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IN CHAMBERS AS OPEN COURT  
IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: D11/06

6.3.07

BETWEEN:

DARREL HINES

Petitioner

AND:

ESTHER HASSETT

Respondent

BEFORE: The Honourable Madam Justice Levers

APPEARANCES:

Counsel for the petitioner: Mr. A. Akiwumi of Stuarts Walker Hersant

Counsel for the respondent: Ms. S. Brooks of Brooks & Books

HEARD: 14<sup>th</sup> to 15<sup>th</sup> February and 2<sup>nd</sup> March 2007

RULING



Levers, J.

The Summons before the Court is to strike out/dismiss the Amended Petition  
filed by the Petitioner, Darrel Hines on the basis that the Court has no  
jurisdiction to hear the matter.



1 It is alleged by the Respondent that the Petitioner is not domiciled in this  
2 country and that therefore the Court has no jurisdiction to hear the Petition.

3

4 During the course of arguments counsel for the Respondent conceded the  
5 preliminary objection taken by her as to jurisdiction. The Court then  
6 proceeded to hear the Petition. As it transpired that in this jurisdiction the  
7 authorities on this question of domicile were very few, counsel requested the  
8 Court to write a judgment.

9

#### 10 The Facts

11

12 On 29<sup>th</sup> January, 2001, in London, the Petitioner was lawfully married to the  
13 Respondent. At the time, the Petitioner was a bachelor and the Respondent  
14 was a spinster.

15

16 Both parties purchased properties in London and Ireland respectively. The  
17 Petitioner bought a home into the marriage, in which his mother presently  
18 lives, the mortgage for which for sometime was serviced from their joint  
19 incomes The other two properties, one in London and one in Ireland were

1 purchased during the marriage and are rental producing investment  
2 properties bringing in an income to both parties.

3

4 The parties subsequently decided to come to live in Cayman after visiting  
5 the island on a vacation. The Petitioner works for an IT company and the  
6 Respondent is employed as an office manager. The marriage has broken  
7 down, and a Petition has been filed by the husband on the basis that that the  
8 marriage has broken down irretrievably giving some particulars with which  
9 the Respondent does not agree. She alleges that the reason for the  
10 breakdown is the Petitioner's adultery.

11

12 For purposes of this judgment, the central issue is the question of domicile.

13 As I stated previously, it is submitted by the Petitioner that this Court has  
14 jurisdiction to hear the case, as he is domiciled and has residence in these  
15 islands, and that he has every intention of continuing to reside here.

16

17 The Petitioner was born in Kenya and subsequently went to boarding school  
18 in the United Kingdom, as most children of English origin born in Africa do.

19 The Petitioner subsequently moved with his mother to the United Kingdom  
20 where they purchased a house in 1992 in which his mother now lives. The

1 Respondent and he traveled the world having finished his education in  
2 England and then got married to the Petitioner in 2001.  
3  
4 He lived and worked for a few years in London and then migrated to the  
5 Cayman Islands in 2004. It is true to say that the Petitioner's domicile till he  
6 moved with his mother to London was Kenya and he says that it is  
7 questionable as to whether his domicile was ever London. It would appear  
8 that he studied in London and worked for a few years but unlike the  
9 Respondent who was positive in her assertion that United Kingdom was her  
10 country of domicile and that she would want to own property there, the  
11 Petitioner was not so positive.

12

13 The question this Court has to decide on the facts of this case is whether  
14 under Section 5 of the Matrimonial Causes Law (2005 Revision), the Court  
15 has jurisdiction to entertain a suit for the dissolution of this marriage.

16

17 **The Law**

18

19 Section 5 of the Matrimonial Causes Law (2005 Revision) reads:

1           “The Court has jurisdiction to entertain a suit  
2 arising out of this Law where, at the time of filing  
3 suit, or at a material time with reference to the suit  
4 and within one year of the presentation of the  
5 petition, either of the parties to the suit was  
6 domiciled in the Islands; or the party filing suit,  
7 being a female, has been ordinarily resident in the  
8 Islands for at least two years immediately  
9 preceding the presentation of the petition.”  
10

11  
12 To come within this provision of the Law, the Petitioner filed affidavits,  
13 witness statements, and gave sworn testimony which was subject to cross-  
14 examination.

15  
16 It is convenient at this stage to examine the meaning of the word “domicile”  
17 in this context. The domicile of a person is in general the place or country  
18 which is in fact his permanent home, or is so deemed by operation of law,  
19 and it is not necessarily determined by his nationality. It is the place or  
20 country in which a person is resident *animo manendi*. The law of the  
21 country of a man’s domicile applies to him. Every person is deemed to have  
22 a domicile. However, no one has more than one domicile at one time. If  
23 this Court held that the Petitioner was domiciled in this country, then clearly  
24 Section 5 of the Matrimonial Law (2005 Revision) would apply to him. He  
25 cannot be domiciled in Cayman and in England at the same time.

1

2 There is a distinction between a domicile of origin and a domicile of choice,  
3 which I will touch upon but need not at this stage.

4

5 A person's domicile of origin is that received by him at birth.

6

7 Any person *sui juris* can acquire a domicile of choice by residence and the  
8 intention of permanent residence. A domicile of choice may be abandoned,  
9 and then the domicile of origin revives until and unless a new domicile of  
10 choice is acquired. In other words, at all times a person must have a  
11 domicile and if there is no other domicile available then the domicile of birth  
12 or origin revives.

13

14 In practically all the leading cases on change of domicile, one finds the same  
15 formula in little varying language by different judges, namely that there  
16 must be a definite purpose to transfer one's permanent home to another  
17 country and that must be a residence in that country. In other words, a new  
18 domicile is acquired when there is an intention that has been carried out, for  
19 example, by actual residence there. A residence in pursuance of the  
20 intention however short will establish a domicile.

1

2 In an instructive judgment Lanton, J. put the point very clearly in

3 *Gulbenkian v Gulbenkian* (1937) 138 L.T. at p50:

4

5           “The intention must be a present intention to reside  
6 permanently, but it does not mean that such  
7 intention must necessarily be irrevocable. It must  
8 be an intention unlimited in period but not  
9 irrevocable in character.”

10

11 That quote, in my view, applies to the Petitioner in this case. Neither  
12 intention by itself or residence by itself is enough to change the domicile of  
13 a person. This is the reason that the Court requires evidence from the  
14 Petitioner.

15

16 In this case, the Petitioner lead evidence to discharge the burden that the  
17 court places on him to establish that it was and is his intention to live  
18 permanently in these islands, and that it is not an unreasonable intention  
19 which can never be carried out or archived.

20

21 The question whether or not a person has acquired a domicile of choice is  
22 not a question of law but of fact and has to be decided by the evidence in

1 each particular case. Proof of intention to change domicile is very important  
2 and must be strong.

3

4 The fact that the foreigner living in any country is liable to be deported  
5 under the Aliens Order or under the Immigration law does not prevent him  
6 from acquiring a domicile of choice in a country. The intention to change  
7 domicile may be evidenced in many ways. Although no general rules can be  
8 laid down as to the method of proof, there are several factors that can be  
9 looked at. There may be a declaration of intention, or supposed change of  
10 domicile in documents such as wills, letters, emails etc; or in the case of a  
11 man or woman who has a residence in the United Kingdom, the fact that  
12 they now live elsewhere and have not gone back to England except for a  
13 short period of time, and have applied for work permits elsewhere  
14 continuously; or where the employer has applied to Immigration for a permit  
15 to say that he is a key employee and should not be sent back under the  
16 Immigration Roll Over Policy; or where parties have purchased a grave in a  
17 country, or a home in the country; or parties have very few ties abroad and  
18 have lived elsewhere continuously for a period of five years are all examples  
19 of evidence that the Court can take into account.

20

1 In Le Mesurier v Le Mesurier [1895] AC 517, the Judicial Committee of the  
2 Privy Council held that the only true test of jurisdiction to decree a divorce  
3 is the domicile for the time being of the marriage pair.

4  
5 In Lord v Colvin [1859] 28 LJ Ch 361, Sir Richard Kindersley, VC said:

6 “I would venture to suggest that the definition of  
7 an acquired domicile might stand thus: ‘that place is  
8 properly the domicile of a person in which he has  
9 voluntarily fixed the habitation of himself and his  
10 family, not for a mere special and temporary  
11 purpose, but with a present intention of making it  
12 his permanent home, unless and until something  
13 (which is unexpected or the happening of which is  
14 uncertain) shall occur to induce him to adopt some  
15 other permanent home.’”

16  
17 The Respondent’s attorney placed great emphasis on the case of Hawks v  
18 Hawks, [1996] CILR at page 317. The petitioner in that case was Canadian  
19 and was on a work permit in the Cayman Islands. He had resided here for  
20 four years. He had originally come to the Cayman Islands on a two year  
21 contract on a work permit which was renewable annually, and he and his  
22 wife had given up their Canadian residence, had closed most of their bank  
23 accounts in Canada but retained their home in Toronto.

24

1 In addition, they had bought a home in the Cayman Islands. The assertion  
2 was that although his son would be educated in Canada, he had adopted  
3 Cayman as his home since he had taken all necessary steps to terminate his  
4 Canadian residence. It was held in that case that the petitioner was  
5 domiciled in the Cayman Islands, on the basis of his continued residence in  
6 the Cayman Islands, the sale of his house in Canada and the changing of the  
7 Petitioner's employment to an indefinite period. The Court held that all  
8 those factors were persuasive to show that he had come to regard Cayman as  
9 his home. The test to be satisfied was, "what would satisfy the conscience  
10 of the court." The absence of an alternative jurisdiction in which the parties  
11 could dissolve their marriage did not of itself confer jurisdiction on the court  
12 to hear the petition but was a further justification to the Court to assume  
13 jurisdiction once the domicile of choice had been established.

14  
15 The Respondent's attorney at the time this case commenced did not have the  
16 benefit of the case of *Mark v Mark* (2006, a House of Lords decision (2006)  
17 1 AC 98). Briefly, the case held that the habitual residence was an  
18 expression used in a variety of statutes for a variety of purposes and could  
19 have a different meaning according to the statutory context. Furthermore,  
20 that a person might be habitually resident in more than once place at a time.

1 That the purpose of Section 5(2) of the 1973 Act had been to prove an  
2 answer to the question of whether the parties and their marriage had a  
3 sufficiently close connection to the United Kingdom to make it desirable that  
4 the English courts should have jurisdiction to dissolve the marriage. More  
5 importantly for purpose of the case at hand it held that the residence, for the  
6 purpose of Section 5(2) of the 1973 Act did not need to be lawful residence.  
7 The question of whether the residence was habitual was ultimately a  
8 question of fact, although the legality of a person's residence in England  
9 might possibly be relevant to answering that factual question. That domicile  
10 was a concept of the common law and had to be given the same meaning in  
11 whatever context it arose. The question of whether or not a person had  
12 formed that permanent intention to remain in a country was a question of  
13 fact and not of law, although the legality of a person's presence in England  
14 would be of evidential value.

15  
16 The Court reviewed a number of authorities in *Mark v Mark* (supra) and the  
17 one I view as most relevant to this case is *Szechter v Szechter* [1971] P286,  
18 in which Sir Justice Simon P held, **“that the parties who had been given**  
19 **leave to stay in the United Kingdom for a limited period had acquired a**  
20 **domicil of choice in England, by residing here with the intention of**

1 **making this country their permanent home.”** (Following *Boldrini v*  
2 *Boldrini and Martini* [1932] P 9; and *Cruh v Cruh* [1945] 2 All ER at page  
3 545). He went on that, **“it was immaterial that their intentions were**  
4 **liable to be frustrated by the decision of the Secretary of State for the**  
5 **Home Department as to permission for their continued residence in the**  
6 **United Kingdom.”** Under our law, therefore, a domicile of choice is not  
7 lost if the residence becomes unlawful at some later date.

8  
9 In my opinion, legality is relevant to the question of domicile only to the  
10 extent of whether the person can reasonably intend to reside in a country  
11 with the intention of remaining there indefinitely. It is evidence that the  
12 court can look at. Illegality does not vitiate a person’s intention. Of course  
13 evidence that the person intended to reside somewhere indefinitely despite  
14 the illegality would need to be carefully scrutinized. The question whether a  
15 person is domiciled in the country is not affected one way or the other by the  
16 question of whether he has entered the country legally or illegally. If the  
17 court finds that his intention has been established by credible and reliable  
18 evidence, it would seem contrary to fundamental principles, to decline to  
19 give effect to it by not recognising that the domicile of choice has been

1 acquired even “immediately upon the person’s arrival in that country”. (See  
2 Bell v Kennedy [1968] 1SC & Div 307 at p320)

3

4 It therefore cannot be clearer that the question of illegality goes to the factual  
5 situation and the evidential burden that the Petitioner has to discharge. In  
6 other words, the Petitioner has to satisfy the conscience of the court, that  
7 despite the illegality, it is his intention to make it his permanent home and  
8 that it is his dominate.

9

10 The Respondent’s case was that the Petitioner was only saying that his  
11 domicile was Cayman to get a divorce quickly because of his desire to be  
12 with his paramour. The submissions on behalf of the Respondent were:

- 13 1. That he would be rolled over, in other words sent back if he stayed  
14 after seven years;
- 15 2. That it was not his intention to live here permanently because he still  
16 had his home in England;
- 17 3. That he had no ties with this country;
- 18 4. That he had not purchased a home in this country;
- 19 5. That he has made no application for permanent residency;
- 20 6. That his contract of employment is not indefinite;
- 21 7. And that he has not shown any links with the community;
- 22 8. That he has not terminated his relationship with the United Kingdom.

1

2 But the question of illegality now is irrelevant in view of the authorities  
3 previously cited. When it comes to domicile there is no need to have a  
4 guarantee of permanency of residence from the Immigration Department  
5 at the time of applying for a divorce, if there is evidence of intention to  
6 reside permanently and to adopt a country of residence as one's domicile.

7 On a careful reading of Hawks v Hawks (supra), this does not appear to  
8 have been accepted. And, if any authority in this jurisdiction makes  
9 legality of residence a prerequisite to acquiring a domicile of choice that  
10 must no longer be good law.

11

12 The definition of domicile under our law is that it has the meaning  
13 ascribed to it from time to time in English law. As it was held in Mark v  
14 Mark, the fact of illegality does not vitiate the ability of the *propositus* to  
15 have a domicile of choice.

16

17 It is my view that the English law requires only that the intention be *bone*  
18 *fide* in the sense of being genuine and not pretended for some other  
19 purpose such as getting a divorce to which one would not be entitled by  
20 the law of the true domicile. The Petitioner in this case gave sworn

1 evidence which was subject to cross-examination and filed evidence to  
2 show that his intentions were genuine. That evidence came from two  
3 persons who knew him. He called his employer to say that he had  
4 applied for a work permit for the last four years and had renewed his  
5 work permit application for the Petitioner for another year and that he has  
6 every intention of renewing it further. In fact that he had asked for the  
7 employee to be a key employee so he could be not rolled over, and sent  
8 back home after seven years. I was impressed with the Petitioner's  
9 evidence. His only connection with England seems to be the investment  
10 property and his mother. It is not unusual to have persons of English  
11 origin wishing to have some form of investment in England despite the  
12 intention to remain and make the Cayman Islands their permanent home.  
13 Many expatriates send their children to England and it is not unusual to  
14 have an investment in England to have another income. Furthermore, the  
15 fact that the Petitioner's family is in England cannot be the basis for the  
16 assertion that he has the intention of being domiciled in the United  
17 Kingdom. Mr. Akiwumi persuasively makes the following points:

18 (1) That the Petitioner is resident in the Cayman Islands and  
19 has been so for six years;

20 (2) The choice of residence was freely made;

- 1 (3) He remained in the Cayman Islands after hurricane Ivan  
2 and his commitment to the local community is clear from  
3 the witness statement of Christopher Hew;
- 4 (4) That he has long professional relationship with his  
5 employer;
- 6 (5) He has excellent career prospects with his employer;
- 7 (6) He has made declarations of his intentions to remain in  
8 the Cayman Islands to various friends, especially  
9 Christopher Hew and his employer who have both filed  
10 affidavits;
- 11 (7) That the properties owned in the United Kingdom and  
12 Ireland respectively are investment properties and that his  
13 failure to purchase property in the Cayman Islands is not  
14 because a lack of desire but simply because he gave his  
15 wife the option of buying some property in Ireland and as  
16 a result, his finances are limited; and
- 17 (8) That he has not returned to the United Kingdom at all,  
18 since November 2004.

19

20 All these various items listed above are not by themselves persuasive but  
21 accumulatively they have persuaded this court that in fact the Petitioner  
22 has every intention of being domiciled in the Cayman Islands. As I said  
23 previously, the Respondent conceded the question of domicile but for  
24 purposes of future reference this judgment was undertaken.

25

1 The Court holds that based on the evidence and on the very strong  
2 authority of Mark v Mark (supra), this Petitioner was domiciled in the  
3 Cayman Islands and that the Court has jurisdiction to hear the petition.  
4

5 I wish at this stage to thank both counsel, Mr. Akiwumi for his clear and  
6 concise submissions and his diligence in finding Mark v Mark (supra) for  
7 the Court; and Mrs. Brooks for very properly conceding the preliminary  
8 point of jurisdiction once she had learnt of the case of Mark v Mark.  
9

10 Costs

11  
12 All costs relating to this application as to the question of domicile to the  
13 Petitioner to be agreed or taxed and to be paid forthwith.  
14

15 Dated this 6<sup>th</sup> day of March, 2007

16  
17 

18 Judge of the Grand Court

