

**702. Persons suffering from mental disorder.** The domicile of a person suffering from a mental disorder cannot be changed, either by his own act or by the act of the person having his custody<sup>1</sup>. There is a possible exception to this rule where the mental incapacity begins during childhood, when the child is incapable of an independent domicile, and is not succeeded by adult capacity; in these circumstances the domicile of a mentally disordered person continues to be governed by the rules applying to dependent children<sup>2</sup>.

- 1 *Hepburn v Skirving* (1861) 9 WR 764; *Sharpe v Crispin* (1869) LR 1 P & D 611; *Urquhart v Butterfield* (1887) 37 ChD 357 at 383, CA. Cf *Bempde v Johnstone* (1796) 3 Ves 198 at 201. It is an open question what types of mental disorder attract this rule: see *Sharpe v Crispin* (1869) LR 1 P & D 611 at 618 ('ability to think and act for himself in the matter of domicile otherwise than as a minor child'). For the meaning of 'mental disorder' in the Mental Health Act 1983 see s 1(2); and MENTAL HEALTH vol 30 (Reissue) para 1202.
- 2 *Sharpe v Crispin* (1869) LR 1 P & D 611. Here, however, the intentions of the person concerned were also considered.

### (3) RESIDENCE

**703. Residence in general.** The term 'residence' bears varying meanings according to its context<sup>1</sup>, and great caution must be exercised before authorities on the meaning of 'residence' in such contexts as bankruptcy<sup>2</sup>, taxation<sup>3</sup>, or the old poor law provisions<sup>4</sup>, are applied in other contexts. In particular, it is clear that some degree of permanence is required for the acquisition of residence in some contexts<sup>5</sup>, but not, or to a lesser extent, in others<sup>6</sup>.

Generally, 'residence' means physical presence other than casually or as a traveller<sup>7</sup>. In considering whether residence is established the court considers a man's whole environment, especially in relation to his wife and family, and not merely his physical situation<sup>8</sup>. In some cases, a person may be resident in England despite a temporary absence<sup>9</sup>; and he may be held to be resident in two or more countries<sup>10</sup>. It is possible to be resident in a country without owning or enjoying exclusive possession of any premises there<sup>11</sup>.

- 1 See eg *Foreman v Beagley* [1969] 3 All ER 838 at 841, [1969] 1 WLR 1387 at 1392, CA.
- 2 See BANKRUPTCY vol 3(2) (Reissue) para 116.
- 3 See the leading cases of *Levene v IRC* [1928] AC 217, HL; and *IRC v Lysaght* [1928] AC 234, HL; and INCOME TAXATION vol 23 (Reissue) para 1252.
- 4 See eg *R v Norwood Overseers* (1867) LR 2 QB 457, applying the maxim *ubi uxor ibi domus* (a man's home is where his wife is).
- 5 See eg *Levene v IRC* [1928] AC 217 at 222, HL (taxation); *Fox v Stirk and Bristol Electoral Registration Officer* [1970] 2 QB 463, [1970] 3 All ER 7, CA (qualifications for entry on register of electors); *Brokelmann v Barr* [1971] 2 QB 602, [1971] 3 All ER 29, DC (relief from customs duty).
- 6 Eg *Bell v Kennedy* (1868) LR 1 Sc & Div 307 at 319, HL; *Fasbender v A-G* [1922] 2 Ch 850 at 857-858, CA; *Stone v Stone* [1959] 1 All ER 194, [1958] 1 WLR 1287 (acquisition of domicile of choice); *Armstrong v Armstrong* [1898] P 178; *Matalon v Matalon* [1952] P 233, [1952] 1 All ER 1025, CA; *Sinclair v Sinclair* [1968] P 189, [1967] 3 All ER 882, CA (judicial separation).
- 7 *Sinclair v Sinclair* [1968] P 189, [1967] 3 All ER 882, CA; *Manning v Manning* (1871) LR 2 P & D 223; *Armstrong v Armstrong* [1898] P 178; *Matalon v Matalon* [1952] P 233, [1952] 1 All ER 1025, CA (all cases of judicial separation).
- 8 *Sinclair v Sinclair* [1968] P 189 at 231-232, [1967] 3 All ER 882 at 898, CA.
- 9 *Sinclair v Sinclair* [1968] P 189 at 228-231, [1967] 3 All ER 882 at 896-898, CA; *Raeburn v Raeburn* (1928) 44 TLR 384; *Dasent v Dasent* (1850) 1 Rob Eccl 800 at 803 per Dr Lushington (all judicial separation);

- Fox v Stirk and Bristol Electoral Registration Officer* [1970] 2 QB 463 at 475, [1970] 3 All ER 7 at 12, CA (qualification for entry on register of electors).
- 10 *Sinclair v Sinclair* [1968] P 189 at 232, [1967] 3 All ER 882 at 899, CA; *Fox v Stirk and Bristol Electoral Registration Officer* [1970] 2 QB 463 at 475, [1970] 3 All ER 7 at 11, CA. For taxation purposes, residence may be 'multiple and manifold': *IRC v Lysaght* [1928] AC 234 at 245, HL.
- 11 See eg *Levene v IRC* [1928] AC 217, HL; *Matalon v Matalon* [1952] P 233, [1952] 1 All ER 1025, CA; *Stone v Stone* [1959] 1 All ER 194, [1958] 1 WLR 1287.

**704. Ordinary residence.** 'Ordinary residence' is residence adopted voluntarily and for settled purposes as part of the regular order of life for the time being, as opposed to such residence as is casual, temporary or unusual<sup>1</sup>. It is possible, in some contexts, for a person to be ordinarily resident in two or more places<sup>2</sup>, but this would seem to be impossible in cases where ordinary residence is a basis for the court's jurisdiction<sup>3</sup>.

Different views have been expressed on the question whether there is any difference between 'residence' and 'ordinary residence'<sup>4</sup>. It is clear that ordinary residence, like residence, can be changed in a day<sup>5</sup>.

- 1 *Levene v IRC* [1928] AC 217, HL; *IRC v Lysaght* [1928] AC 234, HL; *Macrae v Macrae* [1949] P 397, [1949] 2 All ER 34, CA; *Hopkins v Hopkins* [1951] P 116, [1950] 2 All ER 1035; *Stransky v Stransky* [1954] P 428, [1954] 2 All ER 536; *Lewis v Lewis* [1956] 1 All ER 375, [1956] 1 WLR 200; *R v Barnet London Borough Council, ex p Shah* [1983] 2 AC 309, [1983] 1 All ER 226, HL. The fact that a person keeps a home available for immediate occupation in a country is evidence of ordinary residence there (*Stransky v Stransky* supra; *Lewis v Lewis* supra); but a home in this sense is not essential. A person who makes repeated attempts to enter the country but who is denied leave to enter cannot claim to be ordinarily resident: *R v Secretary of State for the Home Department, ex p Butta* [1994] Imm AR 197.
- 2 *Pittar v Richardson* (1917) 87 LJKB 59 at 61, DC (liability for military service).
- 3 See eg the Carriage by Air Act 1961 s 1(1), Sch 1 art 28(1); and AVIATION vol 2 (Reissue) para 1545.
- 4 For the view that there is a difference see *Levene v IRC* [1928] AC 217 at 232, HL; *IRC v Lysaght* [1928] AC 234 at 243, 248, HL; *Stransky v Stransky* [1954] P 428 at 437, [1954] 2 All ER 536 at 541. For the contrary view see *Levene v IRC* supra at 225; *Hopkins v Hopkins* [1951] P 116 at 121-122, [1950] 2 All ER 1035 at 1038-1039.
- 5 *Macrae v Macrae* [1949] P 397 at 403, [1949] 2 All ER 34 at 36, CA.

**705. Habitual residence.** 'Habitual residence' has been defined as a regular physical presence, enduring for some time<sup>1</sup>. In most contexts there will be no real distinction between 'habitual residence' and 'ordinary residence'<sup>2</sup>. In the law of continental European countries, where the term is more common, habitual residence is regarded as a matter of pure fact, in which the duration, continuity and durability of the residence are material<sup>3</sup>. In English law also, habitual residence is primarily a matter of fact<sup>4</sup>. It would seem possible to be habitually resident in two places, at least for certain purposes<sup>5</sup>, and habitual residence may continue during periods of temporary absence<sup>6</sup>.

In English law, too, special provision is made so that the habitual residence of a child is unaffected for one year by the unlawful removal of the child from the territory of his habitual residence<sup>7</sup>.

- 1 *Cruse v Chittum (formerly Cruse)* [1974] 2 All ER 940. As a young child has habitual residence no element of intention can be required: see eg the Adoption Act 1976 s 17(2)(b).
- 2 *R v Barnet London Borough Council, ex p Shah* [1983] 2 AC 309, [1983] 1 All ER 226, HL; *Kapur v Kapur* [1984] FLR 920. Cf *Cruse v Chittum (formerly Cruse)* [1974] 2 All ER 940.
- 3 See Jurisdiction in Matrimonial Causes (Law Com no 48) para 42. Cf Dicey and Morris *The Conflict of Laws* (12th Edn, 1993) 161-162. For the need to weigh statements as to habitual residence by interested parties with care see *F v S (Wardship: Jurisdiction)* [1993] 2 FLR 686, CA.
- 4 *Re M (Minors) (Residence Order: Jurisdiction)* [1993] 1 FLR 495, CA; *Re M (A Minor) (Habitual Residence)* (1996) Times, 3 January, CA.
- 5 Cf para 704 text to note 2 ante; and *Re V (Abduction: Habitual Residence)* [1995] 2 FLR 992 (concurrent habitual residence in two countries impossible in context of Hague Child Abduction Convention).