30.10.96

IN OPEN COURT

IN THE GRAND COURT OF THE CAYMAN ISLANDS

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. D 4 OF 1996

BETWEEN:	ROBERT SCOTT HAWKES	PETITIONER
AND:	BELINDA-JANE HAWKES	RESPONDENT

Mrs. A. Hernandez for the Petitioner
Mr. Pierre Lamontagne Q.C.
instructed by Mrs. E. Nervik for the Respondent

BEFORE DOUGLAS, J

RULING

As required by Section 5 of the Matrimonial Causes Law (Law 9 of 1971) the Petitioner, in paragraph 5 of his divorce petition dated and filed on 24th January 1996 states that he is domiciled in the Cayman Islands since 1990.

Paragraph one of the Respondent's answer is as follows:

> "As to paragraph 3 of the petition the Respondent states that the Court does not have jurisdiction in hearing this petition as is being alleged by the Petitioner because the Petitioner is not domiciled in the Cayman Islands. The Petitioner came to Cayman after being given a job in Canada to work at Caribbean Utilities Company in the Cayman Islands. His employment is purely contractual and subject to a work permit."

The above paragraph states succinctly the Respondent's challenge to

the Petitioner's claim to domicile, and accordingly to the Courts jurisdiction in this matter.

I find no record of a Petitioner's assertion of domicile ever before being challenged in this jurisdiction. Indeed, our local authorities do not seem to contain any such issue relating to divorce and matrimonial causes. Proof of domicile by a male petitioner is required by virtue of Section 5 (ibid) which provides as follows:

> "The Court has jurisdiction to entertain a suit arising out of this Law where at the time of the filing or at a material time with reference to the suit and within one year of the presentation of the petition either of the parties was domiciled in the Islands or the party filing the suit being a female, has been ordinarily resident on the Islands for at least two years immediately preceding the presentation."

In recent years a number of expatriate males have filed for divorce in this jurisdiction, and it appears that their claim of domicile has been accepted without challenge. However this Petitioner is now required to prove his domicile beyond the mere statement contained in paragraph 3 of his petition to wit, that he is domiciled in the Cayman Islands since 1990 and owns property in the Islands.

The evidence adduced in order to prove his domicile of choice came from the Petitioner himself and, in substance, could apply to many hundreds of expatriates now living and working in the Cayman Islands. His testimony shows that in 1990 he accepted a job with the Caribbean Utilities Company and as a result, came to the Islands with his wife and a young child. According to him they basically decided that this

was going to be their home and he therefore gave up his resident membership, closed his bank accounts and did all the things required when moving from one country to another for an indefinite period of time. However they retained their home in Toronto which was not sold until 1995. In 1993 the parties purchased a house in Bodden Town, Grand Cayman which is registered in both their names, as joint tenants. The Petitioner further testified that he has played an active role in the community, starting the Boys Scouts sailing programme, and also represented the Cayman Islands in offshore sailing competitions. He denied having any ties with Canada except that his parents, whom he visits once a year, still live there, and that he is also required to visit Canada fairly regularly on the job. Under cross-examination the Petitioner admitted that he has not applied for residency in the Cayman Islands although he intends to do so, that he intends to send a son to Boarding School in Canada and that until 1995 he was here on an annually renewable work permit. He denied ever considering going to work in the Turks and Caicos Islands, but admitted that if his work permit were not renewed he will probably go to another Caribbean country. Finally, he admitted giving up his last bank account in Canada earlier this year at about the same time he was about to file his petition for divorce.

In challenging the Courts jurisdiction the Respondent placed the burden of proving his domicil squarely on the shoulders of the Petitioner.

Domicil was defined by Sir. Jocelyn Simon P. in the case of Henderson

v. Henderson reported at (1965) 1 All.ER. p. 184 as "that legal relationship between a person (called the propositus) and a territory subject to a distinctive legal system which invokes the system as the personal law of the propositus and involves the Courts of that territory in having primary jurisdiction to dissolve his marriage."

It is a well established principle of law that there are two forms of domicile, namely domicile of origin and domicile of choice. It was held in the case of **Re. Fuld reported at (1968) Probate** p. 675, that to establish the abandonment of a domicile of origin and the acquisition of a domicil of choice the standard of proof required was such as would satisfy the conscience of the Court. I have deliberately selected this standard over those which are more commonly utilised, such as "beyond reasonable doubt", and "to the balance of probability". It can be argued, that satisfying the conscience of the court encompasses both these standards. Perhaps this is exactly what makes it more acceptable, and hence more desirable as the standard of proof to be applied in matrimonial matters.

A great number of cases have been cited and placed before this court, many of which were decided in the English Courts during the 19th Century and deal with domicil as relating, for the most part to probate. However, all the cases cited illustrate one common principle, and that is in order to prove domicile there must be residence accompanied by an animus manendi i.e. an intention on the part of the person to make the new country his permanent home. I find that these numerous authorities together tend to obfuscate the actual

standard of proof required in an issue such as is now before this Court. It is difficult to draw an analogy between proving the domicil of a deceased alien who had spent his last years in England during the 19th century, and a Canadian coming to live in the warm and tax free environment of the Cayman Islands, particularly one who has stated that he intends to make these Islands his home. Certainly the burden of proof cannot be the same. As Lord Macnaghten said in the **re Winan,** a case reported at (1904-7) ALL. E.R. at 410. You must look very narrowly into the nature of the residence suggested as a domicil of choice before you deprive a man of his native domicil. It can also be seen that in Winan, the propositus was already deceased and in no position to express his intention. It was therefore left to the Court to determine, on the evidence before, it whether Winan intended to make England his permanent home. It is likely that with the large number of immigrants residing in England today Winan may have been decided differently.

The evidence on which the Court is required to determine the domicile of this Petitioner is solely based on his own testimony. It is submitted by Mr. Pierre Lamontagne Q.C. for the Respondent, that the Petitioner is himself a lawyer and this ought to alert the Court to examine more closely his actions, rather than his mere words. It is not for the Court to determine the veracity of a witness by the nature of his employment. The Court is cognisant of the principle that in order to constitute a domicil of choice there must be both an animus manendi coupled with residence. Residence in a place raises a strong presumption of intention permanently to remain there. (See **Gulbenkian**

v. Gulbenkian) (1937) 4 ALl. E.R. 618. The mere declaration by the Petitioner that when he accepted the job he decided that Cayman was going to be his home, and his subsequent move to Cayman does not, in this instance, without further evidence, constitute a change of domicile. I do not find that the steps taken on his departure from Ontario illustrated a clear intent to change domicil, but merely steps which a prudent man, particularly a lawyer, would have taken to ensure that his name did not remain on the tax roll of his domicil of origin. The sale of his matrimonial home at that time would have been of some significance in determining the Petitioner's animus manendi, but the home was not sold until some years later.

At the time of his arrival in the Cayman Islands Mr. Hawkes was not only subject to a contract of a limited duration, one for a two year peiod, but also to a year to year work permit. It is submitted that in this regard he could not have formed an intention to remain in the country permanently. Here the case of **Udney v. Udney** reported at (1869) L.R. 441 is of relevance. In that matter Lord Westbury said, I quote:

> "The residence for the purpose must be residence fixed not for a limited period or particular purpose, but general and indefinite in its future contemplation."

It is therefore not difficult to see that this petitioner's claim to domicile as from his arrival in 1990 is not a valid one. What however is of relevance is his status at the time of filing of the petition. Although Mr. Hawkes was still subject to an annual work permit at the

conclusion of his first contract, the terms of his employment became indefinite, no longer being of a fixed period of time. It has been contended that because of the permissive nature of his stay any presumption of domicile is precluded. In Zanelli v. Zanelli, a case which appears at paragraph 1130 of the English and Empire Digest Volume 2, 1978, a husband, an Italian national by birth had married and lived with his wife in England. He deserted his wife without warning and returned to Italy. It was held that he had acquired domicil of choice in England after the marriage notwithstanding that he was an alien and that his stay in England was permissive. Similarly, notwithstanding the fact that the Petitioner's stay in Cayman was, and is permissive by nature, he is not precluded from establishing domicile. There is no indication of how long Zanelli lived in England, but there is, in this instance, evidence that at the time of filing his petition Mr. Hawkes had already lived in this jurisdiction for five years. In addition, there were two events which coupled with all the other circumstances of this case, clearly manifested his animus manendi. Firstly in 1993 he acquired a house in the Cayman Islands. Secondly in 1995 he sold his house in Ontario. The evidence of an active role in the community also supports his contention that he had made these Islands his home and intended to remain.

Summarising the situation we can see that at the time of the filing of the petition Mr. Hawkes had moved himself and his family from Ontario to the Cayman Islands, had been a resident in the Islands for a period of over five years during which time he purchased a house in Grand

Cayman and sold his house in Canada. It can readily be seen that there is little difference between the circumstances of this case and that of May v. May reported in (1943) 3 ALL.E.R. 146 where it was held that:-

> "There was evidence of an animus manendi which, coupled with the fact of nearly 4 years' residence, was sufficient to establish the petitioner's domicil in England. Where the intention to reside is established, the fact that the petitioner as an alien is liable to be deported at any time, does not prevent the acquisition of a domicil of choice."

It has been contended that the standard of proof required has not been met, that there has been no independent witness to substantiate or support the petitioner's animus manendi. This matter must be distinguished from the case of Stone v. Stone, reported at (1959) 1 ALL.E.R. 194 in which the husband's domicil of origin was the United States. He went to England in 1944, thereafter joined the U.S. Army and between then and 1957 moved from country to country but spent all his leave in England. In 1957, while on leave in England, and one year before the decision regarding his domicil was heard, he decided to remain in England for the rest of his life. In order for him to prove domicile three witnesses to whom he spoken of his determination were called. When one reviews the circumstances of the Stone case it is easy to distinguish it from the matter before this court. In that case the petitioner could make no claim to residence for any satisfactory period of time. Without the testimony of the three witnesses there was nothing to establish that he had a fixed and

determined purpose and intention to make England his alleged new domicil his permanent home. In the present case, apart from six years of residence, Mr. Hawkes has adduced an preponderance of evidence to support his declared intent to abandon his domicil of origin and to establish himself and his family in Cayman Islands. Dicey and Morris on the Conflict of Laws, Twelfth Edition at page 131 supplies some helpful illustrations on the acquisition of a domicil of choice. All bear similarity to this matter. In White v. Tennant, a 19th century case D, who is domiciled in England determines to settle in Queensland. He sells his house in England not taking his effects with him, embarks to Queensland. He acquires a domicile in Queensland immediately upon his arrival. Here D had not only sold his house but travelled halfway around the world at a time when travel was slow and the majority of people going from England to Australia were considered emigrants. Accordingly, it was not difficult for him to establish a domicile of choice in Australia on his arrival. In another, that of Doucet v. Geoghegan reported at (1878) of Ch. D. 441. D, whose domicil of origin is French resides in England. He intends to reside in England for an indefinite time but hopes when he has made his fortune to be able to return to France. He is domiciled in England.

In addition to the testimony of Mr. Hawkes a letter from Epstein, Cole, Barrister of Toronto Ontario has been placed before me. The purpose of this document is to indicate that should this Court make a ruling adverse to Mr. Hawkes, he would be unable to obtain a divorce both here and in Ontario, his domicile of origin and that such a situation would be undesirable. The letter reveals that by the

Divorce Act of Canada, a Federal statute, a Court in a province has jurisdiction to hear and determine a divorce proceeding only where either spouse is ordinarily resident in the province at the commencement of the proceedings, and that since neither Mr. or Mrs. Hawkes is ordinarily resident in Canada there is no province in Canada which could entertain the divorce. This letter, ipso facto, could not vest this court with jurisdiction without proof of domicile. However, as has been submitted, where domicile of choice is established the court should assume jurisdiction otherwise the result would be undesirable.

The evidence adduced has clearly satisfied the conscience of the court as it unequivocally points to the conclusion that the Petitioner intends to remain and is therefore domiciled in the Cayman Islands. As was done in this instance the mere making of the dubious and inconclusive assertion in a petition, that the petitioner is domiciled in the Cayman Islands since 1990 and owns property in the Islands, although providing some of the required elements, does not, ipso facto, constitute sufficient evidence of domicil.

The view has been expressed that considering the number of expatriates now working and residing in the jurisdiction, many of whom are male and may wish to divorce their wives, there ought to be a clear and defined principle regarding the acquisition of a domicil of choice. There can be no change in the definition of domicile, nor in the requirement of a domicile of choice. Residence and an intent to remain will always have to be proved. Where the difference lies is in

the degree of proof required to prove the animus manendi in each individual case. In some instances less evidence is required to satisfy the conscience of the court such as in a case where one arrives in a foreign country in the status of a immigrant. This was obviously the ratio decidendi in the **White v. Tennant** case (ibid). It can be seen that one is far more likely to form an intent to migrate, an animus manendi, when coming from a cold an heavily taxed country into a warm and hospitable tax free environment such as the Cayman Islands, than can be said of most of the propositi in the cases cited.

There are also those who come from similar, but somewhat less affluent countries and settle here for mere financial reasons, with the hope of returning home at some future and indefinite date, if or when they become financially independent. This often vague intent would not be sufficient to preclude them from acquiring a domicile of choice. As Lord Campbell, L.C. said in **Aikman v. Aikman** reported at 4 (1878) 9 Ch. D. 441:

> "If a man is settled in a foreign country, engaged in some permanent pursuit requiring his residence there, a mere intention to return to his native country on a doubtful contingency will not prevent such a residence in a foreign country from putting an end to his domicil of origin."

Hence domicile of choice will always be determined by the residence and the intention to make the new residence a permanent home, notwithstanding that it may be for an indefinite period. The fact

that Mr. Hawkes may, at some indefinite time in the future, accept a job if offered in the Turks and Caicos Islands or elsewhere, does not in any way affect his present domicile of choice.

As I have already indicated, I am satisfied that the Petitioner has acquired a domicil of choice in the Cayman Islands and accordingly this Court has jurisdiction in this matter.

Dated 30th October 1996

K. Douglas
Judge of the Grand Court