Domicile

A person is normally domiciled in the country that he regards as his 'home'; not the place where he happens to be living temporarily from time to time but the country which he regards as his real homeland. It is often described as the country in which a person intends to die. Temporary in this context means not permanent. It is perfectly possible to emigrate from the UK and live abroad for 40 or 50 years without ceasing to be UK domiciled. For example, a person may go to Australia in his twenties to spend the whole of his working life there but may intend to return to the English village where he was born, and where he can see no opportunity for employment, after he reaches retirement age. He will remain domiciled in the UK throughout his time in Australia.

Whilst a person can be resident in two or more countries simultaneously, or can be resident in no country at all, he must be domiciled somewhere and can be domiciled in only one place at any one time. To achieve this, the law supplies everyone with a domicile of origin. This can be displaced by a domicile of choice but will be revived if the domicile of choice ceases to exist. A person's domicile of origin is normally the country in which his father was domiciled at the time of the child's birth. Although for most people this will be the country in which the taxpayer is born it is important to remember that this is not the true test and a taxpayer can be born and live in the UK. at least until he reaches adulthood, without becoming domiciled here if his father is not domiciled here. If the father changes his domicile during the son's infancy the son will also acquire the new domicile as a domicile of dependency. When he reaches adulthood, however, he will either revert to his domicile of origin or adopt the new domicile as a domicile of choice. A person acquires a domicile of choice by going to another country with the purpose of living there permanently.

Domicile is primarily a question of intent. It is obviously difficult to determine intent to the satisfaction of the courts, particularly if the

taxpayer is dead at the time it falls to be evidenced as will be the case with inheritance tax on death. All that the courts can do is to look at the professed intention of the deceased – if, that is, he has made it known to anyone – and look at whatever evidence is available to test whether the professed intent is genuine, or, if there is no professed intent, endeavour to establish what the intent was. This can often be very difficult. At the end of the day, if there is no clear evidence that a person has acquired – and kept – a domicile of choice in a specific country, the courts are likely to fall back on the principles that there must be positive evidence to show that a person has abandoned his domicile of origin and that such domicile revives if, at any time, he cannot be clearly seen to have a different domicile of choice. On the other hand, it is fairly well established that it is up to the person contending that there has been a change of domicile to establish that fact. The normal tax principle that it is up to the taxpayer to prove that the Revenue's claim is misguided does not apply in this context.

An interesting case, but one not well known in the tax field, is that of *In the Estate of Fuld, decd. (No 3)* [*1966*] *2 WLR 717*, which the Revenue sometimes quote to show that an intention to remain indefinitely in a country is sufficient to establish domicile there. Mr Fuld was born in Germany, moved to England, but as a child was interned in Canada during the war. He studied there and took Canadian nationality. He came to England in 1946 but also spent a significant amount of time in Germany, where his mother lived and the family business (in which he was not actively involved) was based. He married a German girl but she did not get on with his mother so they continued to live in England. He was taken ill in England in November 1961 but was moved to his mother's house in Frankfurt – reluctantly as far as he was concerned – where he remained until his death five months later. During this period he was anxious to return to London, but his health never permitted it. Scarman J said that '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.' Applying this test, he was held to have died domiciled in Germany. The judge was 'unable to infer' from the declaration that he intended to reside in Canada that he made to obtain Canadian citizenship 'the existence of an intention to settle in Ontario'. He felt that Mr Fuld had toyed with the idea of settling in Canada at recurrent intervals throughout his life but never made up his mind to do so. Accordingly, he had not acquired a Canadian domicile of choice. Although he came to regard London 'as his "home", his "centre" and, when away, to look forward eagerly to his return there', he maintained connections with Germany. The judge was 'not satisfied that he ever made up his mind to settle in England, or . . . that he ever formed the intention of continuing to reside in England for an unlimited time.'.

In order to shed his UK (or rather English and Welsh, Scottish or Northern Irish) domicile a person will need to build up evidence to show both that he has abandoned his UK domicile of origin and that he has acquired a new domicile of choice. If a person emigrates to another

country where he then lives permanently until he dies, it is generally easy to show that he has acquired a new domicile of choice. However, most people who emigrate for tax reasons do not do this. They tend to use the new country as a base and spend significant amounts of time in other countries including England, etc. Indeed, many emigrants leave with the firm view in mind that they are allowed to visit England for up to 90 days a year. Whilst in general this is true as far as income tax is concerned, such a pattern of life is likely to be taken as a strong indication that the taxpayer has not abandoned his UK domicile of origin. Saving tax, particularly death duties, should not dominate a person's life and unless an emigrant has a genuine intention to sever his connection with England it may be sensible to accept that he will not shed his UK domicile and will have to give the Inland Revenue their due at the end of the day. If a person wishes to safeguard his estate he needs to accept that this is likely to require a radical change in his lifestyle and that he will need to genuinely sever most of his connections with this country. The acquisition of a domicile of choice is not easy. Even if one is acquired it is held on a slender thread and constant vigilance may be needed to ensure that it is not lost and the domicile of origin revived. The prospective emigrant should take as many as possible of the following steps in order to evidence the abandonment of an English domicile and the acquisition of a new domicile.

1. Dispose of all private residences in the UK. If a person has a residence here this is suggestive of an intention to live here at least some of the time and thus casts doubt on the intention to die elsewhere.
2. Buy a private residence in the new country. If a person stays in hotels or guest houses this suggests that he is living temporarily in the new country and has not made a firm decision not to return to England.
3. Make a will under the law of the new country. This is suggestive of an intention that one's assets will be primarily in that country on death, one's trusted executor will be there and so will one's personal records. Many people recommend buying a grave plot in the new country. The writer is personally sceptical of this. Grave plots are generally cheap and the acquisition of a plot is as likely to be looked on by the Revenue as much as a device to suggest one is domiciled in the new country (and that accordingly one is worried about being regarded as English domiciled) as evidence of an intention to die in the new country.
4. Take the nationality of the new country. At a minimum, if permission is needed to live permanently in that country, ensure that this is obtained.
5. Give up British nationality even if the new country permits dual nationality.
6. Join clubs and social organisations in the new country. The place where a person spends his social life is likely to be the place he regards as home.

7. Resign from clubs and social organisations in the UK.

8. Dispose of UK investments – or at least reduce them to a small percentage of overall investments.

9. Acquire investments in the new country. This is not, of itself, of great importance as a prudent person will invest his funds where he feels that they are safe and produce a good return. Nevertheless if a person leaves the bulk of his assets in England this casts doubt on his intention to give up his English domicile.

10. Do not take out subscriptions to English newspapers and magazines. This suggests a reluctance to abandon the taxpayer's English connections.

11. Close English bank accounts.

12. Maintain a bank account in the new country. This is probably a practical necessity in any event.

13. Try to build up a circle of friends in the new country. An involvement in local affairs suggests an intention to become part of the local community in the new country.

14. When visiting England avoid giving an impression of homesickness.

15. Do not retain directorships of UK companies.

16. Do not retain business interests in the UK.

17. Do not vote in UK elections.

18. Exercise any right to vote that one may have in the new country.

19. Consider what other steps in the light of the particular circumstances of the taxpayer can be taken either to sever all connections with the UK or to build up connections with the new country. Social, political and personal connections are generally more important than business connections.

None of the above is vital in itself. However the courts will seek to look at all the factors that can be put in evidence to determine whether there is a settled intention to reside permanently in the new country. Connections with England that are retained militate against the existence of such an intention unless it can be shown that there are specific investment, commercial or family reasons for any such connections. Unless the courts find convincing evidence of a settled intention to reside permanently in the new country they will hold that the emigrant remained domiciled in England. The would-be emigrant should also be very careful what he says to his friends and professional advisors. In the case of *In re Furse decd., Furse v IRC [1980] STC 597* Mr Furse seems to have been held to be English domiciled largely on the basis of what he told his bank manager, and *In re Sir Charles Clore decd., (No 2), Official Solicitor v Clore and Others [1984] STC 609* the English domicile appears to rely heavily on what he told his solicitor, personal assistant, and close friends.

As one of the major problems with establishing domicile is generally lack of evidence it may also be worth considering making a Statutory Declaration notorised to the effect that one is leaving the UK with the intention to live permanently abroad and that, whilst one may in the future make occasional visits to this country, there is no intention ever to resume residence here.

Prior to 1 January 1974 a woman was automatically deemed to acquire her husband's domicile on marriage as a deemed domicile of choice. On a marriage after that date there is no such assumption. However, as when a couple get married they generally have an intent to live together, it is likely to be difficult in practice to show that the domicile of a married woman is different to that of her husband. After her husband's death, or on divorce or separation, a married woman may well reacquire her own domicile of origin. This obviously depends very much on the facts. It is of course also possible for a woman to retain her own domicile of origin on marriage if the circumstances support this. It is not possible to acquire a domicile of choice whether on marriage or otherwise without living in the new country for some period.

The acquisition (and retention) of a non-UK domicile of choice does not of itself take the emigrant wholly outside the scope of inheritance tax if he retains UK assets as the tax extends to UK assets held by non-UK domiciliaries. If the value of such assets is in aggregate under the starting point for the tax, currently £154,000, it is unlikely to be worthwhile taking evasive action as future increases in value of the assets are, in many cases, likely to be matched by increases in the tax threshold. If the taxpayer wishes to retain significant UK assets – and accepts the difficulties this may cause in a domicile argument – he will need to interpose an overseas company or other entity between himself and the assets. The asset owned by the taxpayer will then be the shares in the overseas company, which is a non-UK asset, not the underlying UK assets. This will take the UK assets outside the scope of inheritance tax. An overseas trust is not a suitable vehicle to use to hold the UK assets as a trust is itself within the scope of inheritance tax. Before transferring UK assets to an overseas company the effect on the flow of income, particularly as regards double taxation relief, needs to be considered. The transfer also clearly needs to be timed so as to ensure that it is outside the scope of capital gains tax. There is a particular problem if the UK asset is a house, as the Revenue could seek to impose a benefit in kind income tax charge in any year that the taxpayer visits the UK. Retention of a house in the UK is in any event likely to make it very difficult to demonstrate a real intention to shed UK domicile.

The Law Commission recommendations

Domicile is a general legal concept that applies in particular to marriage and family law, not merely – indeed not primarily – for tax purposes. It connects a person with a particular legal system. The changes proposed by the Law Commission are not therefore aimed at changing the tax rules. They are primarily prompted by the fact that, in an era of an

increasing number of second marriages and one parent families, it is frequently no longer appropriate for a child's domicile to follow that of his father.

The main changes proposed are as follows.

(*a*) A child should be domiciled in the country with which he is for the time being most closely connected. This will normally be the country in which the parent, or parents, with whom he lives is domiciled.

(*b*) The concept of domicile of origin should disappear.

(*c*) The normal civil standard of proof on a balance of probabilities should apply to disputes about domicile, instead of the present rule that it is for the person who alleges a change of domicile to prove it.

(*d*) To establish a change of domicile (including from the domicile at birth) it should be sufficient to show an intention to settle in the new country for an indefinite period.

(*e*) A person should retain his existing domicile until he acquires a new one, instead of reverting to the domicile of origin.

(*f*) A person who moves to a federal or corporate state with the intention of settling in that state for an indefinite period but without settling in one of its individual subdivisions should be regarded as domiciled in the subdivision with which he is most closely connected.

(*g*) The domicile of a wife who married before 1 January 1974 should be determined without reference to her husband's domicile, as currently applies to one who married after that date.

In general these changes are likely to be good news for the emigrant, albeit less so for a person who comes to the UK. On a balance of probabilities a person who leaves the UK and makes his home in another country is likely to become domiciled in that country unless he can show that he has gone there for a specific purpose which is likely to cease at some stage. Currently it is very difficult even for a retiree to another country to shake off a UK domicile of origin. A person who goes abroad with a likelihood, but no firm intention, that he will return to the UK at some stage may well be able to show an intention to settle in the new country for an indefinite period and shed his UK domicile. If so he needs to consider carefully the tax planning opportunities this will open up if in fact he later decides to return to the UK. Actually, as mentioned earlier, the Revenue consider even under the present rules that a person becomes domiciled in a particular country if he intends to settle there indefinitely. This is based on the case *In the Estate of Fuld, decd. (No. 3)* [*1966*] *2 WLR 717*. However, the balance of probabilities test makes this easier to show. It also makes it easier to challenge the Revenue's views before the Special Commissioners, so the changes are likely to also lead to an increase in domicile appeals.