facing the court (for instance the right of the child to maintenance) may well encourage the court to make a finding in one direction, and another issue (for instance the tax liability of the child's estate) may well encourage it to make a finding in the other direction, it is clear that the view that the *widow* is making a choice is little more than a fiction in many cases. This view is strengthened by the fact that the overwhelming majority of widows will never have addressed themselves to the problem, being completely unaware of their legal "power" in the matter.

Under the model law it might be advisable to continue this policy of allowing the court to make a decision on the merits under the guise of interpreting the intention of the person with whom the child is living. There is much to recommend this approach, since it is likely to yield a just result in cases that are litigated. The price, however, is a lack of certainty as to the domicile of the child that even the best legal adviser would not be able to remove, and this lack of certainty would be likely to result in detriment to certain children in respect of property expectations and even

more fundamental matters such as capacity to marry. It might be possible to devise a system whereby the domicile of a child would change unless the person with whom the child is living lodges a deed in a registry or makes a statutory declaration stating that the child's domicile is not to change. The problem here, however, is that declarations are frequently self-serving and the law of domicile has always treated them with suspicion.[37] It would be difficult to ensure that this danger would not arise in the present context. Conversely, to require a declaration as a precondition to the effectiveness of the choice made by the person with whom the child is living not to change the child's domicile would restrict the benefit of the rule to the few who have the advantage of expert legal advice.

Overall, therefore, it is suggested that the court should be charged with the task of determining whether a change of domicile has occurred. Of course, declarations would not thereby be excluded any more than they are under the present law, but they would not determine the issue conclusively.

A more difficult question is whether the child's domicile might be changed by a person with whom he is living even though that person does not change his own domicile. In a New Zealand decision of 1966, *Re G.*,[38] the court was "inclined to the view"[39] that a parent has this power. It is, however, suggested that in the new law no such power should be recognized. It would be very difficult to specify limits to such a power and even if the welfare of the child were a necessary element, it would, in effect, amount to the creation of a power to select any country in the world as the child's domicile with quite unforeseeable implications. It would perhaps be possible to qualify the power by requiring that there be some minimum connection between the child and the jurisdiction selected, but overall it is suggested that there is no necessity for a provision along these lines. (It is, however, proposed tentatively below that the *court* should be given such a power in certain limited cases.)

Before considering in more detail the practical implications of the scheme proposed in respect of the domicile of children, certain other matters require resolution. As has been mentioned, the domicile of

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[37] *Re* Corlet and Isle of Man Bank (No. 2), [1938] 3 W.W.R. 20, [1938] 3 D.L.R. 800 (Alta. S.C.); *In re* Rattenburg Estate and Testator's Family Maintenance Act, 51 B.C.R. 321, [1936] 2 W.W.R. 554 (S.C.); Young v. Young, 67 Man. R. 108, 21 D.L.R. (2d) 616 (C.A.1959); Bell v. Kennedy, L.R. 1 Sc. & Div. 307, at 313 (*per* Lord Cairns L.C.) and 322-23 (*per* Lord Colonsay) (H.L. 1868); *Re* Craignish, [1892] 3 Ch. 180, at 190-91, 67 L.T. 689, at 693 (C.A.) (Chitty J.); Qureshi v. Qureshi, [1972] Fam. 173, at 192, [1971] 1 All E.R. 325, at 338-39 (P.D.A. 1970) (*per* Sir Jocelyn Simon); DICEY, *supra* note 1, at 105-06; CHESHIRE, *supra* note 1, at 173-74; GRAVESON, *supra* note 1, at 206; CASTEL, CONFLICTS, *supra* note 1, at 122-24. The position in the United States is similar. *See* Williamson v. Osenton, 232 U.S. 619, 34 S. Ct. 442 (1914); Korn v. Korn, 398 F. 2d 689 (3d Cir. 1968); WEINTRAUB, *supra* note 1, at 12; Heald, Note, *Self-Serving Declarations and Acts in Determination of Domicile*, 34 GEO. L.J. 220 (1946).

[38] [1966] N.Z.L.R. 1028 (S.C.), *noted in* Carter, *Conflict of Laws*, [1967] A.S.C.L. 691, at 695.

[39] *Id.* at 1031.

foundlings is a matter of uncertainty. Recent legislation in New Zealand provides that their domicile should be considered to be that of the country where they are found until their parents are identified.[40] This solution, in harmony with the view of many commentators as to what the court would hold under present law, has much to recommend it, and it is suggested that the model law should specify this. Where the foundling makes his home with a person, he should, it is suggested, be treated in the same way as any other child and his domicile should change accordingly.

With regard to adopted children, it is suggested that the new law should specifically provide that for all purposes they would be treated as though they were the children of their adoptive parents. At present, the general view is that the domicile of origin of the child is that of his natural father or mother. It may be argued that this is an unsatisfactory criterion, being contrary to the general policy of adoption, which is to sever the natural parent-child relationship.[41] Moreover, the practical difficulties in establishing the domicile of the natural parents, as well as the hardship that this may possibly cause to the child or his natural parents, make the retention of this criterion unsatisfactory. It is suggested that the domicile of origin of an adopted child should be determined as though the date of the completion of the adoption were the date of the child's birth and the child were the natural child of his adoptive parent or parents: that is to say, the rules for determining the domicile of a natural child already proposed should apply to the adoptive child, except that the date of the adoption would be treated in the same way as the date of birth in respect of the natural child. There are no strong policy arguments in favour of this criterion; what is necessary is the selection of a criterion of reasonable certainty which will approximate the domicile of origin of other children.

Turning to some of the expressions used in the Model Act, the first issue that requires examination is the concept of a child "having a home with" a person. This expression has been adopted in recent English[42] and New Zealand[43] legislation on the subject and has been preferred to that of habitual residence (which was favoured in Ontario and Prince Edward

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[40] Domicile Act 1976, STAT. N.Z. 1976, No. 17, s. 6(6):

> Until a foundling child has its home with one of its parents, both its parents shall, for the purposes of this section, be deemed to be alive and domiciled in the country in which the foundling child was found.

Webb & Webb, *supra* note 27, at 379, have described this provision as being "of necessity, somewhat mechanical".

[41] However, there is a growing support for the view that an adopted child should have the right to establish who his natural parents are. *See generally* J. TRISELIOTIS, IN SEARCH OF ORIGINS (1973); Prager and Rothstein, Note, *The Adoptee's Right to Know his Natural Heritage*, 19 N.Y.L.F. 137 (1973). Recent legislation in England enables any adopted child over the age of eighteen to obtain a copy of his birth certificate, which may enable him to trace his natural parents: Children Act 1975, U.K. 1975, c. 72, s. 26.

[42] Domicile and Matrimonial Proceedings Act 1973, U.K. 1973, c. 45, s. 4(2), (3).

[43] Domicile Act 1976, STAT. N.Z. 1976, No. 17, s. 6(4). Webb & Webb, *supra* note 27, at 377 n. (m), consider that "[i]t is unfortunate that 'home' is nowhere defined in the Act. *Quaere*, does it mean where the child resides, or if 'kidnapped', where it normally ought to reside?".

Island) on the basis first, that with young children, the latter concept is somewhat artificial and secondly, that the concept of "having a home" affords a more satisfactory criterion in cases where the child may reside for long periods in another jurisdiction, at a boarding school, for example.

The core of the concept is easy to understand and simple in application. It is, however, possible to imagine cases in which it is difficult to say that a child "has his home" with one person rather than another (as, for instance, where divorced parents spend equal amounts of time with the child) or, indeed, that a child has *any* home (as, for instance, in the case of an abandoned child in an institution or a child who has run away from home and has no fixed place of residence). The difficulty in such cases is, however, not a reason for rejecting the concept, although with regard to institutions a specific provision is recommended below. The concept has the advantage of being an everyday notion with which most people will identify. The law is no stranger to difficult determinations of questions of fact. Strengthening the definitional certainty of the concept by, for instance, specifying minimum numbers of days' residence is of course always possible, but to do so would weaken the ultimate value of the concept: its flexibility in responding to the complexities of human relationships and behaviour.

Children in institutions, it must be admitted, present a problem. It is surely unrealistic not to recognize that a child who stays for perhaps many years in an institution does "have his home" there. If "home" is not the most felicitous expression, some other more neutral word might be chosen, but the reality of the situation is that the child is living continuously in one place among people with whom he has a relationship with strong similarities to that of parent or guardian and child. It is suggested that, in such a case, the domicile of the child should be that of the jurisdiction in which the institution is situated. The alternative of denominating a particular person in the institution as the one whose domicile is to govern would not appear satisfactory, since that jurisdiction may be totally inappropriate.[44] The question whether a child "has his home" in such an institution will, as stated above, be a question of fact. A child who is in the care of an institution for a couple of weeks on account of some family emergency would not likely be held to "have his home" there, but a stay of a year or two might well be interpreted differently.

There will also be cases where a child simply cannot be said to "have a home" anywhere, as where he runs away from home and wanders from one province to another. It is suggested that the best solution in such a case is to provide that he retains his former domicile until he settles in a place that may be called a home. This is in substance the solution adopted by the recent legislation in England[45] and New Zealand.[46]

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[44] As, for example, where the child is living in a religious institution in Ontario run by an order whose Principal is an Irishman who has never abandoned his or her Irish domicile.

[45] Domicile and Matrimonial Proceedings Act 1973, U.K. 1973, c. 45, s. 4(2), (3).

[46] Domicile Act 1976, STAT. N.Z. 1976, No. 17, s. 6(4), (6).

The present age for the attainment of an independent domicile appears to be too old, having regard to present realities. The recent legislation on domicile in Ontario,[47] Prince Edward Island,[48] England[49] and New Zealand[50] has reduced the age for acquiring an independent domicile either to sixteen years or to the age of marriage, if under the age of majority. Since a child of sixteen years may not normally be forced to live with his parents[51] and since many persons in their late teens migrate from province to province, there appears little to recommend the retention of an artificial domicile during the period between sixteen and twenty-one. The law could provide that a child acquires an independent domicile when mature enough to do so. It is, however, suggested that a specific age limit, while admittedly arbitrary, is preferable in this context, since the price of uncertainty would be too great. Accordingly, it is suggested that a child should be capable of acquiring an independent domicile at the age of sixteen or at the age of marriage if under sixteen years.

A matter that merits consideration is whether a general power should be introduced by which any person with a genuine interest in the matter would be permitted, on behalf of the child — or indeed the child himself would be permitted — to apply to the court for an order declaring that the child's domicile should, in the interests of the child, be changed to a different jurisdiction even though that person has not changed his own domicile to that jurisdiction. The argument in favour of such a provision is the vulnerable position of the child; unlike an adult, the child has no power over a matter which may have very important consequences for him, both financial and personal. Under other proposals made above, it is true that the person charged with the responsibility of determining the child's domicile would not be permitted to change it against the child's interests. Yet, in a case where that person's change of domicile would result, in the opinion of the child, in deleterious effects for him, the child would be obliged to await the determination of the issue in subsequent proceedings after the occurrence of the contingency the child feared. Access to the court before the event would appear to be an advantage in such a case.

The proposal is based on the view that it is not advisable to leave the important decisions of the domicile of children entirely to the parents, who (a) may have little appreciation of the effect of their decision; (b) in some cases have no inclination to act in the interests of their child; or (c) might

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[47] The Family Law Reform Act, 1978, S.O. 1978, c. 2, s. 68(2).

[48] Family Law Reform Act, S.P.E.I. 1978, c. 6, s. 61.

[49] Domicile and Matrimonial Proceedings Act 1973, U.K. 1973, c. 45, s. 3(1). For criticism of the former law on this matter, *see* Carter, *Conflict of Laws*, [1970] A.S.C.L. 606, at 613.

[50] Domicile Act 1976, STAT. N.Z. 1976, No. 17, s. 7.

[51] *See* Hewer v. Bryant, [1970] 1 Q.B. 357, at 369, [1969] 3 All E.R. 578, at 582 (C.A.) (*per* Lord Denning M.R.); P. BROMLEY, FAMILY LAW 319-20 (5th ed. 1976); S. CRETNEY, PRINCIPLES OF FAMILY LAW 315-16 (2d ed. 1976); Robinson, *Custody and Access*, in STUDIES IN CANADIAN FAMILY LAW, *supra* note 16, 543, at 552.

not have the financial resources to go themselves to a country in which it would be to the advantage of the child to be domiciled.

The argument already made against giving power to the parent to determine a child's domicile without the parent taking up that domicile has force in the present context. It would surely be quite inadvisable that either a parent or a court in a Canadian province, by waving a wand as it were, should be permitted to confer a Chinese domicile on a child who has never set foot in that country. It is, however, suggested that a provision giving the court this power could be narrowly drawn so as to give additional assurance, apart from the court's inherent good sense in the matter, that the power would not be used too broadly.

It is proposed that the following limitations should be provided:

(a) The court should not be empowered to confer a new domicile on the child unless the child has a genuine connection with that jurisdiction. In other words, there must be some good reason why the new domicile is being sought which links the child with that jurisdiction. The formula of a "real and substantial connection", which has been used by courts in a number of countries in regard to other aspects of private international law might usefully be adopted.

(b) The court should exercise such power only where it would be clearly in the interests of the child that such a change be made. This restriction should ensure that only cases where the issue is one of major importance will come before the court.

(c) The court should be required to make the order only if it is satisfied that the interests of *other* persons would not be unreasonably affected. For this purpose the court should be empowered to bring any person whom it considers may be so affected into the proceedings, and an obligation to give notice — perhaps public notice — to such persons should be imposed on the applicant.

(d) The court should only make the order where either parent is habitually resident or domiciled in the jurisdiction or where the child is habitually resident there.

Even with these limitations, it may be inadvisable to include this provision in the model legislation; if not accepted by all the provinces, it would be likely to lead to different determinations of children's domicile in different jurisdictions. Accordingly, the best course is to include the provision on an optional basis, contingent on its general acceptance by provincial legislatures. It should be noted that it is readily severable from the other provisions of the draft Model Act.

IV. Conclusion

The purpose of this article has been to raise some of the many issues affecting the subject of the domicile of children and to show that the problems cannot be resolved by the enactment of a simple section mitigating (but not removing) some of the grosser aspects of sexual

discrimination. As is so often the case in conflicts of law, it is almost impossible to propose a solution that will provide a correct balance between the goals of conceptual clarity, practicality of application and social desirability. The present discussion has necessarily been limited to the principal issues. It has not trespassed into such areas of family law as illegitimacy, for example. The draft Model Act is framed so as to apply to *all* children, but leaves the definition of "parent" to be determined according to the social policy of the province in question.

With the increasing attention being paid by the legal and social sciences to the position of children, it is surely to be expected that many of the issues raised in the present article will be greatly refined as the subject of the domicile of children becomes a matter of general interest and debate.

Draft Model Act on the Domicile of Children

1. This Act shall have effect in place of all former rules of law relating to the domicile of children.
2. In this Act, "child" means a person under the age of sixteen years who has not married.
3. (1) Subject to the other provisions of this Act a child has the domicile of the parent with whom he has his home.
   (2) Where a child has his home with both parents and the domicile of one parent is not the same as that of the other, then:
      (a) if the domicile of one parent is the place in which the parents have their habitual residence, the domicile of the child shall be in that place;
      (b) in any other case, the domicile of the child shall be in the place in which he has his habitual residence.
4. The domicile of origin of a child to whom section 3(2)(b) refers shall be the place in which he was born.
5. Where a child whose domicile is that of his parent ceases to have his home with that parent, he continues to have the domicile of that parent (or, if that parent is dead, the domicile he had at the time of his death) until he has a home with the other parent or a person who is *in loco parentis* towards him, whichever is the sooner.
6. Where a child has his home with two persons who are *in loco parentis* towards him and married to each other, the domicile of the child is to be determined in accordance with the principles set out in sections 3, 4 and 5, as if those persons were the parents of that child.
7. Where a child has his home with more than one person, who are *in loco parentis* towards him, none of whom are married to each other, the domicile of the child is determined by that of that person *in loco parentis* towards him with whom he has the closest connection.
8. Until a foundling child has his home with one of his parents, both his parents shall, for the purposes of the Act, be deemed to be alive and domiciled in the place in which he was found.
9. On adoption, the domicile of origin of a child shall be determined as though the date of the completion of the adoption were the date of the

child's birth and the child were the natural child of his adoptive parent or parents.

10. The domicile of a child may remain unchanged by the person or persons on whom he depends for his domicile in cases where the operation of the rules for the determination of the child's domicile would otherwise cause undue hardship to the child; and, where the domicile of a child so remains unchanged, it may thereafter be changed by that person or persons so as to coincide with the then domicile of that person or persons, provided that the subsequent change would be for the benefit of the child.
11. Where a child has its home in an institution, the domicile of the child shall be that of the country in which the institution is situated.
12. (1) On application to it by an interested person, the court may make an order changing the domicile of a child to that of another place when it considers it proper to do so.
    (2) The court shall not make an order under subsection (1) unless it is satisfied:
        (a) that either parent of the child is domiciled or habitually resident in the province or that the child is habitually resident in the province;
        (b) that there is a real and substantial connection between the child and the place to which it is sought to change his domicile;
        (c) that it would clearly be in the interests of the child to make such order; and
        (d) that the making of the order will not unreasonably affect the interests of other persons.
    (3) Before granting an order under subsection (1) the court may direct notice of the proceedings to be served on any person appearing to it to have an interest in the determination of the application.