

LAW REFORM COMMISSION OF BRITISH COLUMBIA

ANNUAL REPORT 1985/86

LRC 86

The Law Reform Commission of British Columbia was established by the *Law Reform Commission Act* in 1969 and began functioning in 1970.

The Commissioners are:

ARTHUR L. CLOSE, *Chairman*

MARY V. NEWBURY, *Commissioner*

LAYMAN R. ROBINSON, Q.C. *Commissioner*

Thomas G. Anderson is Counsel to the Commission.

Allan J. Perry is Legal Research Officer.

Sharon St. Michael is Secretary to the Commission.

The Commission offices are located on the
6th Floor, Chancery Place
865 Hornby St.
Vancouver, B.C.
V6Z 2A4

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Appendix C

**MINOR REPORT
(LRC 79)**

September 27, 1985

Honourable Brian R.D. Smith, Q.C.
Attorney General
Parliament Buildings
Victoria, B.C. V8V 1X4

Dear Mr. Attorney:

*Re: Minor Report (No. 82):
The Domicile of a Minor*

On April 16th of this year the *Charter of Rights Amendments Act, 1985* (Bill 33), was introduced and given first reading. Among the changes embodied in the Bill was the repeal of the *Married Woman's Property Act* and its replacement by simple and concise provisions respecting the legal position of married persons. They establish that each spouse has a legal personality, separate and distinct from the other spouse. The Law Reform Commission commented

favourably on such an initiative in its Report on Interspousal Immunity in Tort (LRC 62, 1983) and the recommendations made in that Report are implemented by Bill 33.

Among the other matters specifically dealt with in the equality provisions of Bill 33 is the right of a married woman to acquire a legal domicile separate and distinct from that of her husband. This represents an improvement over the former law under which a married woman acquired and retained the domicile of her husband. This “domicile of dependency” subsisted even where husband and wife had separated and no longer lived in the same jurisdiction.

There is, however, another aspect of the domicile of dependency on which Bill 33 is silent. This concerns the domicile of a minor. At common law, the domicile of a minor is that of his or her father.

The impact of Bill 33 on the rules for determining the domicile of a minor are uncertain. On one view, the child*s domicile of dependency remains untouched by the Bill and we retain a legal rule under which the status of a person is arbitrarily determined with reference to sex. This would be clearly anomalous in the light of other provisions of Bill 33 aimed at attaining equality of the sexes under law.

On the other hand it might be argued that the child*s domicile of dependency was intimately linked to its mother*s domicile of dependency and with the abrogation of the latter the rules for determining the domicile of a minor have now changed. The difficulty with this view is that the nature of the change which has been wrought is uncertain and there are no rules which might be applied to determine the domicile of a minor.

In the case of a child born out of wedlock, the provisions of Bill 33 concerning child status are also a source of uncertainty so far as domicile is concerned. At common law, the domicile of an illegitimate child was that of the child*s mother. The effect of Bill 33 is to eliminate the legal concept of illegitimacy. The Bill provides that “the person is the child of his natural parents” and that “any distinction between the status of a child born inside marriage and a child born outside marriage is abolished.” Again, it is difficult to state with certainty the effect this will have on the law of domicile. There is a distinct possibility, however, that these provisions will have inadvertently created a domicile of dependency of a child on a father of whom the child has no knowledge and with whom the child has had no contact.

This problem has received consideration in Ontario and legislation has recently been introduced which provides guidelines to be applied in determining the domicile of a minor. On June 4th, the *Family Law Act, 1985* was introduced into the Ontario Legislature and given first reading. Section 69 of the Act provides:

- 69.** The domicile of a person who is a minor is,
- (a) if the minor habitually resides with both parents and the parents have a common domicile, that domicile;
 - (b) if the minor habitually resides with one parent only, the parent*s domicile;

- (c) if the minor resides with another person who has lawful custody of him or her, that person's domicile; or
- (d) if the minor's domicile can not be determined under clause (a), (b) or (c), the jurisdiction with which the minor has the closest connection.

This provision is one which we believe should be adopted in this province. It would meet the concerns described above by providing guidance on a matter rendered uncertain by Bill 33.

It is our recommendation that a provision similar to section 69 be enacted as section 55A of the *Law and Equity Act*. At the time this letter was finalized, Bill 33 had not yet received second reading so the opportunity may exist to implement this recommendation through amendments to it.

This letter is to be taken as a Minor Report (No. 82) of the Law Reform Commission recommending a change in the law as herein set out. This recommendation was approved by the Commission at a meeting on September 26, 1985.

Yours sincerely,
Arthur L. Close
Chairman

ALC/ss