DOMICILE (lex Domicilii)

DOMICILE ACT 3 of 1992

Civil Unions Act:

CASES: No Prescribed cases but

Grindal v Grindal  Both the factum of residence and animus manendi are required to establish domicile.

Elion v Elion  The test of animus manendi.

Baker vs Baker  members of the armed forces: A soldier can acquire domicile in the country where he is not stationed.

Mc Millan v Mc Millan  Members of the armed forces cannot acquire domicile in the country where they are stationed.

Nefler v Nefler  Lifelong imprisonment confers domicile at the place of imprisonment.

Naville v Naville  A diplomat can acquire domicile in the country where he is stationed.

Smith v Smith  illegal immigrants cannot acquire domicile of choice in a country they entered illegally.

Toumbis V Antoniou  A propositus (i.e. the subject of the case) can acquire domicile of choice even when they have a temporary residence dependant on the pleasure of the Minister of Home Affairs.

4.1 INTRODUCTION

- Because legal systems differ, it is of the utmost importance to determine which legal system determines a person’s status.

- i.e. according to WHICH legal system it must be determined WHETHER and to WHAT extent a person has

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<tr>
<th>Legal Capacity</th>
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A person's status is determined by the law which is in force where that person is domiciled. (*lex domicilii*)

**Example:**
According to South African Law, a person under the age of 18 years may not marry without parental consent. However according to English Law a person may marry without parental consent if they are over the age of 18.

Most continental legal systems determine a person’s private law status according to the law of the country in which they are a citizen.

However, in South Africa a person’s status is determined by the place in which they are domiciled. (*lex loci domicilii*)

### 4.2 DEFINITION OF DOMICILE

Domicile is the place where a person is

- legally deemed
- to be constantly present
- for the purpose of:
  - Exercising her rights
  - And
  - Fulfilling her obligations
- even in the event of her FACTUAL ABSENCE.
4.3 IMPORTANCE OF DOMICILE

- A person’s *lex domicilii* is important in various fields of private law:
  - i.e. in determining whether a child is **legitimate** or **extra-marital**, one would look to the law of the country where the child’s domicile of origin is.
  - in the **Law of Succession**.
    - It is the Law of Intestate Succession of the Country in which the **DECEASED** was **DOMICILED** at the time of her death which will determine how her **MOVABLE PROPERTY** should devolve should she die intestate.
    - It is the *lex domicilii* of the **Testator** at the time of EXECUTING the Will which will determine whether she has the **CAPACITY** to dispose of her movable property by means of that Will.
    - A person’s domicile will determine whether they have the capacity to inherit or not.
    - Domicile will also determine the system of Law according to which a Will is to be **INTERPRETED**.
    - Unless the Testator has indicated a specific system of Law, the Law of the place where the Testator was domiciled when the WILL was EXECUTED will prevail.
  - The domicile of the **HUSBAND** at the time of the marriage dictates what the **MATRIMONIAL PROPERTY REGIME** of the marriage will be. See *Frankel's Estate v The Master*
• This principle is IMMUTABLE and it is irrelevant if the husband later changes his domicile.

This is logical because one’s matrimonial property regime cannot chop and change according to where the husband is domiciled.

e.g. a man who is domiciled in South Africa travels to England to study there. Whilst there he marries an English woman. Because he is domiciled in South Africa, although in fact residing for the time being in England, the patrimonial consequences of the marriage will be determined by South African law. South African law states that a marriage is IN COMMUNITY OF PROPERTY unless the parties concluded an ANC before entering into the marriage.

• The difficulty arises in terms of same sex marriages. The Civil Unions Act does not prescribe how domicile is to work in same sex marriages. Thus if a South African man married an British man in Canada, there is a problem of whose domicile would govern the patrimonial consequences of marriage are yet to be determined. In Minister of Home Affairs v Fourie the problem was recognized, and the courts suggested that South Africa look at the German position before passing any legislation authorizing same sex marriages. However, despite the Courts advising the legislature, the legislature chose to ignore the courts and the problem remains.

Domicile plays a role in the Law of Procedure as it could be a factor determining which division of the High Court has JURISDICTION in a particular case.
• Generally the Plaintiff must sue the Defendant out of the court in the area where the Defendant is domiciled or resident as that court has jurisdiction over the Defendant.

• A matter regarding a person’s status must be heard by the Court having JURISDICTION in the area where that person is DOMICILED.

• Domicile is a factor in determining the INTERNATIONAL JURISDICTION for a FOREIGN COURT in order to recognize and enforce an order of such Court.

4.4 GENERAL PRINCIPLES GOVERNING DOMICILE


○ This Act is not retrospective.

○ This means that the Act DOES NOT AFFECT ANY

RIGHT  CAPACITY  OBLIGATION  LIABILITY

which was

| Acquired  | Accrued  | Incurred |

by virtue of the Domicile a person had at ANY TIME PRIOR to the date in which the Act came into operation.
Furthermore the Act does not affect the LEGALITY of any act performed before that date.

There are three basic principles which govern domicile.

<table>
<thead>
<tr>
<th>Every person must have a domicile at all times</th>
<th>The changing of a person’s domicile is never accepted WITHOUT PROOF</th>
<th>No one can have a domicile in more than ONE PLACE at the same time</th>
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<tr>
<td>➢ This is because a person’s status is largely dependant on his domicile in law.</td>
<td>➢ Once a person has established a domicile, it is accepted that he retains that domicile until the CONTRARY is PROVED.</td>
<td>➢ This is logical as one needs to have a domicile in order to establish a person’s status.</td>
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<td>➢ It is for this reason that the law cannot allow a person to be without a domicile.</td>
<td>➢ This is determined on a BALANCE OF PROBABILITIES.</td>
<td>➢ A person cannot be without status.</td>
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4.5 KINDS OF DOMICILE

Our Law recognizes 3 types of domicile
4.5.1 Domicile of Origin

- This is also called a person’s ORIGINAL DOMICILE.

- It is the domicile that the law assigns to her AT BIRTH. The general rule is that a legitimate child takes the domicile of its father, and an “illegitimate” child, the domicile of their mother.

- The Domicile Act provides that no one loses their domicile until they have acquired another domicile whether by Choice OR Operation of Law.

The Act specifically provides that a person’s domicile of origin DOES NOT REVIVE unless:

| She/he Acquires a domicile of choice | AND | The Law assigns a domicile to him/her at the place where her place of origin was because he/she is MOST CLOSELY CONNECTED with that place. |

Prior to the coming into operation of the Act, a person’s domicile of origin revived if she abandoned her domicile of choice without assuming a new domicile.

- A person’s domicile of origin, has because of the provisions of the Act, lost its significance.

- Its only function is that it is the FIRST DOMICILE assigned to a person and is simply an example of a domicile by operation of Law.
4.5.2 Domicile of Choice

- This is the most important kind of domicile.

- Section 1(1) of the Domicile Act provides that regardless of

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<th>Sex</th>
<th>Or</th>
<th>Marital status</th>
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**everyone** who is above or over 18 years

**AND**

everyone UNDER the age of 18 years who LEGALLY has the status of a major

Is COMPETENT to acquire a **DOMICILE OF CHOICE**

**UNLESS**

She/he lacks the MENTAL CAPACITY to make a rational choice.

Prior to the coming into operation of the Act a wife (according to the common law) automatically acquired her husband’s domicile at marriage and followed that domicile whenever he changed it irrespective of whether she was present at that particular place or whether she had the intention of residing there permanently. This applied even if the parties had separated and the wife was, for example living in another country!

This was called a **DOMICILE OF DEPENDENCE**.
Children also used to have a **domicile of dependence**, which was the domicile of their **guardian**.

- The Act also provides that a person below the age of 18 may acquire a domicile of choice but this will only be so if the person has the **status of a major**.

- So we see that in order to acquire a domicile of choice a person must:
  1. be over the age of 18
  2. have the status of a major;
  3. have the mental capacity to make a rational choice;

Our Law has two further requirements:

4. **FACTUM**: The person must **ACTUALLY SETTLE** at a particular place (factum) – objectively determined

5. **ANIMUS MANENDI** The person must have the **INTENTION OF RESIDING PERMANENTLY** at that place (that is the animus) – subjectively determined.

- Although the last two requirements need not come into being simultaneously, they must at some time or another exist simultaneously.

  e.g. A person may first settle at a particular place and only at a later stage form an intention of settling there.

- **Factum** requirement – objectively determined
This means that the person must actually settle at a particular place.

The Domicile Act will only recognize a person’s LAWFUL presence for the purposes of domicile of choice.

An illegal alien can thus not acquire a domicile of choice in South Africa, despite the fact that they might have the intention of settling here permanently.

In Van Rensburg / Ballinger the court held that a prohibited immigrant whom the authorities had openly permitted to reside in South Africa could acquire a domicile of choice here.

People who are DEPORTED from South Africa LOSE their domicile in this country, even if they intend returning to South Africa. This is because their return to South Africa would be unlawful and as indicated above the Domicile Act only recognizes a LAWFUL presence for purposes of recognizing a domicile of choice.

Should a person leave their place of domicile in order to escape the process of law, she will not lose her domicile at the place from which she has fled. (A fugitive from justice).

The object of this is to prevent the fugitive from relying on the courts not having jurisdiction to hear the matter and thereby escaping the consequences of their misconduct. This rule is based on public policy.

To determine whether a person has actually settled at a particular place (the factum requirement) is determined OBJECTIVELY.

There is no specific period of actually physically residing there, however it is insufficient if the person is simply a visitor to that place.
A person’s residence in a particular place is irrelevant, provided that a person was physically present at that place, where she INTENDED to stay AND that her residence was LAWFUL.

The courts may however take into consideration the DURATION of the PHYSICAL PRESENCE to infer from that whether the person had the INTENTION of remaining at that place.

Once a domicile of choice has been established because it has met with all the above requirements, that person’s continued presence is not required.

This is why, for example, if we go on an extended trip overseas, we will not lose our domicile of choice merely because we are overseas and not at home.

b) Animus requirement – subjectively determined

Remember this means that the person must have the intention of residing permanently at that place.

There used to be uncertainty regarding the interpretation of the word “permanently”.

The common law authors described the animus as

- the INTENTION NOT TO LEAVE the particular place.

- at other times the INTENTION OF RESIDING PERMANENTLY at a particular place.
Furthermore the Courts were not unanimous with regard to the DEGREE of permanence required in order to satisfy the *animus* requirement.

The Appellate Division also delivered conflicting judgments on this issue.

In *Eilon v Eilon* 1965 the AD interpreted the *animus* requirement very strictly and stated that it was met if:

“the person had a fixed and deliberate intention to abandon his previous domicile, and to settle permanently in the country of choice and that a contemplation of ANY CERTAIN OR FORESEEABLE event on the occurrence of which residence in that country would cease, EXCLUDES such an intention. If he entertains ANY DOUBT as to whether he will remain or not, intention to settle permanently is likewise excluded.”

The minority decision in this case stated, however, that:

“the enquiry does not involve a scrupulous and solicitous investigation as to whether perhaps in the future he might not in certain circumstances decide to remove his permanent home.”

The view of the minority decision in *Eilon v Eilon* was accepted by the legislature and Section 1(2) of the Domicile Act now provides that the *animus* requirement is met if the person has the INTENTION OF SETTLING in a place “FOR AN INDEFINITE PERIOD”.

Therefore a person can satisfy the *animus* requirement even if they intend moving at an unknown future time.

In order to satisfy the animus requirement the person must be able to carry out the intention of settling at the particular place.
• The question arises whether certain persons such as military staff, diplomats, employees of foreign governments and prisoners etc. are capable of acquiring a domicile of choice at the place where they are stationed, posted or imprisoned. This is because it is their employers or the State who/which will decide where they are to reside and that they therefore cannot give effect to their intent of settling at a particular place.

• The common law provided that such people were incapable of acquiring a domicile of choice at the place where they were so stationed, posted or imprisoned.

➤ The domicile Act does NOT EXPRESSLY deal with this situation, that is whether a person who is not free to decide where he/she wants to reside, may acquire a domicile of choice at the place where they are stationed, posted or imprisoned etc.

• The Act does not expressly exclude a person whose presence at a particular place is not BY CHOICE from acquiring a domicile of choice there.

It could therefore be argued that:

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<th>In terms of section 1 of the Act</th>
<th>Because the Act does not expressly state that such people can meet the <em>animus</em> requirement even though their ability to give effect to their intention is limited by for example employment or imprisonment, the Common Law still applies in this respect.</th>
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<td>And</td>
<td>provided the person is over the age of 18</td>
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<td>And</td>
<td>has the required mental capacity, such person is competent to establish a domicile of choice.</td>
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The Common Law position is as follows:

i. Military staff

- Soldiers can acquire a domicile of choice where they are stationed.
- In *Baker vs Baker* the Court held that soldiers could acquire a domicile of choice at a place where they are NOT stationed.

ii. Diplomats, Public Servants, Employees and Officers of Foreign Offices or Businesses.

- In *Naville vs Naville* the Court decided that a foreign diplomat could acquire a domicile of choice in South Africa whilst still in service of a foreign country.
- The same principle should apply in respect of public servants and employees and officers of foreign governments and businesses.

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iii. Prisoners

- A prisoner cannot acquire a domicile of choice at the place where he is imprisoned, as he/she is not there of their own free will.
• In Neffler vs Neffler it was decided that a prison who had been imprisoned for life AUTOMATICALLY acquired a domicile of choice in prison.

4.5.3 Domicile by Operation of Law (Assigned Domicile)

❖ Section 2(1) of the Domicile Act states any person does not have the capacity to acquire a domicile of choice, will be domiciled at the place with which he is most closely connected.

❖ He will therefore acquire a domicile by OPERATION OF THE LAW.

❖ Who are these people who cannot acquire a domicile of choice?

| Children under the age of 18 | AND | Mentally incapacitated persons |

❖ This assigned domicile will continue for as long as their minority or incapacity continues.

❖ The Law will assign to them a domicile to which the person is MOST CLOSELY CONNECTED.

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<th>Domicile of a Child</th>
<th>Domicile of a Mentally Incapacitated Person</th>
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<td>○ Section 2 of the Domicile Act: the child is domiciled at the place where he/she is most closely connected.</td>
<td>○ Section 2(1) of the Domicile Act – persons who do not have the mental capacity to make a rational choice cannot acquire a</td>
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<td>○ S2(2) There is a rebuttable</td>
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<td>presumption that if a child KNOWINGLY has his/her home with ONE or BOTH of his parents that parental home is the domicile.</td>
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<tr>
<td>▪ For purposes of the Domicile Act, a child is a person under the age of 18 who does not have the status of a major.</td>
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<td>▪ Domicile is assigned to a minor under the age of 18 who is unmarried.</td>
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<tr>
<td>▪ When a minor reaches the age of 18, OR attains the status of a major (marries) assigned domicile is retained until domicile of choice is established.</td>
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<td>▪ The Act provides that the term “parents” includes a) adoptive parents b) parents who are not married to each other.</td>
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<td>▪ There is no distinction between legitimate or illegitimate children.</td>
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<tr>
<td>domicile of choice and acquire a domicile at the place where they are most CLOSELY CONNECTED.</td>
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