Radcliffe Chambers

WHO TAKES THE MOVABLES?

Some problems of domicile and intestacy

Kate Selway

Radcliffe Chambers
11 New Square, Lincoln's Inn
London WC2A 3QB
clerks@radcliffechambers.com

Tel 020 7831 0081
Fax 020 7405 2560
DX 319 London
www.radcliffechambers.com

Establishing the domicile of a deceased

- ***Why is it important?***

- to determine the validity of the will (if any)
- to determine the right to a grant of representation
- to determine whether the I(PFD)A 1975 applies
- to determine what part of the estate is liable to IHT
- the law of a testator's domicile governs the foreign movable assets of his estate for the purposes of succession & enjoyment
- (foreign immovable property is governed by the *lex situs* – the law of the country in which the immovable property is situated)

Introducing Mrs Kemp …

- born in the UK, April 1944 to British parents
- married Mr Kemp in the UK in 1992; no children
- soon after marrying they went to live in South Africa
- they remained there until Mrs Kemp's death in 2015
- Mrs Kemp executed a home-made will in South Africa in Feb 2009, but had instructed SA attorneys to prepare wills dealing with separately with her English and SA estates
- the will benefitted Mr Kemp and Mrs Kemp's sister's children
- Mr Kemp died intestate in 2017 survived by his children from a previous marriage

Mrs Kemp's estate

- **In the UK:-**
- an investment portfolio in the UK worth c. £500,000
- an interest in her late mother's estate worth c. £70,000
- cash in a Lloyds TSB account of just under £9,000

- **In South Africa:-**
- the substantial matrimonial home in Leopard Creek
- someshares
- a car
- £10k (in SA rand) in a bank account

Establishing domicile

- ***Is there a conflict of laws problem?***
- Does South African law apply the same principles as English law in determining a person's domicile?
- As it happens yes, but if each jurisdiction applies different principles and a different result is produced then this may give rise to a difficult conflict of laws point
- Eg under English law a person may lose their domicile of origin and acquire a domicile of choice in a foreign state, but under the law of that foreign state the person's activities may not have been sufficient to acquire that foreign domicile
- *Re Annesley* [1926] Ch 692

English Law: principles of domicile

- ***Domicile of origin, domicile of dependency, domicile of choice***
- If a person has his home in the country of his domicile of origin, he continues to be domiciled there until he acquires a domicile of choice in another country
- If he acquires such a domicile of choice he retains it until he abandons it. Upon such abandonment, he may acquire a new domicile of choice. If he does not, his domicile of origin revives
- The notion which lies at the root of domicile is permanent home
- In order to acquire a domicile of choice in a country a person must intend to reside in it permanently or indefinitely
- "*It must be a residence fixed not for a limited period or particular purpose, but general and indefinite in its future contemplation*" *Udny-v-Udny* (1869) LR 1 Sc & Div 441 at 458
- *Re Fuld* [1968] P 675
- *Agulian-v-Cyganik* [2006] EWCA Civ 129

Evidence of the acquisition of a domicile of choice

- Most disputes on domicile turn on the question of whether the necessary intention accompanied the residence. This question often involves very complex and intricate issues of fact.

- *Drevon-v-Drevon* (1864) 34 LJ Ch 129 at 133:

  > *"There is no act, no circumstance in a man's life, however trivial it may be in itself, which ought to be left out of consideration in trying the question whether there was an intention to change the domicile."*

- See HMRC's *Residence Domicile & Remittance Basis Manual* at RDRM23080 for a detailed checklist of questions and documents

Mrs Kemp's domicile

- If Mrs Kemp retained her domicile of origin (England) then her worldwide movable property will be governed by English law, while her immovable property will be governed by the *lex situs*, i.e. South African law (subject to the effect on Mrs Kemp's estate of any decision in the South African courts as to whether or not Mr and Mrs Kemp's marriage was "in community of property")
- If Mrs Kemp died domiciled in SA, a grant of probate will nonetheless be required in England so that the sizeable English estate can be administered. Once a grant has been obtained in SA it may be resealed in this country as a "colonial" grant under the Colonial Probates Acts 1982, 1927 under the authority of the South Africa Act 1962
- Procedure dealt with by Rule 39 NCPR, or if probate in SA has not yet been obtained, apply for an ancillary grant under Rule 30 NCPR

Questions to ask Mrs Kemp's PR

- Where would she stay in the UK?
- What family did she have in the UK?
- How often would she speak to her UK financial adviser; where would meetings take place and how often?
- When did she first buy a house in South Africa?
- What were her hobbies and social habits?
- How involved was she in her local community in South Africa?
- What was the nature of her employment, if any, both before and after her marriage?
- Did she have any business interests in South Africa?
- What nationality was her husband?
- Where did her husband's family come from and what links were maintained with them?
- Did she ever speak of coming back to the UK to live; if so on what terms?
- Alternatively, did she ever express any views on the permanency or otherwise of her residence in South Africa?

Mr Lammidge

- ***How does John Lammidge's worldwide immovable and movable estate devolve?***
- John Lammidge died intestate in January 2009 aged 48
- He was domiciled and resident in New South Wales; having moved there from the UK at aged 19; he had a career as a stockbroker
- His parents and his uncle pre-deceased him; he was an only child, never married and had no children
- His only surviving relatives are his two English cousins Felicity and Henry
- Mr Lammidge had a house in New South Wales and cash in an Australian bank account
- He had movable property in England consisting of various shareholdings valued at c. £250,000 at the date of his death

New South Wales succession law

- Under NSW succession law, as it applied at the date of Mr Lammidge's death in January 2009, Mr Lammidge died without leaving any qualifying heirs and therefore his estate passed to the State of New South Wales as *bona vacantia*.
- This was, until 2nd March 2010, the effect of s. 61B(2) to (7) of the Probate and Administration Act 1898. Cousins were not included in the class of entitled beneficiaries listed in the various subsections of s. 61B, with the effect that

  > *"In default of any person taking an interest under subsections (2) to (6), the estate shall belong to the Crown as bona vacantia, and in place of any right to escheat."* (s.61B(7))

- Had Mr Lammidge died on or after 3rd March 2010, however, his two cousins would have been entitled to his estate, by reason of the amendments made to the Probate and Administration Act 1898 by the Succession Amendment (Intestacy) Act 2009
- This has long been the position under English law, of course: cousins are entitled on intestacy in accordance with the provisions of s. 46(1) and s. 47 of the Administration of Estates Act 1925

Devolution of Mr Lammidge's estate

- Intestate succession to immovables is governed by the *lex situs.* (This is the position under both English and New South Wales law.)
- Accordingly, Mr Lammidge's immovable estate in Australia devolves, in accordance with s. 61B(7) of the Probate and Administration Act 1898, upon the State of New South Wales
- Generally, intestate succession to movables is governed by the law of a deceased's last domicile. This rule was stated by Jenkins LJ in *In the Estate of Maldonaldo (decd.)* [1954] P 223 at 245
- Is this rule applicable to all the movables in Mr Lammidge's estate i.e. both the Australian and the English movables?
- Although the general rule is that intestate succession to movables is governed by the law of a deceased's last domicile, the position is different where the intestate dies without heirs. This issue has been the subject of several important cases.

Who takes the English movables?

- ***In re Barnett's Trusts*** **[1902] 1 Ch 847;**
- ***In the Estate of Musurus, deceased*** **[1936] 2 All ER 1666;**
- ***In the Estate of Maldonaldo (decd.); State of Spain-v-Treasury Solicitor*** **[1954] P 223.**

- All three of cases concerned movable property in England where the intestate deceased had died domiciled abroad (in Austria, Turkey and Spain respectively). In order to answer the question "who is entitled to the English movables?" in cases of this type, the crucial distinction is whether, under the law of the foreign domicile, the foreign state succeeds to the intestate's estate **as the heir**, or whether the foreign state becomes entitled to it **because there is no heir**

In re Barnett's Trusts [1902] 1 Ch 847

- An Austrian citizen, who was entitled to a fund in court in this country, died domiciled in Vienna, intestate and without heirs
- Under Austrian law, his property was confiscated as "heirless property" by the fiscus, represented by the Austrian Finance Minister
- The right of the Austrian State, therefore, was not a right of succession, but a right to confiscate property to which there was no heir
- The English Court held that in those circumstances the Austrian State was not entitled to the English movable estate (i.e. the fund in court), but that it passed to the English Crown, by the law of England, as *bona vacantia*

In the Estate of Musurus, deceased [1936] 2 All ER 1666

- The position was similar in the *Musurus* case where it was held that the authority by which the Turkish government claimed the intestate's personal property in England was, in substance, the same as that by which the British Crown claimed in the absence of any heirs. In those circumstances, the judge said (at p. 1669):-

> *"I regard in effect the claim by which the old Turkish government of that date would have had as being a regalian claim* [to the English movables]. *In those circumstances it does not prevail against the corresponding claim of the Crown in this country"*

In the Estate of Maldonaldo (decd.); State of Spain-v-Treasury Solicitor [1954] P 223.

- The same principle was followed in the later *Maldonado* case, **although the outcome was different**, since in this case the Spanish State took as "ultimus heres" and as a true successor and was not seeking to exercise its paramount authority as a sovereign state to confiscate ownerless property.

- The relevant article in the Spanish Civil Code was in the following terms:-

  "In default of persons having the right to inherit in accordance with the provisions of the foregoing section the state shall inherit …"

Returning to Mr Lammidge …

- Did the State of New South Wales succeed to Mr Lammidge's estate **as his heir**, or did it become entitled to his estate **in default of there being an heir**?
- The answer lies in the relevant NSW legislation (which, unsurprisingly, closely resembles the corresponding position in English Law under s.46 of the Administration of Estates Act 1925). Section 61B(7) of the Probate and Administration Act 1898:

  > *"In default of any person taking an interest under subsections (2) to (6), the estate shall belong to the Crown as bona vacantia, and in place of any right to escheat."* (s.61B(7))

- In this subsection it is stated that the estate shall belong to the Crown (i.e. the State of New South Wales) as "*bona vacantia*" i.e. ownerless goods, and that this right is in lieu of the Crown's former right to succeed to heirless property under the old feudal right of escheat. This feudal right was the right of the lord of the manor to succeed to property where the tenant of a fief had died without heirs.

… contd

- The right of the State of New South Wales under this subsection is a right to take the intestate's estate **because there is no heir**. The State of New South Wales is not itself an heir, nor does the subsection make it an heir.
- Accordingly the Estate of NSW is not entitled to the English movables
- ***So who has the better right?*** The Solicitor for the Affairs of Her Majesty's Treasury (on behalf of the English Crown) or the cousins Felicity & Henry?
- The contest would appear to be between these two competing arguments: (1) whether the *lex situs* applies to the English movables in these circumstances, thus entitling Felicity and Henry to the English movables, or (2) whether the English Crown has the better entitlement because it claims under a regalian right (*jus regale*) rather than the *lex situs*.
- In the absence of any decided authority, this is a difficult question to answer. In the *Maldonado* case, the Court held that the English Crown stepped in to exercise a "prerogative right" but in that case there were no competing claims from next-of-kin who would have been entitled under English law.
- *Dicey* suggests (para. 27-013) the Crown would still take, but when asked, the BVD stated that it did not intend to make a claim to the estate, leaving the way clear for Felicity to seek letters of administration under Rule 30(1)(c) NCPR so she could administer Mr Lammidge's English estate for the benefit of herself and her brother.

List of authorities

- ***Re Annesley*** **[1926] Ch 692**
- ***Udny-v-Udny*** **(1869) LR 1 Sc & Div 441 at 458**
- ***Re Fuld*** **[1968] P 675**
- ***Agulian-v-Cyganik*** **[2006] EWCA Civ 129**
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LONDON
WC2A 3QB
+44 (0)20 7831 0081
+44 (0)20 7405 2560 (fax)
www.radcliffechambers.com
kselway@radcliffechambers.com