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# A BILL

## To

Consolidate and reform the law for determining the domicile of individuals.

Enacted by the Legislative Council.

### PART 1

#### PRELIMINARY

#### 1. Short title and commencement

- (1) This Ordinance may be cited as the Domicile Ordinance.
- (2) This Ordinance shall come into operation on a day to be appointed by the Secretary for Justice by notice published in the Gazette.

#### 2. Interpretation

- (1) In this Ordinance—
  - “child” (未成年人) means an individual who has not attained the age of 18 (whether or not the individual is married under the law of any country or territory and whether or not the individual is a parent), and “adult” (成年人) shall be construed accordingly;
  - “court” (法院) includes a magistrate;
  - “parents” (父母), in relation to a child, means the father and the mother of that child and includes—
    - (a) the adoptive parents of the child;
    - (b) the step-parents of the child; and
    - (c) the parents of the child who are not married to each other.
- (2) In this Ordinance, a reference to a country or territory, in relation to an individual whose domicile at any time is in question, is a reference to a country or territory that has its own system of law at that time.

## PART 2

## DETERMINATION OF DOMICILE

**3. General rules**

- (1) Every individual has a domicile.
- (2) No individual has, at the same time and for the same purpose, more than one domicile.
- (3) Where the domicile of an individual is in issue before any court in Hong Kong, that court shall determine the issue in accordance with the law of Hong Kong.

**4. Domicile of children**

- (1) A child is domiciled in the country or territory with which he is for the time being most closely connected.
- (2) In determining which country or territory a child is for the time being most closely connected with, the court shall take into account all relevant factors, including which country or territory the child intends to have his home in.
- (3) Where the child's parents are domiciled in the same country or territory and the child has his home with either or both of them, it shall be presumed, unless the contrary is proved, that the child is most closely connected with that country or territory.
- (4) Where the child's parents are not domiciled in the same country or territory and the child has his home with one of them, but not with the other, it shall be presumed, unless the contrary is proved, that the child is most closely connected with the country or territory in which the parent with whom he has his home is domiciled.

**5. Domicile of adults**

- (1) On becoming an adult, an individual retains (subject to subsection (2)) the domicile that he had immediately before he becomes an adult.
- (2) Subject to sections 6, 7 and 8, an adult acquires a new domicile in a country or territory if—
  - (a) he is present there; and
  - (b) he intends to make a home there for an indefinite period.

**6. Acquiring a domicile in Hong Kong**

- (1) An adult does not acquire a domicile in Hong Kong under section 5(2) unless he is lawfully present in Hong Kong.

(2) An adult's presence in Hong Kong shall be presumed to be lawful unless the contrary is proved.

(3) In exceptional circumstances where it is proved that strict adherence to subsection (1) would result in injustice, an adult may despite subsection (1) acquire a domicile in Hong Kong even though his presence in Hong Kong is unlawful.

## **7. Acquiring a domicile in another country or territory**

In deciding for the purposes of section 5(2) whether an adult acquires a domicile in a country or territory other than Hong Kong, one of the factors that shall be considered is whether his presence in that country or territory is lawful by the law of that country or territory.

## **8. Domicile of adults under disability**

(1) An adult lacking the capacity to form the intention necessary for acquiring a domicile is domiciled in the country or territory with which he is for the time being most closely connected.

(2) Whether an adult lacks that capacity is a question of fact.

(3) When that capacity is restored to an adult, he retains the domicile that he had immediately before the capacity was restored.

## **9. Continuity of domicile**

Where an individual is domiciled in a country or territory as determined in accordance with this Ordinance, he continues to be so domiciled until he acquires another domicile, whether under section 4, 5, 8 or 10.

## **10. Domicile in country comprising 2 or more territories**

In any case where—

(a) an adult is present in a country comprising 2 or more territories and intends to make a home in that country for an indefinite period; but

(b) the application to him of the other provisions of this Ordinance does not show that he is domiciled in any particular territory within the country,

then (notwithstanding the other provisions of this Ordinance) he shall be treated, until he acquires another domicile (whether under section 5 or 8 or this section), as domiciled in the territory within that country with which he is for the time being most closely connected.

## 11. Standard of proof

Any fact that needs to be proved for the purposes of this Ordinance shall be proved on a balance of probabilities.

## 12. Domicile before commencement date

The domicile that an individual had at a time before the commencement date of this Ordinance shall be determined as if this Ordinance had not been enacted.

## 13. Domicile on or after commencement date

(1) The domicile that an individual has at a time on or after the commencement date of this Ordinance shall be determined as if this Ordinance had always been in force.

(2) For the purposes of a determination under subsection (1), this Ordinance applies in place of—

- (a) the rules of common law for determining the domicile of an individual that are inconsistent with this Ordinance; and
- (b) the enactment repealed by section 14.

(3) For the purposes of a determination under subsection (1) and without prejudice to subsection (2)(a), this Ordinance abolishes the following rules of common law—

- (a) the rule that a domicile of origin is given to every individual at birth by operation of law;
- (b) the rule that a child has a domicile of dependency;
- (c) the rule that a married woman has at all times the domicile of her husband;
- (d) the rule on the acquisition of the domicile of choice based on residence and intention of permanent residence;
- (e) the rule on the revival of the domicile of origin;
- (f) the rule that a mentally incapacitated adult retains the domicile that he had when he became mentally incapacitated for so long as he remains in that condition; and
- (g) the rule that the standard of proof required to prove that an individual's domicile changes from a domicile of origin to a domicile of choice is more onerous than that required to prove a change from a domicile of choice to another.

(4) Except as provided in this section, nothing in this Ordinance affects any rules of common law.

## PART 3

## CONSEQUENTIAL AMENDMENTS

**Matrimonial Causes Ordinance****14. Interpretation (Part III)**

Section 11C(2) of the Matrimonial Causes Ordinance (Cap. 179) is repealed.

**15. Certain existing rules of recognition to continue in force**

Section 59(a) is amended by repealing “the spouses’ domicile” and substituting “either spouse’s domicile”.

**Explanatory Memorandum**

The object of this Bill is to implement the recommendations of the Law Reform Commission’s report on “Rules for Determining Domicile” published in April 2005 (“the Report”). Domicile is what is termed in private international law a “connecting factor”: it determines under which system of law and within the jurisdiction of the courts of which country or territory certain issues (principally related to an individual’s status or property) are to be determined. The recommendations in the Report seek to clarify and simplify the law for determining an individual’s domicile, and introduce certain changes to bring the law in line with modern conditions.

2. Part 1 provides for preliminary matters (short title, commencement and definitions). As defined in clause 2—

- (a) a child is an individual under 18, irrespective of whether the individual is married or is a parent (see recommendation 5 of the Report);
- (b) a reference to parents includes adoptive parents, step-parents and parents of a child who are not married to each other;
- (c) a country or territory means a country or territory that has its own system of law (the concept is also referred to by some legal writers as a law district).

3. Part 2 (comprising clauses 3 to 13) contains the rules for determining the domicile of an individual.

4. Clause 3 sets out the general rules as to domicile: that every individual has a domicile, that no individual has, at the same time and for the same purpose, more than one domicile, and that where an individual's domicile is in issue before any court in Hong Kong, the issue is to be determined by the law of Hong Kong. This clause implements recommendation 14(b) of the Report.

5. Clause 4 implements recommendation 4 of the Report—

- (a) by providing that a child is domiciled in the country or territory with which he is most closely connected;
- (b) by introducing 2 rebuttable presumptions to assist in the determination of the country or territory with which a child is most closely connected, that is to say—
  - (i) where the child's parents are domiciled in the same country or territory and the child has his home with either or both of them, it shall be presumed, unless the contrary is proved, that the child is most closely connected with that country or territory; and
  - (ii) where the child's parents are not domiciled in the same country or territory and the child has his home with one of them, but not with the other, it shall be presumed, unless the contrary is proved, that the child is most closely connected with the country or territory in which the parent with whom he has his home is domiciled.

6. Under clause 5(1), an individual will retain his last childhood domicile on becoming an adult (i.e. on reaching the age of 18), unless he acquires a new domicile. Two requirements are set out in clause 5(2) for the acquisition of a new domicile by an adult, namely—

- (a) he is present in another country or territory; and
- (b) he intends to make a home in that country or territory for an indefinite period.

Clause 5 implements recommendations 6(a) and 7 of the Report.

7. Clauses 6 and 7 implement recommendation 6(b) and (c) of the Report. Clause 6(1) sets out the general rule that lawful presence in Hong Kong is required for an adult to acquire a domicile in Hong Kong. Clause 6(2) states that an adult's presence in Hong Kong is to be presumed to be lawful unless the contrary is proved. Under clause 6(3), in exceptional circumstances where strict adherence to the general rule would result in injustice, an adult may acquire a domicile in Hong Kong even when his presence in Hong Kong is unlawful. Clause 7 provides that, in deciding whether an adult acquires a domicile in a country or territory other than Hong Kong, one of the factors to be considered is whether his presence in that country or territory is lawful by the law of that country or territory.

8. Clause 8 implements recommendation 10 of the Report and provides that an adult who lacks the capacity to form the intention necessary for acquiring a new domicile is domiciled in the country or territory with which he is most closely connected. The reference to an adult who lacks that capacity covers an adult who lacks the capacity for whatever cause, and includes an adult who is in a comatose, vegetative or semi-vegetative state.

9. Clause 9 provides for continuity of domicile. This together with the abolition of the doctrine of revival of domicile of origin (see paragraph 12(b) below) implements recommendation 8 of the Report.

10. Clause 10 makes special provisions for the acquisition of a domicile in a country comprising 2 or more territories. This implements recommendation 12 of the Report by providing that an adult who is present in a country comprising 2 or more territories and intends to make a home somewhere in that country for an indefinite period, but has not formed an intention to make a home in any particular territory in that country, will be domiciled in whichever of the constituent territories with which he is most closely connected.

11. Clause 11 implements recommendation 11 of the Report and provides that the normal civil standard of proof on a balance of probabilities applies in proving any fact for the purposes of the new law, if enacted.

12. Clauses 12 and 13 implement recommendation 13 of the Report—

- (a) The rules in clauses 3 to 11 do not apply in determining the domicile that an individual had before the commencement date of the Bill as enacted.
- (b) In determining the domicile that an individual has on or after the commencement date of the Bill as enacted, the rules in clauses 3 to 11 apply as if they had always been in force, in place of the rules of common law for determining the domicile of an individual that are inconsistent with this Bill and the enactment repealed by clause 14. In particular, the common law rules on the domicile of origin and the domicile of dependency of children (which rules differentiate between children born in or out of wedlock), the common law rules on the domicile of dependency of married women, the acquisition of the domicile of choice (based on residence and intention of permanent residence) and the revival of domicile of origin as well as the common law rule that a mentally incapacitated adult retains his domicile immediately before incapacitation are abolished (recommendations 2, 3, 8 and 9 of the Report). The rule that the standard of proof required to prove that an individual's domicile

changes from a domicile of origin to a domicile of choice is more onerous than that required to prove a change from a domicile of choice to another will also be discarded, as the normal civil standard of proof will apply under clause 11.

13. Part 3 (comprising clauses 14 and 15) contains consequential amendments to the Matrimonial Causes Ordinance (Cap. 179) (“that Ordinance”)—

- (a) Section 11C(2) of that Ordinance allows a married woman to have her own independent domicile for certain limited purposes (e.g., the jurisdiction of court in respect of divorce, nullity, judicial separation). This provision is an exception to the common law rule of domicile of dependency of a married woman. With the abolition of that rule, that provision will no longer be necessary. Therefore, clause 14 repeals that section 11C(2).
- (b) Under section 59 of that Ordinance, a divorce or legal separation obtained in, or is recognized as valid in, the country of a married couple’s domicile is recognized as valid in Hong Kong. With the abolition of the domicile of dependency of a married woman, the husband and the wife may have different domiciles. Clause 15, therefore, amends that section 59 so that a divorce or legal separation obtained in, or is recognized as valid in, the country of either spouse’s domicile is recognized as valid in Hong Kong.