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HOME STATE, CROSS-BORDER CUSTODY, AND HABITUAL RESIDENCE JURISDICTION: TIME FOR A TEMPORAL STANDARD IN INTERNATIONAL FAMILY LAW

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ABSTRACT

This article addresses three jurisdictional standards that arise in every cross-border child custody dispute between European Union Member States and the United States: home state, cross-border, and habitual residence jurisdiction. These jurisdictional standards face uncertainty in many cases.

First, this article provides a history of family law jurisdiction in the United States and thoroughly reviews home state jurisdiction in United States domestic law. While domestic family lawyers know this standard, the standard's rigidity and fragmented application among the states baffle many foreign family lawyers.

Second, this article offers an overview of the remarkable emergence of family law in European Union law, chronicling the history of cross-border jurisdiction as a treaty matter to the present day status of family law jurisdiction under European Union law. This article reviews the recent Court of Justice of the European Union and United Kingdom court decisions on habitual residence, which leave an uncertain standard for habitual residence determinations in custody disputes.

Third, this article reviews habitual residence jurisdiction in custody disputes under private international law. After reviewing the relevant treaties, this article examines cases in seven jurisdictions to show the uncertain jurisdictional standard that remains, despite habitual residence's supposed uniformity.

After analyzing these cases, this article proposes a time-based, categorical standard for habitual residence jurisdiction determinations. Private international law needs a uniform standard for the growing number of cross-border custody disputes. A temporal standard would make habitual residence determinations more certain, which would in turn benefit children, parents, and courts.

I. INTRODUCTION

International family law reflects deeply personal stories about children, parents, and courts. Most cross-border cases, however, showcase a dry protagonist: jurisdiction. Jurisdiction can be complex in a modern, mobile, multicultural world and may involve national, international, interstate, intergovernmental, and state law. Determining jurisdiction can present a legal maze.

Section II of this article begins by reviewing United States family law jurisdiction with a focus on today's "home state" jurisdiction. In a sense, United States family law begins and ends with bright line tests. Today, jurisdiction exists primarily in the child's "home state" – a time-based concept.

In contrast, European custody jurisdiction largely lacks time-based standards. Section III examines European Union family law's gradual development. In the European Union, jurisdiction primarily turns on "habitual residence," which can be a vague, uncertain, and jurisdiction-specific standard.

Private international family law also turns on habitual residence. Section IV reveals this term's uncertainty by examining two Hague conventions and case law regarding habitual residence. Thus, Sections II through IV strive to achieve this article's first goal: to provide a broad understanding of child custody jurisdiction within these three frameworks, side-by-side.

This comprehensive look at the primary jurisdictional factors illuminates a need to concretize jurisdictional determinations with a firmer standard. Accordingly, this article's second goal, fulfilled in Section V, is to provide more legal certainty for all families in cross-border custody disputes by proposing a new standard in private international family law

– a temporal standard complemented by categorical definitions for temporary presence in a jurisdiction.

II. FROM FATHER'S RIGHTS TO HOME STATE JURISDICTION UNDER THE UCCJEA

In the United States, each of the 50 states generally follows its own family laws.[1] For child custody jurisdiction, however, broad uniformity exists under the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA").[2] The UCCJEA embodies three centuries of evolution. This Section explains United States family law history, the UCCJEA, and home state jurisdiction in several domestic states.

A. UNITED STATES LAW BEFORE THE UCCJA

1. EARLY HISTORY

Child custody determinations in the United States have changed drastically over the past three centuries. During most of the 18th century, fathers in North America had "an almost unlimited right to the custody of their minor legitimate children."[3] This preference gave way during the legal and cultural shift after the American Revolution, when laws in the United States challenged fathers' rights, recognizing the important role of mothering in child development.[4]

Using common law, judges took the reins in family law as a matter of social policy.[5] The courts' role in family law stemmed from the English *parens patriae* doctrine, which provided jurisdiction in the name of the king to oversee transfers of feudal duties.[6] In the 1800's, courts used this doctrine to intervene in familial disputes to protect the best interest of the child.[7]

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1 See generally, LESLIE HARRIS, FAMILY LAW (Aspen 2009).

2. Unif. Child Custody Jurisdiction and Enforcement Act, 9 U.L.A. 649 (1997).

3. MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 235 (The University of North Carolina Press 1985).

4. *Id.* (citing Bedell v. Bedell, 1 JOHNSON'S CHANCERY REP. 605 (N.Y. 1815) (granting custody to mother instead of alcoholic father).

5. *Id.* at 6 – 9, 14, 18.

6. *Id.* at 235.

7. *Id.* at 239.

The best interest of the child is a key concept in family law. [8] This longstanding principle permeates family law internationally.[9] The best interests of the child is "[a] standard by which a court determines what arrangements would be to a child's greatest benefit…."[10] Though courts do not single-handedly define this standard.

United States society in the early 1800's, concerned about leaving familial legal problems solely in judges' hands, called upon state lawmakers to intervene. Marriage, viewed only in part as a private contract, was squarely under state control.[11] State lawmakers shaped law and policy by codifying the balancing tests that state courts used to determine custody.[12]

These standards differed from state to state.[13] As a result, parents would seek the friendliest venue for custody disputes, as evident in the publicized *D'Hauteville* case.[14] In that case, the mother secured custody, in a Pennsylvania court because Pennsylvania was "a maternal custody haven."[15] Since the mid-1800's, parents have forum shopped for state custody laws.

As state custody laws developed, commentators sought unified family law principles. Early family law treatises in the United States attempted to synthesize family law.[16] However, such uniformity failed because, following popular and professional preference, judges shaped the state-specific codified family law.[17] Thus, in practice, courts retained the leading role in this area of law for the rest of the nineteenth century.

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8. Prather v. Prather, 4 S.C. Eq. 33 (S.C. Ct. App. 1809) (granting custody to mother based on child's interest despite the strong presumption for father's custody rights).

9. Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J.L. & FAM. STUD. 337, 338 (2008).

10. BLACK'S LAW DICTIONARY (8th ed. 2004).

11. GROSSBERG, *supra* note 3 at 239. *See also*, Joseph Story, *Commentaries on the Conflicts of Law* (Boston 1834) (describing marriage as "something more than a mere contract. It is rather to be deemed as an institution of society founded upon the mutual consent and contract of the parties, and in this view has some obligation, different than what belongs to ordinary contracts."

12. GROSSBERG, *supra* note 3, at 239.

13. *Id*.

14. COMMONWEALTH OF PA., REPORT OF THE D'HAUTEVILLE CASE (Philadelphia 1840).

15. GROSSBERG, *supra* note 3, at 241.

16. Joel Prentiss Bishop, *Commentaries on the Law of Marriage and Divorce* (1852); James Schouler, *Law of Domestic Relations* (1870).

17. GROSSBERG, *supra* note 3, at 241.

In time, yearly divorces in the United States increased nearly fivefold from 1890 to 1920.[18] In response, state legislatures regulated custody determinations. By 1936, all states had codified their own custody laws.[19] As state courts applied their unique family law statutes, their orders had the potential to clash with other state courts' orders.[20]

2. PROBLEMS WITH JURISDICTION

In 1953, a child custody case of conflicting jurisdiction offered the United States Supreme Court a rare chance to address custody jurisdiction. In *May v. Anderson*,[21] a mother kept her three children in Ohio despite a Wisconsin court's *ex parte* order that granted the father a divorce and custody of the children.[22] An Ohio state trial court held that it was constitutionally bound to give full faith and credit to the Wisconsin order and ordered the children's return.[23]

On appeal, the Supreme Court considered whether the Ohio court had to honor the Wisconsin court's order, which lacked personal jurisdiction.[24] Thus, the Court's analysis turned on whether a state court had to recognize another's custody order that lacked personal jurisdiction.[25]

In previous cases, the Court held that personal jurisdiction was unnecessary for divorce because divorce was purely a status determination.[26] However, courts needed personal jurisdiction over both parties to order financial support, because such orders involved property rights.[27] The Court extended this reasoning because "[r]ights far more precious … than property rights [would] be cut off if [the mother was] bound by the Wisconsin award of custody."[28] As a result, courts could

18. MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 112 (Columbia University Press 1994) (reporting an increase in divorces from 33,461 – 167,105 during these years).

19. *Id.* at 114 (citing CHESTER G. VERNIER, AMERICAN FAMILY LAWS, 4 vols. (Stanford University Press 1936); *see Id.*, at 24-54, Table of State Laws.

20. *See, e.g.*, Harmon v. Harmon, 111 Kan. 786 (Kan. 1922); Sorge v. Sorge, 112 Wash. 131 (Wash. 1920); Twohig v. Twohig, 176 Wis. 275 (Wis. 1922); Crabtree v. Crabtree, 154 Ark. 401 (Ark. 1922); McNeir v. McNeir, 76 Misc. 661 (N.Y. 1911); Smith v. Frates , 107 Wash. 13 (Wash. 1919).

21. May v. Anderson, 345 U.S. 528 (1953).

22. *Id.* at 529.

23. *Id*.

24. *Id.* at 531.

25. *Id.* at 533.

26. *Id.* at 533-34 (citing Estin v. Estin, 334 U.S. 541, 542 (1948); Krieger v. Krieger, 334 U.S. 555 (1948)).

27. *Id*.

28. *Id*.

ignore orders if the previous court lacked personal jurisdiction over both parties.

Justice Jackson's dissent in *May* anticipated problems that this decision would create with conflicting orders.[29] The dissent would have held that the father's and children's presence gave the Wisconsin court custody jurisdiction.[30] Though custody rights were indeed more precious than property rights, Jackson viewed custody as a status issue that "Wisconsin had a far more real concern with" than Ohio.[31] Justice Jackson recognized the decision's effect as follows:

> The Wisconsin courts cannot bind the mother, and the Ohio courts cannot bind the father. A state of the law such as this, where possession apparently is not merely nine points of the law but all of them and self-help the ultimate authority, has little to commend it in legal logic or as a principle of order in a federal system.[32]

Otherwise stated, after *May v. Anderson*, a parent faced with future divorce proceedings in one state could preemptively move to a new state and obtain a custody order. If the other spouse got a conflicting order in another state, the parent who took the children to the friendlier venue could simply ignore a conflicting order. In this event, the only solution remaining was child abduction, which courts could legally sanction with further conflicting orders. As this article will illustrate, Justice Jackson's dissent presciently predicted problems that lawmakers would address.

Moreover, that case demonstrated that jurisdiction in interstate child custody matters was on the national radar by the 1950's. With increased mobility and the divorce revolution of the 1960's on its way, courts needed uniform guidance on interstate jurisdiction. [33] Without full faith and credit, *May v. Anderson* encouraged forum shopping in the United States – the first of three reasons that catapulted forum shopping and child abduction into pressing national problems.

The second reason was flexible jurisdictional requirements for custody disputes.[34] Wide jurisdictional bases made jurisdiction in multiple courts

29. *Id.* at 538.
30. *Id.*
31. *Id.* at 540.
32. *Id.* at 539.
33. *See* GROSSBERG, *supra* note 3, at 224.
34. SANFORD N. KATZ, CHILD SNATCHING: THE LEGAL RESPONSE TO THE ABDUCTION OF CHILDREN 14 (ABA Press1981).

an unfortunate possibility. Courts variously exercised jurisdiction based on the child's physical presence, the child's domicile, one or both parents' domicile, original jurisdiction, the best interests of the child, or *parens patriae*.[35] Thus, for mobile families, conflicting orders were readily available.

The third reason was that new bases for jurisdiction could arise because of custody decrees' inherent uncertainty and lack of finality. Parents could often take their cases before a new court, which would exercise jurisdiction and modify another state court's existing order.[36] When that occurred, competing orders caused enforcement nightmares and jeopardized the child's best interests.[37] In response to these jurisdictional conflicts, the states had to collaborate.

B. THE UCCJA

The National Conference of Commissioners on Uniform State Laws ("National Conference") is the primary United States institution that designs and monitors the interstate legal system. Over 300 commissioners represent their states and collaborate to support the federal system, modernize laws, and facilitate legal issues.[38]

Pursuing these aims in family law in 1968, the National Conference completed the Uniform Child Custody Jurisdiction Act ("UCCJA").[39] The UCCJA addressed child abductions and conflicting orders "to bring some semblance of order into the existing chaos."[40] Generally, the UCCJA bound courts to enforce other state court orders. However, states could adopt their own versions of the UCCJA. Eventually, all states adopted the UCCJA's four jurisdictional factors.

The first factor that provided jurisdiction involved a judicial determination of the child's "home state," a term that the UCCJA defined concretely – if somewhat arbitrarily.[41] The child's home state was the "state in which the child immediately preceding the time involved lived with his parents, a parent, or a person acting as parent for at least six

35. *Id*.
36. *Id.* at 16.
37. *Id*.
38. *See*, Uniform Law Commission, "About the ULC," at http://www.nccusl.org/Narrative.aspx?title=About%20the%20ULC..
39. *See* Unif. Child Custody Jurisdiction Act, 9 U.L.A. __ (1968).
40. *Id.*, Prefatory Note.
41. *Id* § 2(5).

consecutive months."[42] This objective definition provided a clear standard in most cases.

Under the second factor, the UCCJA provided jurisdiction if the child and at least one parent had a "significant connection" with the state, based on "substantial evidence concerning the child's present or future care, protection, training, and personal relationships" in the state.[43] UCCJA comments indicated home state would take priority over significant connection.[44]

With the third jurisdictional factor, the UCCJA attempted to extinguish *parens patriae*, jurisdiction based solely on the child's best interests, by making it available only in exceptional cases of child abandonment or emergency.[45] Lastly, courts could exercise jurisdiction if no other court had jurisdiction on the previous three bases.[46] These four jurisdictional bases simplified interstate jurisdiction, but over time they would add complexity to the UCCJA's application.

Problems arose because states could adopt their own versions of the UCCJA. This meant that state courts applied jurisdictional bases differently. Some courts made home state jurisdiction primary, others put it on par with significant connection.[47] Conflicting orders persisted.

As time passed, federal laws affected interstate custody disputes. Congress passed the Parental Kidnapping Prevention Act of 1980,[48] the International Child Abduction Remedies Act in 1986,[49] and the Violence Against Women Act of 1994.[50] Each law related to custody and conflicted somewhat with the UCCJA,[51] leaving the latter clumsy and outdated.[52]

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42. *Id.*
43. *Id.* § 3(a)(2).; *Id.* § 7(c)(3).
44. *See id.* § 3, Comment.
45. *Id.* § 3(a)(3).
46. *Id.* § 3(a)(4).
47. *See, e.g.*, Harris v. Melnick, 552 A.2d 38 (Md. 1989).
48. 28 U.S.C. § 1738A (West 2011).
49. 42 U.S.C. § 11601 (West 2011).
50. 42 U.S.C. § 13925-14045d (West 2011).
51. *See,, e.g.*, Danny Veilleux, *What types of proceedings or determinations are governed by the Uniform Child Custody Jurisdiction Act (UCCJA) or the Parental Kidnapping Prevention Act (PKPA)*, 78 A.L.R. 1028 (1990).
52. Robert G. Spector, *International Child Custody Jurisdiction and the Uniform Child Custody Jurisdiction and Enforcement Act*, 33 N.Y.U. J. INT'L L. & POL. 251, 257 (citing FINAL REPORT: OBSTACLES TO THE RECOVERY AND RETURN OF PARENTALLY ABDUCTED CHILDREN (Linda Gardner & Patricia Hoff eds., 1993).

In light of these conflicting laws, persistent potential for conflicting orders, and the differing applications of the UCCJA among the states, the National Conference established a new uniform act – the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA").

C. THE UCCJEA

1. GENERAL OVERVIEW OF THE UCCJEA

After almost 30 years of the UCCJA, the National Conference acted again to streamline jurisdiction. In 1998, the National Conference passed the UCCJEA.[53] Today, the UCCJEA applies in every state except Vermont and Massachusetts.[54] Once adopted by these two state legislatures, the UCCJEA will unanimously set a uniform jurisdictional standard.

The UCCJEA governs custody matters related to "divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, and protection from domestic violence."[55] It also covers international cases, expressly treating foreign nations as U.S. states.[56] In all of these cases, a court will first determine whether the child has a home state.

Home state remains the primary jurisdictional factor under the UCCJEA. The term retains its six-month time-based definition.[57] A home state court has exclusive, continuing jurisdiction over parental responsibility matters.[58] Courts can get jurisdiction exceptionally in other limited cases.[59] Personal jurisdiction and presence are not required.[60] A party cannot waive subject matter jurisdiction.[61] Thus, the UCCJEA provides a rigid standard for initial jurisdiction.

Another type of jurisdiction is modification jurisdiction. The UCCJEA's continuing, exclusive jurisdiction is a distinct trait in contrast to

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53. Unif. Child Custody Jurisdiction and Enforcement Act, 9 U.L.A. 649 (1997).

54. State enactments do, however, vary from the Uniform Act. *See* Unif. Child Custody Jurisdiction Act, Variations from Official Text, 9 U.L.A. 46-62 (2001).

55. The UCCJEA does not cover adoption or tribal proceedings. Patricia M. Hoff, *The ABC's of the UCCJEA: Interstate Child-Custody Practice Under the New Act*, 32 FAM. L.Q. 267 (1998).

56. Unif. Child Custody Jurisdiction and Enforcement Act, *supra* note 53 § 105(a)–(c). The NCCUSL modeled 105(c) after the Hague Convention. Hoff, *supra* note 55 (1998).

57. Unif. Child Custody Jurisdiction and Enforcement Act, *supra* note 53 § 102 (7).

58. *Id.* § 202.

59. Unif. Child Custody Jurisdiction and Enforcement Act, *supra* note 53 § 201, 207 – 208.

60. *Id.* § 201(a)(4)(C).

61. *See, e.g.*, Foley v. Foley, 576 S.E.2d 383 (N.C. Ct. App. 2003); Seligman-Hargis v. Hargis, 186 S.W.3d 582, 585 (Tex. Ct. App. 2006) (noting that UCCJEA is a subject matter statute).

international and European Union jurisdiction. Continuing, exclusive jurisdiction generally means that only the court that made a previous order can modify that order.[62] Two situations provide jurisdiction to modify a previous court order.

First, if a child, parent, and person acting as parent have no connection with the initial state, then a court in another state can modify previous orders.[63] As seen below, many United States courts strictly require a court to determine a lack of connection with the previous state.

Second, temporary emergency jurisdiction exists "if the child is present in this State and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse."[64] Courts must communicate during simultaneous proceedings.[65] Thus, while exceptions exist, home state is the primary factor for interstate jurisdiction.

2. INITIAL JURISDICTION

A court exercises initial jurisdiction when it makes the first custody orders in a given case. The UCCJEA provides jurisdiction with a bright line definition of home state, which is:

> [T]he State in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding. In the case of a child less than six months of age, the term means the State in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.[66]

This definition is almost entirely objective. Except for temporary absence cases – a persistently uncertain standard seen throughout this article – the place where a child has physically resided for six months when a parent files suit is the home state. Consequently, the home state court there will have exclusive jurisdiction, objectively providing jurisdiction in most cases.

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62. Unif. Child Custody Jurisdiction and Enforcement Act, *supra* note 53 § 202.
63. *Id.* § 203.
64. *Id.* § 204. This section conforms with the PKPA.
65. *Id.* § 204(d).
66. *Id.* § 102(7).

(a) "Immediately Before" or "Six Months Before?"

Awkward language in home state's definition, however, created an interpretation issue. The words "immediately before" suggest a short time period between presence in the home state and the proceeding's commencement. However, the UCCJEA gives jurisdiction to the state that:

> [I]s the home State of the child on the date of the commencement of the proceeding, or was the home State of the child within six months before the commencement of the proceeding and the child is absent from this State but a parent or person acting as a parent continues to live in this State.[67]

On its face, the UCCJEA left room to debate on home state's definition.

For example, after Arizona adopted the UCCJEA, an appellate court addressed this issue. In *Welch-Doden v. Roberts*, a mother and child had moved back and forth between Oklahoma and Arizona, eventually staying in Oklahoma for six months.[68] The mother and child then moved to Arizona, where she said they intended to remain.[69] However, the father never joined them in Arizona where, in four months, the mother filed for divorce.[70]

The mother argued that the child had no home state.[71] Because those four months had passed, the child had not lived in Oklahoma "immediately before" the proceedings.[72] The court noted the potential discrepancy and examined the UCCJEA's purpose and background.[73]

The Arizona court sought to promote certainty, aiming "to strengthen (rather than dilute) the certainty of home state jurisdiction."[74] As such, "six months before" enlarged the definition of "immediately before,"[75] meaning that "home state" persists for "six months before the

67. *Id.* § 201(a)(1).
68. Welch-Doden v. Roberts, 42 P.3d 1166, 1168 (Ariz. Ct. App. 2002).
69. *Id*.
70. *Id*.
71. *Id* at 1171.
72. *Id*.
73. Welch-Doden, *supra* note 68, at 1171.
74. *Id* at 1173.
75. *Id*.

commencement of the [child custody] proceeding." Therefore, despite four months in Arizona, Oklahoma remained the child's home state.[76]

This coherent interpretation workably defined home state. Quite simply, if a child lived in a home state within six months before the proceedings, courts in that state have jurisdiction. Many state courts have followed this court's interpretation.[77] Thus, home state's core definition applies an objective, time-based standard.

(b) Temporary Absence

This objectivity, however, wavers in temporary absence cases. The UCCJEA states that time spent temporarily outside of a jurisdiction will count toward time spent in the home state.[78] This awkward concept contains a legal fiction that corrodes the otherwise straightforward home state standard. Unfortunately, temporary absence lacks any definition in the UCCJEA. Consequently, courts have been less than uniform in determining whether a move was temporary.

Under existing judicial definitions, several methods exist to determine whether an absence is temporary.[79] Courts variously use time, parental intent, or the totality of the circumstances of the situation.[80] These differing standards dilute uniformity and inject subjectivity.

Some courts have avoided mind-reading exercises by focusing on the time. One court rejected an argument characterizing "an absence, with the exception of a few days, of almost *seventeen months* to be a 'temporary' absence."[81] Other courts have similarly looked at duration.[82]

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76. *Id* at 1174.

77. *See, e.g*., Veecock-Little v. Little, 42 Conn. L. Rptr. 75 (Conn. Super. Ct. 2006); Stephens v. Fourth Jud. Dist. Ct., 128 P.3d 1026, 1029 (Mont. 2006); Krebs v. Krebs, 960 A.2d 637, 644 (Md. Ct. Spec. App. 2008); Rosen v. Celebrezze, 883 N.E.2d 420, 428 (Ohio 2008); In re B.N.W., No. M2004-02710-COA-R3-JV, 2005 WL 3487792, at *20 (Tenn. Ct. App. Dec 20, 2005); Christine L. v. Jason L., 874 N.Y.S.2d 794, 797(N.Y. Fam. Ct. 2009).

78. Unif. Child Custody Jurisdiction and Enforcement Act, *supra* note 53§ 102 (7).

79. See *T.H. v. A.S.*, 938 S.W.2d 910 (Mo. App. 1997).

80. See *infra.*

81. *In re Marriage of Sareen*, 62 Cal.Rptr.3d 687, 695 (Cal. Ct. App. 2007).

82. *See, e.g.*, Ogawa v. Ogawa, 221 P.3d 699, 704 (Nev. 2009) (holding time-limited three-month stay in Japan was temporary); Felty v. Felty, 882 N.Y.S.2d 504 (N.Y. App. Div. 2009) (holding despite her expressed intent to remain in Kentucky, child's six-week presence there was a temporary absence from the home state in New York); Chick v. Chick, 596 S.E.2d 303 (N.C. Ct. App. 2004) (noting six week absence from Vermont "was a relatively short period of time, especially when compared to the fact that the children had spent almost the entire previous year in Vermont.").

This approach is logical for practical and legal reasons. Practically, a child will integrate over time, regardless of parental intent. Legally, this maintains home state's time-based focus. Thus, courts should primarily look at an absence's duration to determine if it was temporary.

Many courts have instead primarily examined parental intent.[83] Relying on intent is chronically problematic because, in custody disputes, parents often disagree in court about previous intent. These conflicting accounts force courts to wade through facts regarding past states of mind. In the end, courts must embrace only one parent's alleged intentions.

Consider *Shepard v. Lopez-Barcenas*, an Oregon appellate case between a Mexican mother and a father from the United States.[84] Their child was born in 1998 and lived in Mexico.[85] The family moved to Oregon in 1999, where the mother pursued a one-year degree.[86] One month into her degree, the mother ended the relationship, telling the father that she would move back to Mexico after her studies.[87] In January 2000, the father sought custody of their child in Oregon.[88] After the mother waived personal jurisdiction, the court gave the mother custody and the father visitation rights.[89]

The father later tried to enforce those visitation rights in an Oregon court.[90] The court dismissed his case because the original court lacked subject matter jurisdiction under the UCCJEA.[91] In affirming, the appellate court held that the move to Oregon was a temporary absence from the home state in Mexico.[92] The father, however, argued that because he intended a permanent stay in Oregon, the child did not have a home state for six months before filing.[93]

The appellate court disregarded the father's intent, pinning temporary absence on the mother's intent: "'[a]ny temporary absence of *any* of the mentioned persons' is considered to be part of the period during which

83. For a totality of the circumstances approach, *see, e.g.*, *Chick*, *supra* note 82.
84. Shepard v. Lopez-Barcenas, 116 P.3d 254 (Or. Ct. App. 2005).
85. *Id.* at 255.
86. *Id.*
87. *Id*.
88. *Id*.
89. *Id*.
90. *Id*.
91. *Id*.
92. *Id.* at 256.
93. *Id*.

[the child] lived in Mexico."[94] The mother intended a temporary move; her unilateral intent maintained Mexico as the home state.

On the facts, this outcome was correct. Parental intent aside, the family moved to Oregon for the mother's short-term educational endeavor. The child had only been in Oregon for three months of a time-limited move because the mother pursued a one-year degree.

However, the court's analysis is problematic because, instead of focusing on those facts, the court analyzed parental intent. Not surprisingly, these parties claimed different intentions. Instead of looking to the objective indicators in the case, the court's ruling offered a unilateral power to establish an absence's temporary nature by asserting previous intent.

The decision was unfair because the court focused solely on the time "during which [the] mother was temporarily absent"[95] and her purported intent regarding the child's residence. Allowing one parent to decide home state based on subjective intent creates uncertainty. This subjective analysis encourages parties to litigate over intent. Further, this blanket rule may not benefit the best interests of the child after extended stays where a child fully integrates into a new home state despite one parent's subjective intent that the child's presence was temporary.

Unfortunately, some courts have similarly looked to parental intent regarding temporary absence, creating questionable results in cases with extended "temporary" stays.[96] Courts can instead determine temporary absence based on concrete facts. As will be seen in Sections III and IV, temporary absence's trickiness begs for a firm definition internationally, as well.

(c) Newborns – Born into the UCCJEA

The UCCJEA handles one type of temporary presence with a categorical rule for newborns. Sometimes, a mother will give birth and only intend that the child remain in the state temporarily after birth. While this could blur the home state determination, the UCCJEA provides a bright line categorical standard for cases involving newborns.

For children under six months, "[home state] means the State in which the child lived from birth with any [parent]." *In Re Calderon-Garza*, a

94. *Id.* (citing OR. REV. STAT. ANN. § 109.741(7) (West 2011).
95. *Id.*
96. *See, e.g.*, Ruiz v. Tenorio, 392 F.3d 1247 (11th Cir. 2004); Tsarbopoulos v. Tsarbopoulos, 176 F. Supp.2d 1037, 1044 (E.D. Wash. 2001).

case coming out of Texas, involved a mother who left Mexico to give birth in Texas.[97] The mother enjoyed dual United States-Mexican citizenship and stayed at her parents' home in the United States before giving birth to her son.[98] Eleven days after the birth, she notified the father, who visited from New Jersey.[99] The mother and child stayed five months in Texas before going to Mexico.[100] The day after they left, the father filed for paternity in Texas.[101]

Despite the child's one-day absence before filing, Texas was the child's home state immediately before the father filed for paternity.[102] The mother argued that the stay in Texas was only temporary as she maintained a domicile in Mexico and intended to return after receiving her family's support.[103]

Instead of considering intent, the court noted that the child had never been in Mexico and thus could not have been temporarily absent.[104] The mother's intentions were irrelevant; living in a state meant only physical presence.[105] As such, Texas was the newborn's home state.

This was sound reasoning. It displayed this bright line, categorical standard's strength on two levels. First, factually, an absence cannot be temporary from a place where a child was never present. By deftly avoiding the controversial issue of a fetus' home state,[106] the court ruled out a fictitious absence, which follows the UCCJEA's goal to promote a clear standard.

Second, the analysis effectively solved a problem that the UCCJEA addressed – home state for newborns. When parental responsibility disputes arise so early that the child has not lived in a state for six months, the newborn has unique interests. Unlike older children who integrate in an environment, newborns are unlikely to integrate in the same sense without school, activities, and the development of social and familial relationships. The decision in *In Re Calderon-Garza* offers

97. In re Calderon-Garza, 81 S.W.3d 899, 900 (Tex. Ct. App. 2002).
98. *Id.* at 901.
99. *Id*.
100. *Id*.
101. *Id*.
102. *Id.* at 903.
103. *Id*.
104. *Id*.
105. *Id*.
106. Sandra E. Salas, *In Re Calderon-Gaza: The Texas UCCJEA's Reach to Unborn Children*, 10 L. & BUS. REV. AM 435, 438 (2004).

parents a measure of legal certainty regarding jurisdiction in cases over newborns. It does so without slighting the best interests of children.

Moreover, this case demonstrates how a precise category for jurisdictional determinations can provide certainty. After all, without the UCCJEA newborn provision, this could have been a messy determination. The court would have had to determine the child's significant connections because he had no home state or alternatively entertained the temporary absence argument.

Fortunately, litigants in the United States face clear answers in newborn cases. Noting how this specificity simplifies newborn cases, additional categorical definitions of temporary absence could provide more certainty, whether under the UCCJEA or international law.

(d) International Initial Jurisdiction

As the above case subtly demonstrated, the UCCJEA applies straightforwardly in international cases. It simply treats foreign countries as states.[107] This strict standard, like other strict standards, has worked well by adding predictability to comity issues.[108] Albeit straightforward, this strict standard potentially burdens foreign courts and counsel. In order to issue a recognizable order, foreign courts must have initial jurisdiction under UCCJEA standards. Thus, if foreign courts do not follow the UCCJEA, courts in the United States may not subsequently recognize those foreign court orders.

An Indian court order faced such problems in *In Re Marriage of Sareen*.[109] In that case, a family lived in the state of New York and traveled to India.[110] Within one week of arriving in India, the husband filed for divorce and custody after taking the mother's and child's passports and residency documents.[111] Over one year later, the mother and child moved to California.[112] Three months later, she filed for divorce and custody in California.[113]

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107. Unif. Child Custody Jurisdiction and Enforcement Act, *supra* note 53 § 105(a)–(c). The NCCUSL modeled 105(c) after the Hague Convention. Hoff, *supra note* 55 (1998).
108. D. Marianne Blair, *International Application of the UCCJEA: Scrutinizing the Escape Clause*, 38 FAM. L.Q. 547 (2004).
109. 62 Cal Rptr.3d 687 (2007).
110. *Id*.
111. *Id*.
112. *Id*.
113. *Id*.

In considering the previous Indian order, a California appellate court examined whether the Indian trial court had initial jurisdiction.[114] The father argued that because Indian law provided jurisdiction, the California courts could not exercise jurisdiction.[115] However, the California appellate court concluded that Indian law would not suffice – India was a UCCJEA state.[116]

Because the father filed suit after only nine days in India, jurisdiction there did not substantially conform with the UCCJEA.[117] Furthermore, the child's time in India during the Indian court proceeding did not count toward home state time.[118] New York, not India, was the child's home state when he filed suit.[119] As a result, the California court rejected the Indian court order.

This case demonstrates that courts in foreign jurisdictions must follow the UCCJEA. Based on the facts of the case, this decision was fair, but it indicates that parties seeking custody in foreign courts face significant hurdles. After all, foreign courts will not likely consider the UCCJEA's provisions. Nonetheless, they must follow the UCCJEA or risk having their orders rejected in state courts. Similar problems arise when modifying orders in foreign courts.

(e) Modification Jurisdiction

Modification jurisdiction applies tight restrictions. Continuing, exclusive jurisdiction gives the court with initial jurisdiction the exclusive power to modify custody orders, even if a child acquires a new home state. A court in a different jurisdiction can only modify another court's order if "neither the child, nor the child and one parent, nor the child and a person acting as a parent have a significant connection with the" previous state or if "the child, the child's parents, and any person acting as a parent do not presently reside in" the previous state.[120] Further, the court must judicially determine that this factual situation no longer exists.[121]

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114. *Id* at 691.
115. *Id* at 690.
116. *Id* at 691.
117. *Id*.
118. *See In re Marriage of Sareen*, *supra* note 81, at 693 (citing Atkins v. Vigil, 59 P.3d 255 (Ala. 2002); Hegler v. Hegler, 383 So.2d 1134 (Fla. Dist. Ct. App. 1980), Irving v. Irving, 682 S.W.2d 718 (Tex. Ct. App. 1985)).
119. *Id*.
120. Unif. Child Custody Jurisdiction and Enforcement Act, *supra* note 53 §202.
121. *Id*.

A 2007 New York case involved an Italian mother, an American father, their son, and a court that missed this requirement.[122] The mother and child resided in Italy where an Italian court granted her full custody.[123] In January 2005, the mother and child moved to New York.[124]

In August 2006, the mother petitioned a New York court for an order to modify the Italian order to suspend the father's visitation rights.[125] In March 2007, she took the child to Italy, violating the New York court's order that forbid the mother from taking the child.[126] The father continued the New York action, but the mother initiated another suit in Italy.[127] After the New York trial court confused the Abduction Convention and the UCCJEA, issued a bogus arrest order, and ignored the Italian order's notification requirement, the court dismissed the case.[128]

The appellate court held that the child's home state was New York based on his time spent there.[129] Then, based on that holding, the court ruled that the New York court had jurisdiction to modify the Italian order.[130] Careful analysis reveals the error in this court's decision.

Regardless of home state, a court cannot modify a previous order without a judicial determination that no party resides or remains present in the previous home state.[131] In this case, no court made such a determination. That missing step meant that, lacking jurisdiction, the New York court lacked jurisdiction to modify the Italian court's previous custody arrangement.

Ignoring that formal requirement, the court presented a public policy argument. Declining jurisdiction would have given "the mother a choice of jurisdictions, and thus the concomitant right to disregard any orders of the court of which she availed herself when she failed to obtain the

122. Michael McC. v. Manuela A., 848 N.Y.S.2d 147 (N.Y. App. Div. 2007).
123. *Id.* at 147.
124. *Id*.
125. *Id.*
126. *Id*. For more on the status of such orders call *ne exeat* orders, and their status under the Convention, see *Abbott v. Abbott*, 560 U.S. __, (2010). See also, TODD HEINE, "DOES A NE EXEAT PROVISION CREATE RIGHTS OF CUSTODY UNDER THE HAGUE ABDUCTION CONVENTION?: THE SUPREME COURT'S ELUSIVE QUEST FOR A BRIGHT LINE RULE IN ABBOTT V. ABBOTT," available at: http://works.bepress.com/cgi/viewcontent.cgi?article=1001&context=todd_heine (2011).
127. *Id*.
128. *Id.*
129. *Id.*
130. *Id*.
131. Unif. Child Custody Jurisdiction and Enforcement Act, *supra* note 53 § 201.

desired outcome."[132] The justification was unnecessary. Regardless of policy, only courts with exclusive continuing jurisdiction can modify orders. The court should have resolved the case within the UCCJEA's established structure instead of resting on its policy determination.

In buttressing this argument, the court further erred by citing case law that dealt with the Hague Abduction Convention.[133] Though the court probably reached the right result, it did so by diluting the UCCJEA requirements and confusing future courts. Judge Lippman verified in his dissent more of the majority's shortcomings when he observed that the Italian custody proceeding began when Italy was indisputably the home state of the child and continued with the still-pending appeal by the father challenging the Italian court's ruling for the mother.[134] The majority's order, he pointed out, was "at the very least, premature."[135] The New York court should have waited for the Italian court's ruling on the case.

Other courts have gotten the issue right, recognizing exclusive continuing jurisdiction's far reach. The case of *In Re Marriage of Nurie* involved "kidnapping, fraud, and domestic violence, all set against a backdrop of INTERPOL warrants, armed gunmen, and flights from justice," but like most of these cases, "[t]he issue on appeal [was] the far less dramatic one of jurisdiction under the [UCCJEA]."[136] In this case, a six-year-old divorce order provided exclusive, continuing jurisdiction in the California courts, invalidating a Pakistani court order.[137]

Setting aside the case's peculiar facts, the mother took the child to Pakistan and secured custody under Pakistani law. The father, who spent significant time in Pakistan but maintained a California residence, then abducted the child and returned to California.[138] In response, the mother sought recognition of the Pakistani order in the California courts.[139]

The California appellate court held that when a parent maintains a residence in the child's previous home state, a court there that exercised initial jurisdiction maintains exclusive continuing jurisdiction until any court determines that all parties have stopped residing in that

132. *Michael McC.*, *supra* note 122.
133. *Id.* (citing Croll v. Croll, 229 F.3d 133 (3rd Cir. 2000)).
134. *Id.* at 100 (Lippman, J., dissenting).
135. *Id*.
136. In Re Marriage of Nurie, 98 Cal.Rptr.3d 200, 207(Cal. Ct. App.).
137. *Id* at 221.
138. *Id* at 209 - 210.
139. *Id*.

jurisdiction.[140] Therefore, the court disregarded the Pakistani court orders because the Pakistani court did not consider, let alone determine, whether the father gave up his residence in California.[141] The failure to meet this requirement preserved California's exclusive jurisdiction after six years.

This strict application offers legal certainty by requiring a record that all parties left the previous jurisdiction. However, it threatens foreign custody modifications that do not follow the UCCJEA. While some courts are flexible if evidence undeniably shows that both parties have left the previous home state,[142] an adversary without a court determination risks the inability to modify.[143] Here again, foreign courts must follow the UCCJEA to modify custody. To foreign counsel, this may seem unfair because they will not likely know UCCJEA requirements. This perceived unfairness would benefit from aligned international standards in cross-border cases.

To counsel in the United States, however, the required determination provides an extra measure of legal certainty because a court may not go forward with an order to modify without removing obstacles to modification. Thus, the UCCJEA's required court determination is yet another bright line test to increase legal certainty in custody jurisdiction.

(f) Conclusions About Jurisdiction Under the UCCJEA

In sum, the UCCJEA contains several bright line tests to determine home state. Home state is the place where the child lived the previous six months. The court in the home state where the child lived within six months before filing has exclusive initial jurisdiction. Less clearly, a temporary stay in a state counts toward time in the home state. For children less than six months of age, their home state is the state in which they have lived since birth. When state courts consider foreign courts' custody orders, the foreign courts must have had initial jurisdiction under the UCCJEA for the state courts to recognize the foreign orders.

If a court exercises initial jurisdiction, then it has exclusive jurisdiction until another court determines that no party remains in the previous state. Those bright line tests create a jurisdictional scheme that differs

140. *Id.* at 218.
141. *Id*.
142. *Id.* (citing In Re T.J.D.W., 642 S.E.2d 471, 473 (N.C. Ct. App. 2007); Button v. Waite, 208 S.W.3d 366, 370-72 (Tenn. 2006); Staats v. McKinnon, 206 S.W.3d 532, 549 (Tenn. Ct. App. 2006).
143. The case law in other jurisdictions supports this conclusion. See *Nurie*, *supra* note 136, at 500–01 (citing In Re Lewin, 149 S.W.3d 727, 736 (Tex. Ct. App. 2004); State of N.M., ex rel. CYFD v. Donna J., 129 P.3d 167, 171 (N.M. Ct. App. 2006).

significantly from the less certain[144] cross-border jurisdiction in European Union and international law's habitual residence standard.

III. FROM EUROPEAN ECONOMIC INTEGRATION TO FAMILY LAW JURISDICTION UNDER BRUSSEL'S II*BIS*

European Union law determines jurisdiction for custody cases between European Union Member States – a legal reality that has existed for only a decade.[145] Simply stated, Member State courts in the child's habitual residence have jurisdiction. However, the uncertainty of that term in EC Regulation 2201/2002,[146] colloquially known as Brussels II*bis* ("BII*bis*"), gives Member State courts relatively broad discretion. In practice, the habitual residence standard in BII*bis* creates legal uncertainty, despite European Union efforts to harmonize family law.[147]

Those efforts have gradually increased but still unsettle some European Union citizens.[148] After all, the European Union exists to facilitate the internal market; how does family law serve that purpose?[149] European Union family law now resides comfortably within European Union legislative competence, related to free movement of persons and the area of freedom, security, and justice.[150] While a review of European Union law rests outside of the scope of this article, this Section reviews the events that led to BII*bis*.[151] This Section also reveals habitual residence's uncertainty in parental responsibility cases by analyzing BII*bis* cases in the European Union's Court of Justice and the United Kingdom.

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144. William Duncan, *Action in Support of the Hague Child Abduction Convention: A View from the Permanent Bureau*, 33 N.Y.U. J. INT'L L. & POL. 103, 105 (2000).

145. See Brussels II *infra* note 171.

146. Council Regulation 2201/2003, 2003 O.J. (L 338) 1 ("*BII*bis").

147. *See e.g.*, Andrew Dickinson, *European Private International Law: Embracing New Horizons or Mourning the Past*, 1 J. PRIV. INT'L L. 197 (2005); Kirsty Barnes, *The Role of the European Union in the Harmonization of Private International Law: A Theoretical Perspective*, 5 Cambridge Student L. R. 124 (2009). *See generally,* PERSPECTIVES FOR THE UNIFICATION AND HARMONIZATION OF FAMILY LAW IN EUROPE, (Katharina Boele-Woelki ed., 2003).

148. Lord Scott of Foscote questioned, regarding EU initiatives regarding mutual recognition in civil matters, "what has it necessarily got to do with the European Union?" House of Lords, European Union Committee, 10th Report of Session 2004-2005, The Hague Programme: a five-year agenda for EU justice and home affairs, report on the examination of witness Baroness Ashton of Upholland, Q71; see also Vesna Lazic, "Recent Developments in Harmonizing 'European Private International Law' in Family Matters" 10 Eur. J. L. Reform 75, 76 (2008).

149. Johan Meeusen, *What Has it Got to Do Necessarily with the European Union: International Family Law and European (Economic) Integration*, 9 CAMBRIDGE Y. B. EUR. LEGAL STUD. 329 (2006-2007).

150. *Treaty on the functioning of the European Union* ("TFEU"), Article 81(3).

151. Dickinson 209 – 217 *supra* note 147; Eleanor Cashin Ritaine, *Harmonising European Private International Law: A Replay of Hannibal's Crossing of the Alps?*," 34 INT'L J. LEGAL INFO. 419 (2006).

A. FROM ECONOMIC INTEGRATION TO FAMILY LAW JURISDICTION: PAST TO PRESENT

1. A CONVENTION ON JURISDICTION IN CIVIL AND COMMERCIAL MATTERS

Today's European Union family law is rooted in private international law conventions, when the European Union initially waded into this legal area five decades ago with the Brussels I Convention on jurisdiction and recognition of judgments in civil and commercial matters.[152] This allowed the European Economic Community ("the Community") to simplify "the formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals."[153]

However, the only family law matter that Brussels I covered was maintenance.[154] Parental responsibility cases enjoyed no streamlining.[155] For those matters, Member States could only negotiate on their own to simplify recognition and enforcement of foreign custody orders.[156] Nonetheless, Brussels I provided the bedrock for today's European Union jurisdiction, recognition, and enforcement principles in divorce and custody matters.[157]

For over two decades following Brussels I, the Community avoided family law.[158] Forces outside of the Community, however, developed international family law.

Two multilateral conventions in 1980 addressed international child abduction. The Council of Europe produced the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and Restoration of Custody of Children[159] and the Hague

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152. *Brussels Convention on Jurisdiction and Recognition of Judgments in Civil and Commercial Matters*, O.J. L299/32 ("Brussels I"); *See* Dickinson, *supra* note 147, at 200–06.

153. *Treaty Establishing the European Economic Community*, Mar. 25, 1957, 298 U.N.T.S. 11 ("EEC Treaty"), art. 220.

154. See Brussels I *supra* note 152.

155. The drafters excluded divorce because:

[t]he most serious difficulty with regard to status and legal capacity is obviously that of divorce, a problem which is complicated by the extreme divergences between the various systems of law.

Report on the Convention on jurisdiction and the enforcement of judgments in civil matters, [1968] OJ.. C59/10 ("*Jenard Report*"); see also *Explanatory Report on the Convention, drawn up on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters,* [1998] O.J. C221/29 ("*Borras Report*").

156. EEC Treaty, *supra* note 153 at Article 220.

157. NIGEL LOWE, INTERNATIONAL MOVEMENT OF CHILDREN 13 (Jordan: Bristol, England, 2003).

158. The Community passed no family law treaties or laws between Brussels I and Brussels II.

159. 20 May 1980, E.T.S. 105.

Conference on Private International Law completed the related Hague Convention on the Civil Aspects of International Child Abduction.[160] In short, these conventions protected parental responsibility jurisdiction in the child's habitual residence. If someone wrongfully removed a child from its habitual residence to another signatory country, a custodial parent could petition a court to immediately order the child's return to the previous habitual residence.[161]

These treaties promoted harmonization and the role of habitual residence in international family law. Still, the Community could not force Member States to sign these conventions or legislate regarding family law jurisdiction. European heads of state pushed for increased Community power, which resulted in the 1986 Single European Act.[162] Though this ensured "an area without frontiers [and] the free movement of goods, persons, services and capital" in the internal market,[163] it did not yet confer Community competence in family law.

In 1992, after 35 years of free movement, the Community gained competence to regulate family law. The Treaty on European Union[164] broadened Community competence[165] by requiring "judicial cooperation in civil matters."[166] This mandated communication and cooperation between Member States and the Council of Ministers ("the Council") to achieve that goal.

Based on those communications, the Council could "draw up [and recommend conventions] to the Member States for adoption in accordance with their respective constitutional requirements."[167] In turn, Member States communicated their family law needs to the Council, demanding in requests and questionnaires recognition and enforcement of family court orders.[168] In October 1993, the European Group on Private International Law proposed a convention on the recognition of judgments in family matters.[169] Member States voiced support, and the

160. 25 October 1980, 1343 U.N.T.S. 49 ("Abduction Convention").
161. *Id*.
162. Paul Craig and Grainine De Burca, *EU Law: Text, Cases and Materials* 12 (Oxford University Press, 2008).
163. *Treaty on European Union*, [1992] O.J. C 224/1, 1 C.M.L.R. 719, 31 I.L.M. 247 ("TEU"), Article 3(c).
164. *Id*.
165. Lowe, *supra* note 157 at 9.
166. TEU *supra* note 163 at Article K.1 (6). *See also* Dickinson, *supra* note 147, at 207.
167. *Id*.
168. Lowe, *supra* note 157 at 12. See also *Borras Report*, *supra* note 155 at para 7.
169. Borras Report, *supra* note 155 at para 8.

European Council instructed the Council to draft a convention on family law.[170]

The Council completed a draft on which the European Parliament delivered its opinion.[171] The Council approved Brussels II on May 28, 1998, which all Member States signed,[172] and Brussels II had direct effect in national courts.[173]

This treaty applied to jurisdiction, enforcement, and recognition. It differentiated between jurisdiction for divorces and parental responsibility cases. For divorce, a wide range of jurisdictional determinants existed, but fewer grounds existed for parental responsibility jurisdiction. [174]

In parental responsibility cases, courts had priority jurisdiction in the Member State of the child's habitual residence.[175] A court in a Member State other than the child's habitual residence had jurisdiction on other grounds only in specific circumstances.[176]

In child abduction cases, courts had to "exercise their jurisdiction in conformity with the [Abduction Convention],"[177] which also required

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170. *Id*.

171. *Judgments in Matrimonial Matters* [1998] O.J. C152/69. The Council considered the opinion—but largely ignored the EP's suggestions. Cf. *id* with *Council Act of 28 May 1998 drawing up, on basis of Article K.3 of the Treaty on European Union, the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters*, [1998] O.J. C221/1 ("Brussels II").

172. *Borras Report*, *supra* note 155 at para 11.

173. See *Van Gend En Loos v. Nederlandse Administratie Belastingen (Case 26/62)* [1963] ECR 1.

174. For matrimonial proceedings, Brussels II, Art. 2 provided a relatively broad determination of jurisdiction where:

— the spouses are habitually resident, or
— the spouses were last habitually resident, in so far as one of them still resides there, or
— the respondent is habitually resident, or
— in the event of a joint application, either of the spouses is habitually resident, or
— the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or
— the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or is 'domiciled' there

Also, courts of a State had jurisdiction when the spouses were both nationals of that State or both domiciled there.

175. Brussels II, *supra* note 171 at Articles 3 (1) & (2).

176. See *Id* at Articles 8 – 11.

177. *Id* at Article 4; *Borras Report*, *supra* note 155 at para 41.

habitual residence determinations.[178] Accordingly, habitual residence began as the most important jurisdictional factor under Brussels II.[179]

In several ways, however, Brussels II was a cautious exercise of legislative competence in family law. Most noticeably, Brussels II only dealt with parental responsibility in matrimonial proceedings and only applied to children of both married parents.[180] Procedurally, the treaty format encumbered future legislative action.[181] Thus, while Brussels II was a significant move in European Union family law, its shortcomings were instantly apparent.

2. BRUSSELS II BECOMES REGULATION 1347/2000

Even before Brussels II's completion, a major shift in the Community would soon make the family law convention format obsolete. The 1997 Treaty of Amsterdam changed the structure and substance of the European Union Treaties and bolstered the Community institutions' legislative powers.[182] EC Treaty Article 2 expanded European Union power in the area of "freedom, security, and justice," which facilitated free movement of persons.[183]

To ensure freedom of movement, the EC Treaty required the Council to adopt "measures in the field of judicial cooperation in civil matters," including jurisdiction, recognition, and enforcement in civil matters.[184] To achieve this end, the Council had to "act unanimously on a proposal from the Commission . . . after consulting the European Parliament."[185]

Under these mandates, the Commission began the legislative process to turn Brussels II into a Council Regulation.[186] On May 29, 2000, the

178. See Abduction Convention, *supra* note 160 at Article 3.

179. Meeusen, *supra* note 149 at 329.

180. Brussels II, *supra* note 171 (applying only to "civil proceedings relating to parental responsibility for the children of both spouses on the occasion of matrimonial proceedings."); *Borras Report*, *supra* note 155 at para 20, ("civil proceedings" encompassed judicial and non-judicial proceedings, such as administrative proceedings such as those in Denmark and Finland but not religious proceedings.

181. Nigel Lowe, "The Growing Influence of the European Union in International Family Law," 56 Current Legal Problems 439, 470 (2003).

182. Craig and De Burca, *supra* note 162at 21 – 22.

183. M. Bogdan, "The EC Treaty and the Use of Nationality and Habitual Residence as Connecting Factors in International Family Law," in J. Meeusen (ed.) *International Family Law for the European Union* (Oxford: Intersentia, 2007) 303.

184. *Treaty Establishing the European Community*, [1992] 1 C.M.L.R. 573 Article 62, 65 ("EC Treaty").

185. *Id* at Art. 67(1).

186. See, *Opinion of the Economic and Social Committee* [1999] O.J. C386/23; [2000] O.J. C189/91; [2000] O.J. C275/13E.

Council adopted Council Regulation 1347/2000, which entered into force with direct effect on 1 March 2000.[187] This Regulation, Brussels II Regulation ("BIIR"), exhibited largely formal differences from Brussels II, while sharing most of its substance as family law became the subject of European Union legislation.

It should be recognized, however, that the European Union had protected family life before BIIR. For example, families enjoyed protection under Regulation 1612/68,[188] which granted free movement to families of migrating workers.[189] Further, the Court of Justice of the European Union ("CJ") addressed family-related matters concerning free movement in *Reed*,[190] *Konstantinidis*,[191] and *Dafeki.*[192] However, compared to these previous efforts, BIIR signaled expanded legislative competence in family law to promote free movement of persons.[193]

Despite this apparent competence, BIIR's substance retained most of Brussels II's inadequacies. Thus, BIIR remained in effect for only five years.[194] In fact, even before its adoption, the Community and Member States prodded continued European Union family law progress.

B. TODAY'S JURISDICTION UNDER BRUSSELS II*BIS*

Before BIIR's adoption, the European Council catalyzed further family law legislation. European heads of state in the Tampere European Council placed the "European judicial area" at the "very top of the political agenda," expressing a need to make parental access rights enforceable in Member States.[195] Seizing on this momentum in 1999, France presented an initiative to the Commission to enforce parental access rights in all Member States.[196] The Commission responded, as it

187. *Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses*, [2000] O.J. L160/19 ("*BIIR*").

188. *Council Regulation (EEC) on freedom of movement of workers within the Community*, [1968] O.J. L 257/2 (now expanded under *Council Directive (EC) 2004/38/EC*, [2004] O.J. L 229/35).

189. See Meeusen, *supra* note 149 at 330.

190. *Netherlands v. Reed*, Case 59/85, [1986] ECR 1283 (extending legal residence for unmarried companions of workers who were nationals of another Member State).

191. *Konstantinidis v. Stadt Altensteig-Standesamt*, Case C-168/91, [1993] ECR I-1191 (involving family name).

192. *Dafeki v. Landesversicherungsanstalt*, Case C-336/94, [1997] ECR I-6761 (involving recognition of status documents from other Member States).

193. See Meeusen, *supra* note 149 at 334 – 339.

194. Clare McGynn, *Families and the European Union* 109 – 110 (Cambridge University Press 2006).

195. *Presidency Conclusions, Tampere European Council*, 15 October 1999, para 5, point 33.

196. [2000] O.J.C234/07.

was obliged to make proposals on Member State initiatives in cross-border civil matters.[197] In turn, the Commission proposed repealing and replacing BIIR.

That proposal contained several important changes. Most notably, the Commission included all parental responsibility matters to "ensure equality for all children."[198] This proposal made its way through the legislative process.[199] On November 27, 2003, the Council adopted BII*bis*, which enjoyed direct effect in Member States on March, 1 2005.[200] Habitual residence maintains its primary jurisdictional position, with some provisions for exceptional jurisdiction.[201]

Courts that have initial jurisdiction enjoy a relatively tiny measure of continuing jurisdiction. If a child moves lawfully to another Member State, courts in the previous habitual residence have continuing jurisdiction only over access rights for three months after the move, and only if one parent still resides in the former habitual residence.[202] The parent in the previous habitual residence can waive continuing jurisdiction by appearing in a custody action in the new habitual residence without contesting jurisdiction.[203]

This continuing access right jurisdiction is objective and time-bound, but courts could have conflicting jurisdiction if a child acquires a new habitual residence.[204] Nonetheless, this three-month provision briefly protects legally left-behind parents in the interim period between losing a former habitual residence and gaining a new one. This time period provides an objective measure of jurisdiction during the time when a child potentially has no habitual residence.

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197. EC Treaty, *supra* note 184 Article 67(1).

198. *Proposal for a Council Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility*, [2002] O.J. C203/155E at Preamble 5, Preamble 9.

199. *Id*; *Opinion of the Economic and Social Committee on the 'Proposal for a Council Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility,'* [2003] O.J. C61/76; *European Parliament legislative resolution on the proposal for a Council Regulation on the recognition and enforcement of judgments in matrimonial matter and in matter of parental responsibility,* [2004] O.J. C25/171 E..

200. See *BII*bis, *supra* note 146.

201. See Ruth Lamont, "Habitual Residence and Brussels II*bis*: Developing Concepts for European Private International Family Law," 3 J. Priv. Int'l L. 261 (2007) (citing Thorpe, LJ, "The Work of the Head of International Family Law," http://www.familylawweek.co.uk/library.asp?i=1981, accessed March 9, 2010.)

202. *OJEC* (2003) L338 1 at Art. 9(1).

203. *Id.* at Art. 9(2)

204. P. McEleavy, "Current Developments: Private International Law," 53 Int'l & Comp. L.Q. 504 (2004).

Other situations arise when children have no habitual residence. In these relatively rare situations, presence determines jurisdiction.[205] When no court has jurisdiction, the national laws of the Member State court seized with the action determine jurisdiction.[206] Even if a court has jurisdiction, it may exceptionally request the court of another Member State with which the child has a close connection to take the case in the best interests of the child.[207]

Child abduction cases preserve jurisdiction in the habitual residence at the time of the wrongful removal for one year, which represents a departure from the general habitual residence standard. For one year, courts in the previous habitual residence retain jurisdiction, unless all parties with parental responsibility acquiesce to jurisdiction in the new habitual residence.[208] After one year, a court in the new habitual residence may take jurisdiction once the wrongfully removed child has settled in the new environment, if one of four additional conditions exists.[209]

Even after a court determines habitual residence and exercises jurisdiction, another court may have the power to issue provisional orders.[210] The CJ recently handed down a decision dealing with a provisional order, holding that the case must be urgent, the order must be temporary, and it must relate to persons or property in the state.[211] This decision limits the availability of provisional orders. Thus, habitual residence remains the primary jurisdictional factor.

C. HABITUAL RESIDENCE IN THE EUROPEAN UNION COURTS

Brussels II*bis* does not define habitual residence. This regrettable omission leaves habitual residence as a "question of fact to be appreciated by the judge in each case."[212] Habitual residence is a term with wide application in private international law that generally

205. Brussels II*bis* Art. 13.
206. Brussels II*bis* Art. 14.
207. *Id* at Art. 5(3) (defining close connection as a subsequent habitual residence, former habitual residence, child's nationality, habitual residence of a custodial parent, or a place where the child have property subject to a court order); *Id* at Art. 15.
208. *Id* at Art. 10 (a). This provision matches that in Article 12 of the Abduction Convention.
209. *Id* at Art. 10(b) describes these four conditions.
210. BII*bis*, Art. 20 provides that: In urgent cases, the provisions of this regulation shall not prevent the courts of a Member State from taking such provisional, including protective, measures in respect of the person or assets in that State as may be available under the laws of that Member State, even if, under this Regulation, the court of another Member State has jurisdiction as to the substance of the matter.
211. *Detiček v Maurizio Sgueglia*, C-403/09 PPU (2009)
212. Peter Stone, *EU Private International Law* 400 (Edward Elgar: Cheltenham, UK 2006); COM [2002] 22 final, 3 May 2002, at p. 9.

determines jurisdiction.[213] The term lacks a legal definition,[214] instead representing a factual determination that is "simple to apply and flexible, changing as the circumstances of an individual, or family, change over time."[215] Thus, a court must consider the facts of each individual case to determine habitual residence – a vague standard that required the CJ's attention.[216]

1. HABITUAL RESIDENCE IN THE COURT OF JUSTICE OF THE EUROPEAN UNION

The CJ has addressed that fact-based test.[217] The case *A* involved a parental responsibility dispute between a mother and a Finnish public child welfare agency. [218] Three children lived with their mother and stepfather in Sweden since 2001.[219] In 2005, the family traveled to Finland to stay for the summer. In October, they applied for public housing in Finland.[220] In November, a local welfare agency removed the children to a childcare unit.[221] The mother unsuccessfully challenged this action in a Finnish court.[222] On appeal, the Supreme Administrative Court of Finland submitted four questions to the European Court.[223]

In the central question, the Finnish court asked how to determine the peripatetic children's habitual residence.[224] Advocate General Kokott[225] proposed a precise BII*bis* habitual residence definition in the best interests of children.[226] Distinguishing between presence and habitual

213. Peter Stone, *The Concept of Habitual Residence in Private International Law*, 44 INT'1 & COMP. L.Q. 771 (1995); Lamont, see *supra* note 201 at 263.

214. Lowe, *supra* note 157 at 60.

215. Lamont, *supra* note 157 at 263. Professor Lowe identified four habitual residence tests. The (1) dependency test is similar to domicile as it relates solely to the parent's habitual residence. The (2) parental rights test ties the child's habitual residence to that of the custodial parent. Not surprisingly, courts have rejected these two tests as too simplistic and legalistic for efficient application. The (3) child-centered test considers the "nature and quality of the child's residence in a particular country," but fails to exclude parental intent in practice. The (4) fact-based test has largely prevailed, which considers all of the facts in a given case to determine the child's habitual residence. Lowe *supra* note 157 at 60 – 62.

216. Stone, *supra* note 212 at 400 and 412.

217. *Id* at 63; see also Rhona Shuz "Habitual residence of children under the Hague Child Abduction Convention – Theory and practice," CFLQ 1 (2001).

218. *A,* Case C-523/07, [2009] O.J. C 141/14.

219. *A*, Case C-523/07, Advocate General Opinion at para 6 ("AG opinion").

220. *Id*.

221. *Id* at para 7.

222. *Id* at para 8.

223. The CJ has jurisdiction over questions referred by national courts that concern the interpretation of the European Union's legislative acts under TEU, *supra* note 163 at Art. 267.

224. AG Opinion, *supra* note 219 at para 9.

225. Advocate General opinions provide more details regarding the facts, arguments, and law involved in CJ cases.

226. *Id* at paras 13 – 18.

residence, Kokott referenced private international law to interpret the issue.[227]

Following the CJ's judgment in *Rinau*,[228] Kokott used the Abduction Convention's guiding principles to determine habitual residence "by reference to all the relevant circumstances . . . distinguished from the legalistic concept of domicile."[229]

In embracing that definition, Kokott rejected the Commission's suggestion that habitual residence contemplates parental intent.[230] Kokott, however, reasoned that while intent had been useful in determining habitual residence for divorces under Brussels II,[231] intent was less important in parental responsibility cases. When determining a child's habitual residence, children often lack intent, and parents' intentions often conflict.[232]

Further, Kokott rejected habitual residence's definition in social law. The CJ included intent in determining habitual residence in *Swaddling*, a social security benefits case,[233] and national courts had applied the *Swaddling* definition for BII*bis* cases.[234] The Advocate General, and the CJ, nonetheless shifted from intent to establish an autonomous, fact-based habitual residence definition for parental responsibility cases by examining two factors: (1) the "duration and regularity of residence" and (2) the "child's familial and social integration."[235]

First dealing with duration and regularity of residence, the Advocate General rejected any strict time limit.[236] Instead, the Advocate General found that the amount of time to establish habitual residence depended on children's ages and individual familial and social circumstances.[237] While habitual residence tolerates interruptions, children lose a previous

227. *Id* at paras 21 – 25.
228. Case C – 195/08 PPL, [2008] O.J. C223/19.
229. AG Opinion *supra* note 219 at paras 30 - 31.
230. *Id* at para 33("'the place of habitual residence is that in which the [person] concerned has established, with the intention that it should be of a lasting character, the permanent or habitual centre of his interests. For the purposes of determining habitual residence, all the factual circumstances which constitute such residence and, in particular, the actual residence of the [person] concerned must be taken into account.'") (citing Borras Report).
231. AG Opinion, *supra* note 219 at para 31.
232. AG Opinion at paras 31, 36.
233. *Swaddling v. Social Security Commissioner*, [1997] Case C-90/97 at para 29.
234. See e.g. *Marinos v. Marinos*, [2007] EWHC 2047 (UK) at para 24; *M.(P.) v. Devins*, [2007] IEHC 380 (Ireland); see also Lamont, *supra* note 201 at 262 (suggesting intent as a habitual residence determination factor).
235. AG Opinion, *supra* note 219 at paras 38, 40.
236. *Id* at para 41.
237. *Id*.

habitual residence when "a return to the original place of residence is not foreseeable."[238]

Further, Kokott noted that habitual residence can shift quickly, as evidenced by BII*bis*' three-month period of continuing jurisdiction for access rights.[239] Parental intent can play a role in assessing the regularity of the residence but only when intent manifests toward the child's integration by, for example, enrolling the child in school, leasing or purchasing property, or changing addresses.[240] Kokott thus defined the stay's duration and regularity.

Second, Kokott examined factors surrounding a child's familial and social integration. These factors can vary with the child's age, but contact with relatives, "school, friends, leisure activities and, above all, command of language are important."[241] Considering these factors, courts must determine whether a habitual residence exists.

The CJ largely adopted Kokott's opinion regarding the need for uniform and autonomous interpretation, a unique habitual residence definition in parental responsibility cases, and habitual residence's relevant factors.[242] Instead of examining intent, the CJ held that habitual residence:

> corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, in particular the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances specific to each individual case.[243]

Thus, the CJ named roughly eight factors to consider when determining habitual residence: (1) duration, (2) regularity, (3) conditions, (4) reasons for the child's presence, (5) school attendance, (6) linguistic knowledge,

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238. *Id*.
239. *Id* at para 42 (providing national courts continuing jurisdiction over access rights after legal removals in BII*bis* Article 9).
240. *Id* at para 44.
241. *Id* at para 48.
242. *A,* Case C – 523/07, [2009] O.J. C 141/14 at para 34 – 44 ("*A*").
243. *Id* at para 38 (considering intent perhaps only on this issue of whether the child's presence was temporary);*Id* at para 44.

(7) family relationships, and (8) social relationships. Without reference to parental intent, the CJ returned the case to the Finnish court.[244]

When the case returned to Finland, the Finnish Court found "more factors supporting Finland rather than Sweden as the children's country of residence."[245] Thus, despite four previous years in Sweden, the Finnish Court found habitual residence in Finland based on the CJ's factors.

These eight factors could theoretically bring a measure of uniformity to habitual residence determinations among Member State courts. However, such a list of factors makes certainty a remote possibility. The CJ failed to offer concrete guidelines for duration and regularity. Simply considering conditions and reasons for presence does not provide much direction because the CJ did not elucidate how these factors weighed in the determination.

The last four factors are somewhat more objective, but they do not provide readily objective answers. School attendance is probably a good measure of a child's integration, but the courts did not mention whether the children in *A* attended school in Finland. Linguistic knowledge is objective, but some European Union countries share languages and children may learn both parents' languages. Finally, family and social relationships may exist in several Member States. Thus, even in courts that follow these factors, European Union parents still face uncertainty. Worse still, some courts have already chosen a much broader reading of this CJ decision.

2. HABITUAL RESIDENCE AGAIN IN THE COURT OF JUSTICE

Most recently, the CJ heard a case through urgent preliminary procedure[246] that addressed habitual residence and loosely applied *A*'s test. The case *Mercredi* involved a mother who removed her infant child from England to Réunion Island, a French territory.[247] Five days after the

244. *Id* at para 44.

245. Korkein hallinto-oikeus, Yearbook No. KHO:2009:68, File No. 1681, Register No. 3356/06, 3357/06, 3358/06 (30 June 2009) (summary and full-text available at http://www.juradmin.eu/en/jurisprudence/jurifast/jurifast_en.php?PHPSESSID=lnsc57go5od6db04c8jdf2eep0&page=detail&id=407).

246. See, Council Decision of 20 December 2007 amending the Protocol on the Statute of the Court of Justice and amendments to the Rules of Procedure of the Court of Justice adopted by the Court on 15 January 2008 (OJEU 2008 L 24, p. 39). See also, Court of Justice of the European Union, Information for the Press No. 12/08, "A New Procedure in the Area of Freedom, Security, and Justice: The Urgent Preliminary Ruling Procedure" (March 3, 2008).

247. Case C-497/10 PPU, *Mercredi* (Court of First Instance 22 December 2010).

removal, the father initiated custody proceedings in the English courts.[248] An English court asked the European Court of Justice to clarify habitual residence. The CJ noted habitual residence's supposed "independent and uniform interpretation throughout the European Union"[249] as "the place which reflects some degree of integration by the child in a social and family environment … taking account of all the circumstances of fact specific to each individual case."[250] The CJ then handpicked from *A*'s criteria, holding that "particular mention should be made of the conditions and reasons for the child's stay on the territory of a Member State, and the child's nationality."[251] In addition, "other factors must also make it clear that that presence is not in any way temporary or intermittent."[252]

> Then, the CJ unwisely magnified *A*'s mention of parental intent, holding: that the intention of the person with parental responsibility to settle permanently with the child in another Member State, manifested by certain tangible steps such as the purchase or rental of accommodation in the host Member State, may constitute an indicator of the transfer of the habitual residence.[253]

The CJ further divorced the habitual residence definition from duration by stating that "duration of a stay can serve only as an indicator in the assessment of the permanence of the residence."[254] The court added that the child's young age in this case was of particular importance.[255] Thus, the CJ reframed the test in *A* as heavily relying on parental intent and the child's age.

With those factors, the CJ seemingly endorsed that the mother's intent to change the infant's habitual residence shifted the habitual residence – after five days. The CJ posited that the "the languages known to the mother," her "geographic and family origins and the family and social connections which the mother and child [had] with [the] Member State" were particularly important, while downplaying the brief duration.[256] Apparently, *Mercredi* shifts *A*'s test toward intent, giving courts leeway to examine facts and drastically shortening the time – in this case

248. *Id* at para. 25.
249. *Id* at para. 45.
250. *Id* at para. 47 (citing *A* at para 44).
251. *Id* at para. 48.
252. *Id* at para. 49.
253. *Id* at para. 50.
254. *Id* at para. 51.
255. *Id* at para. 52.
256. *Id* at paras 55 – 56.

potentially five days – to establish habitual residence for infants. This shift only weakens habitual residence's certainty but follows similar previous applications in United Kingdom courts.[257]

Fortunately, when the case returned to the English High Court of Justice Court of Appeal, Lord Justice Thorpe did not find such a rapid change of habitual residence.[258] Albeit dicta, in *Mercredi v. Chaffe*, Lord Justice Thorpe stated that the child's "English habitual residence had not been abandoned" in the five to seven days after the child's removal.[259] Nonetheless, the CJ's decision in *Mercredi* leaves Member State courts the option to allow swift changes in infants' habitual residence based on intent.

3. HABITUAL RESIDENCE IN TWO POST-*A* UNITED KINGDOM CASES

Previously, United Kingdom courts already included parental intent in habitual residence. A loose focus on "all the circumstances specific to each individual case"[260] subverts uniform interpretation among national courts. The following two United Kingdom cases show habitual residence's slipperiness.

First, in *S(A Child)*, a court did not effectively apply the CJ's decision in *A*.[261] A Belgian father and an Australian mother had a daughter in December 2005 in Australia. The child spent most of her life in a small Belgian village with her parents and grandmother.[262] In February 2007, the father signed a three-year lease in that Belgian village.[263]

In March 2007, the father took a three-month job in Belfast.[264] In April, the mother and child followed, staying in an apartment that his employer provided there.[265] In May 2007, the mother and child returned to Belgium.[266] The father took a two-year job in London, where for six weeks he stayed with a friend during the week and returned to Belgium on the weekends.[267]

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257. See, e.g., In Re J. *infra* note 392.
258. Mercredi v. Chaffe, [2011] EWCA 272 (High Court of Justice Court of Appeal 2011) (England).
259. *Id* at paras 52, 97.
260. A *supra* note 242 at para 37.
261. *S(A Child)*, [2009] EWCA Civ 1021 (UK).
262. *Id* at para 4.
263. *Id*.
264. *Id*.
265. *Id*.
266. *Id*.
267. *Id*.

Then, the father's friend offered his England home for the family's use.[268] In August 2007, the family moved in but left most of their possessions in Belgium.[269] The daughter spent two weeks with her grandmother in Belgium in September.[270] Unfortunately, the opportunity to use free housing fell through by the end of September 2007.[271]

At this time, the marriage fell apart.[272] The mother planned to take the child to Australia, but the father snatched the child to Belgium on September 28.[273] The mother took her case to an English court that decided the child's habitual residence had been England.[274]

Affirming, the appellate judge repeatedly emphasized the indeterminate three to nine months that the family planned at the borrowed English home, despite the primary Belgian home.[275] The judge opined that the "constancy of that primary home [did] not prevent the acquisition of habitual residence in the work country if the other elements within the defined principles of acquisition [were] satisfied."[276] The court noted the father's "very substantial" English connection through employment, tax contributions, and work permits.[277] Based on these connections and intent, the child acquired English habitual residence in six interrupted weeks.[278]

This English court's analysis is troubling. Those connections and intent had little to do with the child's integration. Thus, the decision ignores the *A* court's analysis instead relying heavily on the trial court's balancing, a trial that occurred before *A* defined habitual residence.

Under that test's eight factors cited above, the child's habitual residence had not shifted. The duration was brief – less than two months.[279] The stay lacked regularity, as the child spent two weeks with her grandmother in Belgium during her brief time in England.[280] The conditions were temporary. The child was present simply to share a rent-free home with both parents.

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268. *Id* at para 5.
269. *Id*.
270. *Id*.
271. *Id*.
272. *Id* at para 6.
273. *Id*.
274. *Id* at para 13.
275. *Id* at paras 5, 13, 14.
276. *Id* at para 13.
277. *Id* at para 13.
278. *Id* at para 15.
279. *Id* at para. 6.
280. *Id* at para. 5.

Further, the court made no reference to school attendance or linguistic knowledge, two factors under *A*.[281] Finally, the child had limited family and social relationships in England. Her parents lived temporarily in England, and her grandmother, with whom she spent a quarter of her residence in England, was in Belgium. Therefore, this analysis strays from *A*'s test.

In a second United Kingdom appellate case,[282] a mother lawfully took her children from Spain to Wales to live with their grandparents and to attend school for a year.[283] After that year, they returned to Spain and enrolled in school.[284] About two months later, the mother unlawfully removed the children back to Wales.[285] A Welsh trial court ordered their return to Spain.[286]

On appeal, the mother argued that the first move established Wales as the children's habitual residence.[287] Lord Justice Ward noted that "acquiring habitual . . . residence . . . permits a stay of comparatively short time [, whereas] domicile . . . requires an intention to remain . . . indefinitely."[288] Without setting time limit, habitual residence "depends 'more upon the evidence of matters susceptible of objective proof than upon evidence as to state of mind.'"[289] However, the court recalled that "[h]abitual residence of young children of married parents all living together as a family is the same as the habitual residence of the parents themselves and neither parent can change it without the express or tacit consent of the other or an order of the court."[290]

Applying this definition, the children's "ordered way of life was Spanish":

> Their education had been undertaken there and with the mother's collaboration it was arranged that it should continue in Spain upon their return. Their schooling in Wales was for a temporary period and for the limited purpose of improving their English.

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281. *Id*; *A supra* note 242 at para. 44.
282. *P-J (Children)*, [2009] 2 FLR 1051 (UK). http://www.familylawweek.co.uk/site.aspx?i=ed37069
283. *Id* at para 3.
284. *Id* at para 4.
285. *Id* at para 8.
286. *Id* at para 21.
287. *Id* at para 23.
288. *Id* at para 26.
289. *Id* (citing *Reg. v Barnet London Borough Council, ex parte Nilish Shah* [1983] 2 A.C. 309 (UK)).
290. *Id* at para 26.

> Their home was in Spain, not with their grandparents in Wales. The visit to Wales was a convenient respite to meet the dual objectives of increasing their language skills and refurbishing the Spanish home. The mother actively participated in the planning of the work even whilst she was in Wales. The essential dental work was carried out in Spain. . . . [The f]amily life was centred [sic] on Spain, which is simply another way of saying Spain was the regular order of their life.[291]

The court thus concluded that the habitual residence was Spain.

That conclusion was correct. However, the court's analysis reveals two problems. First, the court only loosely applied the factors from *A*. Under *A*, the same conclusion follows because the mother could not likely show that the children's "presence [was] not in any way temporary."[292] Instead, the court examined precedent in tax law cases, thereby obscuring habitual residence's autonomous meaning in parental responsibility cases. While the factors may be similar, the court misguidedly referenced the wrong context for parental responsibility cases.

Second, the case exposes an additional source of uncertainty in BII*bis*: temporary absence. Temporary absence complicates these determinations by relying on parental intent. As in this case, parents often contest whether or not an absence was temporary. Courts strain to discover parental intent. Thus, the temporary absence issue increases uncertainty in BII*bis* cases.

Moreover, parental intent may have little to do with a child's integration. Intentions aside, children may integrate during extended stays, a reality that Brussels II*bis* recognizes.[293] In fact, these children might have integrated in Wales under a narrow reading of the factors in *A*.

After all, the children were present in Wales regularly and for a substantial duration. They stayed with their grandparents for a year. They acquired language skills and attended school, which established two explicit factors in *A*. They developed relationships with family and classmates. These factors combine to at least suggest a Welsh habitual residence. The two United Kingdom cases above demonstrate a broad habitual residence test's weaknesses. Even after *A*, parents still face great uncertainty in European Union Member State's national courts.

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291. *Id* at para 34.
292. *A supra* note 242 at para 38.
293. See *BII*bis, Articles 9 & 10.

D. CONCLUSIONS REGARDING BII*BIS*

As this section demonstrates, BII*bis* marks a significant milestone in European Union family law. This development supplies a necessary component for free movement of persons and a functioning area of freedom, security, and justice. Habitual residence's role in cross-border jurisdiction seems cemented into place. However, the fact-based standard leaves many families and courts with a malleable, unpredictable, and often puzzling standard.

Hopefully, *A* will provide a level of uniformity to this enigmatic term. While uniformity may be achievable, *A* leaves substantial uncertainty. Further, perhaps only European Union citizens will reap the minimal benefits of the uniformity from *A*. As seen below, habitual residence under international family law treaties remains out of reach of the CJ – fractured and uncertain.

IV. HABITUAL RESIDENCE UNDER THE HAGUE CONVENTIONS

A. THE 1996 HAGUE CHILD PROTECTION CONVENTION

The Brussels II Convention's crib mate was the wider-reaching 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children ("1996 Convention"), which entered into force on January 1, 2002. In addition to jurisdiction, recognition and enforcement, this Convention's name indicates its two additional aims: applicable law and cooperation.

The Hague Conference on Private International Law ("Hague Conference") has met since 1893 as a venue for different legal traditions to come together and facilitate cross-border civil and commercial matters. Accordingly, the Hague Conference is the most appropriate institution for negotiating international family law treaties, including the 1996 Convention.

With 19 Contracting Parties and 28 signatories so far, this multilateral treaty will likely play a major role in future cross-border parental responsibility cases.[294] All European Union Member States have signed the 1996 Convention,[295] and the United States is taking steps toward

294. Hague Conference on Private International Law, "Status Table," http://www.hcch.net/index_en.php?act=conventions.status&cid=70.

295. *Id*.

signing.[296] The 1996 Convention will determine parental responsibility jurisdiction between signatories.

The Hague Conference's Special Commission drafted this treaty to update its 1961 predecessor and conform to the 1993 United Nations Convention on the Rights of the Child.[297] The 1996 Convention broadly defines parental responsibility as "parental authority, or any analogous relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives in relation to the person or the property of the child."[298]

The key jurisdictional factor in these parental responsibility matters is habitual residence.[299] Other bases exist in relatively rare cases where no habitual residence exists, a new habitual residence exists due to a wrongful removal, a court declares *forum non conveniens*, or jurisdiction in divorce proceedings exists under strict conditions.[300] Additionally, any protective orders in other States require cooperation with authorities in the child's habitual residence.[301]

The term habitual residence was not a newcomer to the Hague Conference. The Hague Conference has used habitual residence to determine jurisdiction in many areas of private international law.[302] Considering its well-established usage, the drafters unanimously approved primary jurisdiction in the child's habitual residence, maintaining identical language from the 1961 Convention that the authorities in the state of the child's habitual residence have jurisdiction.[303]

The drafters considered adding a definition of habitual residence in the Convention,[304] but declined to do so based on the term's use in other Hague Conventions.[305] This was an unfortunate omission because it missed the opportunity to clear up the uncertainty that the term has in international family law.

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296. See http://www.state.gov/s/l/family/index.htm.
297. Explanatory Report on the 1996 Hague Convention (1998) ("LaGarde Report") at para. 1.
298. See 1996 Convention at Art. 1 para. 2
299. See 1996 Convention at *Id* at Art. 5.
300. See *Id* at Arts. 6 – 9, 10:
301. *Id* at Arts. 11 & 12.
302. See P. Stone, "The Concept of Habitual Residence in Private International Law," 29 *Anglo-American L.R.* 342 (2000).
303. Lagarde Report at ¶ 40.
304. *Id*.
305. *Id*.

In an attempt to add some certainty, the United States delegation suggested that the 1996 Convention define situations that would not change a child's habitual residence.[306] The drafters did not include such language, but negotiations indicated that temporary absences from a Contracting State would not change the habitual residence.[307] Unfortunately, this bare recognition offered no guidance as to how to determine an absence's temporariness. Thus, without a definition, courts determine habitual residence based on each case's facts.

This fact-based determination aligns with BII*bis* – and not coincidentally. Because the European Union modeled the Brussels II Convention on the 1996 Convention, the offspring BII*bis* largely shares substantive traits regarding jurisdiction. However, BII*bis* applies between European Union Member States, whereas the 1996 Convention applies between signatories.

Under the 1996 Convention, habitual residence is likewise a shifting concept that carries jurisdiction as it changes when a child acquires a new habitual residence. Accordingly, once a child acquires a new habitual residence, no continuing jurisdiction exists for courts in the previous habitual residence, even one seized of an action, except in wrongful removal cases.[308] Unlike in BII*bis*, no continuing jurisdiction exists for access right holders either.

Though delegates suggested exclusive, continuing jurisdiction for two years after an order, the Conference rejected such a measure.[309] Instead, the drafters decided that a court's physical proximity promoted the best interests of the child. Thus, continuing jurisdiction does not exist under the 1996 Convention, except for child abduction cases.

The 1996 Convention preserves jurisdiction in child abduction cases. After abduction, the court in the previous habitual residence generally keeps jurisdiction, but a court in the new habitual residence can exercise jurisdiction if certain conditions exist.[310] The 1996 Convention provides an immediate return under conditions like the Hague Abduction Convention, affecting the child's return between 1996 Convention signatories.[311]

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306. *Id*.
307. *Id*.
308. See 1996 Convention at Art. 5(2).
309. Lagarde Report at ¶ 40.
310. 1996 Convention, Art. 7 (1) – (2).
311. See 1996 Convention at Art. 50.

For a return under either the 1996 Convention or the Abduction convention, courts must determine the child's habitual residence. Without much 1996 Convention case law available, the Abduction Convention's extensive case law shows the uncertain habitual residence definition that the 1996 Convention inherits.

B. THE HAGUE ABDUCTION CONVENTION

The Hague Abduction Convention provides a practical solution for wrongful removals: immediate returns. Thus, the Abduction Convention protects a custodial parent by functionally preventing another parent from removing the child from the habitual residence to establish jurisdiction in a new country where that parent may enjoy a friendlier forum.[312]

For an abduction to occur, someone must remove the child from its habitual residence.[313] Thus, for abduction cases, courts must always determine the child's habitual residence. As a result, cases under the Abduction Convention provide a wealth of case law among its 81 contracting States' national courts. A review of Abduction Convention cases nicely frames the habitual residence definition in United States and European Union national courts.

Many courts have addressed this issue, developing divergent definitions for habitual residence.[314] However, the United States Supreme Court has not defined habitual residence for Abduction Convention cases despite a three-way fracture in the federal circuit courts.[315]

1. THREE STANDARDS FOR HABITUAL RESIDENCE IN THE UNITED STATES

(a) Parental Shared Intent

Of the three standards in the federal circuit courts, the least certain habitual residence standard relies primarily on parental intent. In the *Mozes* case, a mother took her children from Israel to California with the

312. Elisa Perez-Vera, *Explanatory Report* at 428 - 429.
313. Hague Abduction Convention, Art. 3.
314. For a searchable database on decisions by signatories' courts of all levels under the Hague Abduction Convention, see http://www.incadat.com/index.cfm?fuseaction=convtext.showDetail&lng=1. *See also* R. Lamont, *Habitual Residence and Brussels IIbis: Developing Concepts for European Private International Law*, 3 J. PRIV. INT'L L. 261, 262 (2007). Note, however, that this author and others have noticed shortcomings in this database. *See* C. Bruch & M. Durkin, *The Hague's Online Child Abduction Materials: A Trap for the Unwary*, 44 FAM L. Q. 65, 70 (2010).
315. See *infra*.

father's permission to stay for fifteen months.[316] After twelve months, she filed for divorce in California.[317] In seeking a return, the father argued that the mother wrongfully retained the children in California from their habitual residence in Israel.[318]

The appellate court sought a consistent definition of habitual residence and a uniform interpretation to promote legal certainty[319] based on the Abduction Convention's enabling legislation.[320] Unfortunately, the court focused on the elusive standard of parental intent.[321] Though some courts examine objective facts such as "whether a child is doing well in school, has friends, and so on,"[322] the court rejected such objective tests as "superficial."[323]

Instead, the court held that "in the absence of settled parental intent, courts should be slow to infer from such contacts that an earlier habitual residence has been abandoned."[324] Because the Abduction Convention seeks to deter child abductions, the court set that high standard and adopted a shared intent analysis. Here, the court likened the children's time in the United States to that of an exchange student, which did not shift habitual residence.[325]

This analysis creates a paradigm wherein one custodial parent, by claiming intent to remain, can unilaterally block a child from acquiring a new habitual residence to maintain the previous habitual residence. As seen in Section II, this reasoning lacks logic, inserts subjectivity, and makes courts examine purported intentions rather than focus on the best interests of children.

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316. Mozes v. Mozes, 239 F.3d 1067, 1069 (9th Cir. 2001).
317. *Id*.
318. *Id*.
319. *Id.* (recognizing parents' vital interest in "knowing under what circumstances a child's habitual residence is likely to be altered, and [the] cold comfort to be told only that this is 'a question of fact to be decided by reference to all the circumstances of any particular case.'" (citing C v. S, [1990] 2 All E.R. 961, 965).
320. *Id.* at 1071 ("[W]e are mindful that Congress has emphasized 'the need for uniform international interpretation of the Convention." (citing 42 U.S.C. § 11601(b)(3)(B)).
321. *Id.* at 1076.
322. *Id.* at 1079 (citing Y.D. v. J.B. (Droit de la famille — 2454), [1996] R.J.Q. 2509, 2523 (Quebec Ct. App.) ("L'approche axée sur la réalité que vivent les enfants permet d'éviter d'avoir à sonder les reins et les coeurs des parents."); *Shah,* [1983] 1 All E.R. at 235-36 ("The legal advantage of adopting the natural and ordinary meaning ... is that it results in the proof of ordinary residence ... depending more on the evidence of matters susceptible of objective proof than on evidence as to state of mind.")).
323. *Id*.
324. *Id*.
325. *Id.* at 1083.

For example, in *Holder v. Holder*, this paradigm questionably preserved two children's United States habitual residence.[326] A husband, wife, and their sons had lived in Texas, Japan, and California when the family moved to a German military base for the husband's four-year assignment.[327] Eight months later, the mother took the children back to the United States.[328] The father claimed that both parents intended a four-year stay in Germany.[329] The mother, however, claimed that she had no intention to abandon a United States habitual residence.[330]

On appeal, the Ninth Circuit held, in an admittedly close case, that the parents lacked a shared intent to move permanently.[331] "Despite the factual focus of [the] inquiry, ultimately [the] conclusion rests on a legal determination," that relied on *Mozes*' analysis and the parents' settled intent.[332] "With parental intent as the starting point," the court found no joint intention to abandon "the children's habitual residence and shift it to Germany."[333]

The court then rejected the children's "acclimatization" in Germany despite all of the family belongings in Germany, the older child's eight months in a German school, a planned four-year stay, and an absence of United States residence.[334] Therefore, the mother's contention that she did not intend to stay in Germany blocked the children's habitual residence there.

Again, the shared parental intent test creates troubling results. Essentially, this test allowed a mother to change her mind, remove her children, and leave the father tied to his German post. This lopsided analysis may serve one parent's best interests but not necessarily the children's best interests. It ignores acclimatization in favor of unilateral whim and purported intent. Further demonstrating this test's weaknesses, the Eleventh Circuit has reached concerning results in even longer stays. For example, in the case of *Ruiz v. Tenorio*, the appellate court held that a child who stayed 32 months in Mexico was still habitually resident in the United States.[335] In *Tsarbopoulos v. Tsarbopoulos*, a District Court preserved a child's habitual United States

326. Holder v. Holder, 392 F.3d 1009 (9th Cir. 2004).
327. *Id.* at 1012.
328. *Id*.
329. *Id*.
330. *Id.* at 1013.
331. *Id.* at 1018 ("We acknowledge this is a close case.").
332. *Id.* at 1015.
333. *Id.* at 1018–19.
334. *Id.* at 1019.
335. Ruiz v. Tenorio, 392 F.3d 1247 (11th Cir. 2004).

residence after 27 months in Greece.[336] Under this shared parental consent test, one parent inevitably faces miserable odds. Courts should abandon this illogical and uncertain test that ignores the best interests of the child. Fortunately, not all courts rely on parental intent.

(b) Child-Centered Analysis

The Sixth Circuit applies a child-centered analysis. In *Friedrich v. Friedrich*, another case on a military base in Germany, an American woman and a German man met, married, and in 1989 had a child in Germany.[337] In an intense argument in 1991, the father told the mother to leave their apartment and placed all of her's and the child's belongings in the hallway.[338] Five days later, the mother took the young son to Ohio without the father's knowledge.[339]

The father petitioned for a Hague return.[340] On appeal, the Sixth Circuit performed a child-centered analysis. It began by declining to determine a United States habitual residence based on the child's legal residence or the mother's intent to return to Ohio. Instead, the court looked back in time to the facts in the child's life.[341] The court held that a child's "habitual residence can be 'altered' only by a change in geography and the passage of time, not by changes in parental affection and responsibility."[342] Based on the child's time in Germany, regardless of the mother's intentions or the father's actions, the child's habitual residence was in Germany.[343]

This analysis is far superior to parental intent. Instead of entertaining arguments over who did, said, or intended what, the court narrowed its analysis to the two most important factors: time and geography. This test focuses solely on the child's integration into the environment, not a parent's ability to persuade a court of their intentions in the past. Thus, the child-centered test takes a step towards the standard that this article argues for: a time-centered test.

The Sixth Circuit has reaffirmed its child-centered test.[344] After a family moved back and forth between France and the United States for six years

336. Tsarbopoulos v. Tsarbopoulos, 176 F. Supp.2d 1045, 1048 (E.D. Wash. 2001).
337. Friedrich v. Friedrich, 983 F.2d 1396, 1401 (6th Cir. 1993).
338. *Id*.
339. *Id*.
340. *Id*.
341. *Id*.
342. *Id.* at 1401–02.
343. *Id* at 1402.
344. Robert v. Tesson, 507 F.3d 981 (6th Cir. 2007).

and then split up, they argued their previous intentions in court to establish their twin boys' habitual residence.[345] The District Court in Ohio presiding over the case held that the child's residence was not in France because the parents lacked a shared intent.[346]

The Court of Appeals for the Sixth Circuit, however, rejected the *Mozes* test whose shared intent analysis "has 'made seemingly easy cases hard and reached results that are questionable at best.'"[347] Instead, the court focused "exclusively on the child's experience" to determine habitual residence.[348]

The court weighed the children's last extended stay in the United States before their short return to France, school attendance, and contact with relatives in the United States.[349] In contrast, the court noted little contact with their father and French relatives while in France.[350] Thus, the court held that the evidence indicated habitual residence in the United States[351]

To establish jurisdiction over these custody disputes, the Sixth Circuit ignores the parental intent, instead focusing on the time, place, and relationships where the child resides. These habitual residence determinations are more concrete than under *Mozes*. Most importantly, the Sixth Circuit determines habitual residence from the child's point of view, offering a better test than *Mozes* by focusing on the best interests of the child.

(c) Two-Pronged Child-Centered and Parental Intent Analysis

Courts in the Third and Eighth Circuits have attempted to balance those two conflicting analyses. In the 1995 case *Feder v. Evans-Feder*, a family had lived in Pennsylvania for three years when the father gained employment in Australia.[352] The mother had misgivings about moving to Australia and did not intend to remain there permanently, but the family moved there nonetheless.[353] Six months later, the mother returned to

345. *Id*.
346. *Id*.
347. *Id,* (quoting Koch v. Koch, 416 F.Supp.2d 645, 651 (2006)).
348. *Id.* at 995.
349. *Id.* at 996.
350. *Id.* at 997.
351. *Id*.
352. Feder v. Evans-Feder, 63 F.3d 217, 217-19 (3rd Cir. 1995).
353. *Id.* at 219.

Pennsylvania with the child for an alleged vacation but filed for divorce and custody in Pennsylvania.[354]

In overturning the District Court's decision, the Third Circuit held that the child's habitual residence was Australia.[355] The Court of Appeals considered habitual residence to be a mixed question of law and fact.[356] The court defined habitual residence as:

> the place where [the child] has been physically present for an amount of time sufficient for acclimatization and which has a "degree of settled purpose" from the child's perspective. . . . [A] determination of whether any particular place satisfies this standard must focus on the child and consists of an analysis of the child's circumstances in that place and the parents' present, shared intentions regarding their child's presence there.[357]

Thus, the Third Circuit analyzes the child's circumstances and the parent's shared intentions.

In applying that definition, the court noted that the child was supposed to live in Australia for the foreseeable future.[358] The six months he spent there were significant in his four years of life.[359] Further, the parents had enrolled the child in pre-school for the upcoming year.[360] The couple's house and the father's job in Australia indicated "the couple's settled purpose to live as a family in [Australia]."[361] Thus, the child's habitual residence was Australia.

This case demonstrates how courts applying this two-pronged test primarily examine the child's point of view. They then apply the facts from the child's viewpoint to secondarily determine the parents' intent, without putting much weight on either of one parent's expressed intent at trial. This palatable test focuses on a child's interests but confuses with parental intent.

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354. *Id*.
355. *Id* at 224.
356. This determination, however, drew a dissenting opinion from Judge Sarokin, who reasoned that the determination of habitual residence is a question of pure fact that an appellate court should not review absent clear error. *See id.* at 227.
357. *Id.* at 224.
358. *Id*.
359. *Id*.
360. *Id*.
361. *Id*.

The Eighth Circuit has adopted a similar two-pronged analysis. In *Silverman v. Silverman*, a couple moved to Israel with their two sons.[362] The father claimed that the mother pushed for the move while she described herself as "torn" about living in Israel.[363] The boys enrolled in school, where they performed well and learned Hebrew.[364] However, the parents' relationship deteriorated.[365] The couple found out that if the couple got divorced by a Rabbinical Court in Israel, the father would likely get custody.[366]

After eleven months, the father consented to the boys' vacation with their mother in the United States.[367] At the airport in Israel, the mother decided not to return.[368] She then sought custody in Minnesota.[369] In hearing the father's Hague return case on appeal, the Eighth Circuit Court of Appeals determined that habitual residence was a legal standard requiring the application of facts.[370] The court supported this determination with a policy argument that:

> [i]f habitual residence [were] treated as a purely factual matter, to be decided by an individual judge in individual circumstances unique to each case, parents [would] never be able to guess, let alone determine, whether they are at risk of losing custody by allowing their children to visit overseas or in allowing them to make international trips with an estranged spouse. With such uncertainty, parents experiencing marital difficulties will be less likely to allow children to travel with one parent and less likely to allow children to maintain relationships with families in other countries. Congress must have intended that there be enough consistency in these cases to prevent such a result. Indeed, we find it difficult to believe that American legislators intended to launch American citizens into such unchartable waters.[371]

362. Silverman v. Silverman, 338 F.3d 886, 889 (8th Cir. 2003).
363. *Id*.
364. *Id*.
365. *Id.* at 890.
366. In Jewish divorce law – which is applied to all Jewish couples' divorces in Israel – a presumption exists that a parent will get custody over children of that parent's sex if the child is over the age of six. Generally speaking, divorce actions in Israel favor the husband. See Karin Carmit Yefet, *Unchaining the Agunot: Enlisting the Israeli Constitution in the Service of Women's Marital Freedom*, 20 YALE J.L. & FEMINISM 441 (2009).
367. *Silverman*, *supra* note 362, at 890.
368. *Id*.
369. *Id.* at 891.
370. *Id.* at 896.
371. *Id.* at 896-97.

True to form, the United States Court of Appeals wanted a concrete habitual residence definition.

To reach this end, the court sculpted its habitual residence definition. The court distinguished habitual residence from domicile, but stated that a person may only have one habitual residence.[372] Then, the court adopted the two-pronged *Feder* test, examining the facts:

> from the children's perspective, including the family's change in geography along with their personal possessions and pets, the passage of time, the family abandoning its prior residence and selling the house, the application for and securing of benefits only available to Israeli immigrants, the children's enrollment in school, and, to some degree, both parents' intentions at the time of the move to Israel.[373]

Here again, the court took the facts from the child's point of view to determine parental intent.

The Third Circuit has added a layer to habitual residence that further divorced the analysis from parental intent. In *Karkkainen v. Kovalchuk*, a divorced couple's child lived with her mother in Finland.[374] To facilitate contact with the father in the United States, the mother let the child become a permanent United States resident.[375] At age eleven, the child expressed wishes to move to the United States, and the parents agreed to allow her to visit there for a summer.[376]

The child's mother and stepfather did not challenge her wishes, so she thought that she had "permission to move permanently to the United States if she wished."[377] She bid farewell to her friends and family, applied for a school in the United States, and left for the United States.[378] In July, the child decided to stay in the United States, but the mother withdrew her consent for the visit.[379] In August, the mother sought her daughter's return.[380]

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372. *Id*.
373. *Id.* at 896-99.
374. Karkkainen v. Kovalchuk, 445 F.3d 280, 285 (3rd Cir. 2006).
375. *Id*.
376. *Id.* at 285-86.
377. *Id*.
378. *Id*.
379. *Id.* at 294, 290.
380. *Id*.

On appeal, the Third Circuit examined whether the mother's permission to go to the United States had indefinitely changed the daughter's habitual residence. In applying the two-pronged standard, the court examined the child's acclimatization and degree of settled purpose.[381]

In regard to the child's acclimatization, the court noted that the daughter took classes and participated in activities in the United States and seemingly abandoned Finland.[382] Though her time in the United States was short, the parents' agreed intention that she would choose her residence lessened the time necessary to establish habitual residence.[383] The overarching factor in this part of the test was the daughter's remarkable maturity.[384] Thus, the court held that, from the child's perspective, the daughter had established significant roots in the United States.[385]

In regard to the parent's shared intent, the court altered the shared intent consideration by making it relative to the child's age, giving "somewhat less weight to shared parental intent in cases involving older children . . . capable of becoming 'firmly rooted' in a new country."[386] Considering the daughter's age and the shared intent to reside indefinitely, the court held that the United States was the daughter's habitual residence.[387] Thus, this case adds the child's maturity to the judicial definition of habitual residence.

In theory, this two-pronged analysis provides some balance between the opposing child-centered and parental intent standards.[388] However, this awkward balancing may be "more like judging whether a particular line is longer than a particular rock is heavy."[389] After all, any parent knows that what they intend for their child often differs from how their child develops.

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381. *Id.* at 294.
382. *Id*.
383. *Id*.
384. *Id*.
385. *Id*.
386. *Id.* at 296.
387. *Id*.
388. *See* Stephen E. Schwartz, *The Myth of Habitual Residence: Why American Courts Should Adopt the Delvoye Standard for Habitual Residence Under the Hague Convention on the Civil Aspects of International Child Abduction*," 10 CARDOZO WOMEN'S L.J. 691 (2004); *see also* Carshae DeAnn Davis, *The Gitter Standard: Creating a Uniform Definition of Habitual Residence Under the Hague Convention on the Civil Aspects of International Child Abduction*, 7 CHI. J. INT'L L.321 (2006).
389. Bendix Autolite Corp. v. Midwesco Enter., Inc., 486 U.S. 888 (1988) (Scalia, J., dissenting).

Instead, the objective standard of the Sixth Circuit rings truest to the "factual determination" that the Abduction Convention envisions.[390] The circuit split, however, is likely to remain until the issue reaches the United States Supreme Court.[391] This federal circuit split notably has analogous European Union counterparts.

2. HABITUAL RESIDENCE APPROACHES IN EUROPEAN ABDUCTION CONVENTION CASES

Courts in European Union countries seem comfortable with broad notions of a fact-based test. At first glance, the recent CJ case *A* might facilitate a uniform standard among Member State courts. However, three reasons illustrate why a uniform definition remains out of reach.

First, *A*'s analysis preserves the term's vagaries. Its mere recital of the determination as relying on all of the facts in the case offers little guidance, as subsequent United Kingdom cases show. Second, even if European courts adopt a narrower reading of *A*, this may not apply to Abduction Convention cases. After all, the Abduction Convention, unlike BII*bis*, is not a matter under CJ jurisdiction as applied to non-European Union Member States. Thus, national courts may develop different standards for habitual residence for European Union and non-European Union cases. Courts have entrenched their own differing habitual residence definitions in Abduction Convention cases for decades. A brief analysis of habitual residence in Member States' case law exposes these differences.

(a) Parental Intent: The United Kingdom Approach

Courts in the United Kingdom take an intent- and time-based approach toward habitual residence under the Abduction Convention since the seminal case before the United Kingdom's supreme appellate court, the House of Lords, which followed the national definition for habitual residence. In the case *In Re J.*,[392] the House of Lords largely followed the Court of Appeals opinion that held that a young child's habitual residence relied on two factors: his custodial parent's intent and presence for an "appreciable period of time."[393]

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390. For an argument supporting the Sixth Circuit's standard, *see* Tai Vivatvaraphol, *Back to Basics: Determining a Child's Habitual Residence in International Child Abduction Cases Under the Hague Convention*, 77 FORDHAM L. REV. 3325 (2009).

391. *See, e.g.*, L. Silberman, *Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence*, 38 U.C. DAVIS L.R. 1049, 1065 (2005).

392. In Re J, [1990] 2 A.C. 562 (*see also* http://www.hcch.net/incadat/fullcase/0002.htm).

393. *Id*.

The appellate court cited *Kapur v Kapur*[394] "for the proposition that habitual residence must have an element of voluntariness and of residence for settled purposes."[395] In that case, the court did not determine whether the child had "habitual residence in [England] at the moment when they arrived in [England] in circumstances in which they had every intention of staying [t]here indefinitely and of settling [t]here."[396] Instead, it examined whether the child retained habitual in residence in Australia after his mother took him to England.[397]

Although acquiring a habitual residence takes time, a child can lose his habitual residence in an instant.[398] The House of Lords followed this definition on appeal:

> A person may cease to be habitually resident in country A in a single day if he or she leaves it with a settled intention not to return to it but to take up long-term residence in Country B instead. Such a person cannot, however, become habitually resident in country B in a single day. An appreciable period of time and a settled intention will be necessary to enable him or her to become so. During that appreciable period of time the person will have ceased to be habitually resident in country A but not yet have become habitually resident in country B.[399]

While the child might not have had an English habitual residence, he could have lost his Australian habitual residence the moment his plane touched down at Heathrow.

Further, the child's young age made his habitual residence the same as his mother's. Thus, "the mother ceased to be habitually resident in Western Australia from the moment when she left Western Australia bound for England, with the intention of remaining permanently."[400] This case demonstrates the importance of intent in United Kingdom Abduction Convention cases. This approach problematically allows a parent to unilaterally terminate a habitual residence.

Further, the court removed factual analysis by looking solely at the mother's intent. Though it nodded towards the "appreciable period of

394. [1984] F.L.R. 922
395. [1990] 2 A.C. 562 (*see also* http://www.hcch.net/incadat/fullcase/0002.htm).
396. *Id*.
397. *Id*.
398. *Id*.
399. Lord Brandon of Oakbrook, House of Lords [1990] AC 562.
400. *Id*.

time" requirement – a vaguely constructed concept indeed – the court eliminated time from the analysis by endorsing an immediate loss of habitual residence. This deference to unilateral intent defied the interests of the child and the left-behind parent. Nonetheless, this influential decision focused squarely on parental intent.

The House of Lords revisited the issue in 1998. In the case *In Re S.*, the court distinguished from *In Re J.,* finding a wrongful retention based on custody rights awarded after the child's removal.[401] The House of Lords adopted the opinion of Judge Butler-Sloss in the appellate court below that:

'[o]nce the child has been removed to another jurisdiction, the issue whether the child has obtained a new habitual residence whilst in the care of those who have not obtained an order or the agreement of others will depend upon the facts. But a clandestine removal of the child on the present facts would not immediately clothe the child with the habitual residence of those removing him to that jurisdiction, although the longer the actual residence of the child in the new jurisdiction without challenge, the more likely the child would acquire the habitual residence of those who have continued to care for the child without opposition. Since, in the present case, the English court was seised [sic] of the case within two days of the removal of the child, it is premature to say that the child lost his habitual residence on leaving England or had acquired a new habitual residence from his de facto carers [sic] on arrival in Ireland.[402]

Thus, in this case, the House of Lords maintained its focus on parental intent, analyzing whether the child spent time in the country without the parent's opposition. However, the court shifted its focus toward time in the country, a subtle move towards objectivity in habitual residence.

Based on time, the child could not have established a new habitual residence so quickly. Had the child spent more time in Ireland, the court would have likely left him with his new primary caregiver with whom he had the time to bond.

This focus on time, however, has not prevailed in United Kingdom case law. Rather, the courts focus primarily on a parental intent test that remains ingrained in United Kingdom jurisprudence, as the cases that

401. Re S. (A Minor) (Custody: Habitual Residence) [1998] AC 750 (see http://www.bailii.org/uk/cases/UKHL/1997/32.html).
402. *Id*.

followed *A* have shown.[403] Other European Union courts apply a child-centered approach.

(b) Child-Centered: The Swedish and Danish Approach

Sweden and Denmark generally apply a child-centered test in analyzing habitual residence, but also look to parental consent. Early lower Swedish court decisions put inordinate weight on parental intent.[404] However, the Swedish Supreme Administrative Court changed that focus in a case on habitual residence in Sweden in 1995 that involved a series of abductions where the parent took the child back and forth between Sweden and the United States, spurring litigation on both continents.[405]

The child eventually rested in Sweden where the Supreme Administrative Court refused her return based on Swedish habitual residence. The court noted that, as evidenced by Article 12, a child could acquire habitual residence in a country after a wrongful removal.[406] The child spent two years in Sweden after one abduction and acquired habitual residence in Sweden before the father re-removed her to the United States.[407] Sweden remained the habitual residence when the mother removed the child again.[408] Thus, the mother's final removal was not wrongful.

In this case, the court looked past any parental intent. Instead, the court examined the facts from the child's point of view to determine habitual residence. Admittedly, the court had to consider time because the parents' only shared intent was to deprive the other's parental rights. This case shows how time is more reliable than subjective intent.

In a case before the same court in 2000, habitual residence conversely turned on intent.[409] A child had lived in Sweden with his unmarried parents until the age of five.[410] His mother then removed him against his

403. See *supra*, pp. 56 – 62.
404. The early Swedish focus on intent lives in infamy in the Gothenburg appellate court decision on 14 November 1990. The Swedish court had a case with a mother who moved to Netherlands with the intent to remain there. She had been there 12 days when the father removed the children to Sweden. The Swedish court held that the children acquired a habitual residence in the Netherlands after 12 days, based on the mother's intent to remain.
405. *See* Regeringsrätten [RÅ] [Supreme Administrative Court] 1995-12-20 ref 99 (Swed.) and Ohlander v. Larson, 114 F.3d 1531 (10th Cir. 1997).
406. *Id*.
407. *Id*.
408. *Id*.
409. Regeringsrätten [RÅ] [Supreme Administrative Court] 2001-09-12 ref 53 (Swed.).
410. *Id*.

father's wishes to England, intending to stay.[411] One year later, the mother let the child visit Sweden with the father, who retained him.[412]

Noting that a child can acquire a habitual residence after abduction, the court held that the father had not acquiesced to the removal, despite his failure to file a return petition in England.[413] Notwithstanding time spent in England, the court found a Swedish habitual residence because the child was in Sweden for most of his life.[414]

This case demonstrates conflicting views on habitual residence among signatories. The House of Lords would have likely held that the child's habitual residence shifted because "the mother continued to care for the child without opposition."[415] The Swedish court, however, looked past the father's apparent acquiescence. These contrasting cases indicate the lack of uniformity regarding parental intent, even outside of the United States.

Unlike the previous cases' unplanned shuttling between countries, some parents agree to shuttle children back and forth by having the child alternate residences. Under these arrangements, both parents intend for the child to live periodically in two places but likely lack shared intent regarding the child's habitual residence. Predictably, one parent will retain the child.

In another Swedish case, a shuttle custody agreement fell through.[416] The Swedish court looked to Swedish law, which stated that "a person who is resident in a given state may be considered to have habitual residence in this state if residence must be considered constant in view of the duration of the period concerned and other circumstances."[417] However, the court acknowledged that under its Abduction Convention definition, habitual residence was:

> primarily a matter of making an overall assessment of circumstances which may be observed objectively such as the length of sojourn, existing social ties, and other circumstances of a personal or occupational nature which may indicate a more

411. *Id*.
412. *Id*.
413. *Id*.
414. *Id*.
415. *Re S* [1998] AC 750.
416. *J. v. J*., Case No. 7505-1995, 9 May 1996, Supreme Administrative Court of Sweden.
417. "Om en person är bosatt i Sverige bör han (alltså) anses ha hemvist här, om bosättningen med hänsyn till vistelsens varaktighet och omständigheterna i övrigt måste anses stadigvarande." *Id*.

> permanent attachment to one country or the other. In the case of a small child, the habitual residence of person who has custody, and other family and social aspects, must be the decisive factors.[418]

The child here had been in Sweden with her mother, a habitual resident of Sweden, for over two years, she had adjusted to life in Sweden, and was supposed to spend eight out of twelve years there.[419] Thus, the court applied a child-centered test.

On the one hand, this analysis was sound because it focused on the facts of the case. Lacking agreed parental intent, the court had no choice but to examine the most logical, practical and common sense method of analyzing a child's integration – time spent in the environment.

On the other hand, the decision leaves shuttle custody agreements impotent in Sweden. Here, both parents expressly agreed to recurring temporary absences, but the court ignored that agreement. As a result, any parents must be wary of allowing their children to go to Sweden for time-limited periods because the other parent could retain the child despite express agreements.

This category of temporary presence demands protection under international law. Instead of looking at the facts and parental intent, international law should respect agreements to time-limited absences. This and other categories, explained in Section V, would provide more protection and certainty for families across borders.

Denmark similarly applies a child-centered analysis. Like Sweden, earlier case law in Denmark muddled the habitual residence determination by considering amount of time spent in the jurisdiction, in addition to other factors. In a 1997 case with parallel proceedings in New Jersey, the Denmark court refused a return from Denmark to the United States.[420]

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418. "Allmänt kan sägas att det vid en prövning av hemvistfrågan enligt konventionen i första hand blir fråga om en helhetsbedömning av sådana objektivt konstaterbara förhållanden som en vistelses längd, föreliggande sociala bindningar och andra förhållanden av personlig eller yrkesmässig karaktär som kan peka på en mera stadigvarande anknytning till det ena eller andra landet. När det gäller ett litet barn får vårdnadshavarens hemvist och de familjemässiga och sociala förhållandena i övrigt avgörande betydelse." *Id*.

419. *Id*.

420. V.L. 3. marts 1997, 11. afdeling, B-2511-96 (Vestre Landsret; High Court, Western Division (Denmark); Superior Appellate Court).

Primarily, the court recognized that the children spent a majority of their lives in Denmark, as opposed to several months in the United States.[421] In addition, the court noted that, according to the Danish national register, the children were settled in Denmark throughout.[422] Further, the court noted the father's request for the children to go to Denmark contributed to the habitual residence determination.[423] Thus, the court considered parental intent and the facts.

The Danish court could have decided this case solely on the short time spent in the United States compared with the major part of the children's lives in Denmark. The children's registration on the national register added little. Whether formally registered or not, children may still integrate into a new environment. Additionally, parents may register their children in a country for many reasons, but establishing habitual residence should not be one of them.

Further, the court should not have focused on the father's alleged suggestion that the children go to Denmark. Even if he had, a suggestion does not change a child's integration.

Compared to other jurisprudence, this case shows a lack of uniformity. In several cases above, courts have allowed one parent's lack of consent to block a child from acquiring a new habitual residence. In some jurisdictions, a unilateral assertion of intention at trial has been enough to preserve habitual residence. Here, however, the court turned this logic on its head. This confuses the issues and defies attempts toward uniformity in Abduction Convention cases.

In appellate cases, the Danish courts have focused on time. In one case, a child spent the majority of his life in Denmark.[424] The child's time in the Netherlands was too short to establish habitual residence. Thus, the court focused on time of residence to determine habitual residence.

Similarly, time was the crucial factor in a 2002 Danish appellate case.[425] In that case, however, a time-limited agreement preserved the child's Danish habitual residence. The child had lived in England for her first seven years when her mother agreed to allow the child to stay in

421. *Id*.
422. *Id*.
423. *Id*.
424. Ø.L.K. 23. juni 1998, 16. afd., B-1391-98 (Østre Landsret: High Court, Eastern Division (Denmark);Appellate Court).
425. Ø.L.K, 5. April 2002, 16. afdeling, B-409-02 (Østre Landsret (High Court, Eastern Division, Denmark)).

Denmark for one year with her father. After the year, the father retained the child. The Danish court honored the time-limited agreement and thus ordered the child's return to England.

This outcome seems appropriate. Parents should be able to protect themselves while affording their children time with their other parent and a different culture. Without guidance in the Abduction Convention, however, parents will enjoy protection at the whim of national courts.

The Danish courts put great weight on time in habitual residence determinations. While they have not set a specific time limit, time provides the major factor in habitual residence determinations. Moreover, the courts will respect a time-limited agreement to preserve habitual residence when a child temporarily leaves a habitual residence. The following questions remain: Why leave these particulars to the national courts? Why not include concrete time limits and categorical exceptions within international family law?

(c) Temporal Standards: the Austrian and German Approaches

The Supreme Court of Austria has contributed a concrete habitual residence determination standard for Abduction Convention cases. In Austria, six months' presence generally establishes habitual residence, as evidenced by a 2003 case, in which a child had spent time in Austria and Serbia.[426] At the heart of the case was whether the child's time in Serbia had established habitual residence. The child spent five months in Austria, eight months in Serbia, and seven months in Austria when the father took the children to Serbia.[427] The following month, the mother took the child back to Austria. The father then sought a return.

The supreme Austrian court defined habitual residence[428] as identical to its 1996 Convention definition in Austria.[429] The court held that, in general, six months presence establishes habitual residence, regardless of parental intent.[430] Because the child had been in Austria for more than

426. Ob121/03g, Supreme Court of Austria, 30/10/2003 (see also http://www.incadat.com/index.cfm?fuseaction=convtext.showFull&code=548&lng=1).

427. *Id*.

428. Demgemäß kommt es für die Ermittlung des "gewöhnlichen Aufenthaltes" darauf an, ob jemand tatsächlich einen Ort zum Mittelpunkt seines Lebens, seiner wirtschaftlichen Existenz und seiner sozialen Beziehung macht. Der Aufenthalt bestimmt sich ausschließlich nach tatsächlichen Umständen.

429. Der Begriff des gewöhnlichen Aufenthaltes im Sinn des Art 3 des Übereinkommens ist gleich auszulegen wie in den diesen Begriff enthaltenden Bestimmungen der JN und des Haager Minderjährigenschutzübereinkommens (1 Ob 220/02p)

430. Die Dauer des Aufenthalts ist für sich allein kein ausschlaggebendes Moment, doch ist im Allgemeinen nach einer Aufenthaltsdauer von sechs Monaten anzunehmen, dass ein "gewöhnlicher

six months followed by at most three weeks in Serbia,[431] Austria was the habitual residence.

The Austrian standard seems to provide the clearest-cut habitual residence standard in Europe. Instead of positioning judges as child development analysts or parental mind readers, the Austrian courts need only look at their calendars and, based on objective facts, count whether the child spent six months in the country. If so, this establishes habitual residence.

The standard, however, causes problems in temporary presence situations. The Austrian courts would not be justified in finding Austrian habitual residence for a Serbian child who spent a year in an Austrian boarding school. Thus, a six-month standard requires exception.

Germany has also applied a concrete time standard. The German Constitutional Court heard a re-abduction case in 1998, acknowledging a general rule that six months' presence will establish habitual residence.[432] In that case, the children had lived their entire lives in Germany. The parents had joint custody when, in July 1997, the mother removed the children from Germany to France with a pending German divorce order. After a French trial court denied his Hague petition, the father's agents removed the children from France back to Germany in March 1998.

The mother sought the children's return, which the trial court denied.[433] The mother appealed, and the appellate court reversed. Then, the father appealed to the Constitutional Court based on his constitutional right to family life in the German *Grundgesetz*.[434]

The Constitutional Court denied the return but nonetheless found that the child had obtained a French habitual residence. Despite the nature of the removal, the court's determination was purely factual. The court considered whether the child achieved social inclusion, which, as a "rule of thumb" in the German federal courts, occurred after six months.[435]

Aufenthalt" vorliegt. Ein gewöhnlicher Aufenthalt kann auch gegen den Willen eines Sorgeberechtigten begründet werden, weil es auf den tatsächlichen Daseinsmittelpunkt ankommt (1 Ob 220/02p; 2 Ob 80/03h; vgl auch RIS-Justiz RS0109515).

431. *Id*.

432. 2 BvR 1206/98, Bundesverfassungsgericht (Federal Constitutional Court of Germany), 29 October 1998.

433. *Id*.

434. *Id*.

435. *Id.* at 32 ("In der Rechtsprechung werde 'als Faustregel' häufig eine Aufenthaltsdauer von sechs Monaten angenommen, welche der Bundesgerichtshof im Regelfall als angemessene Zeitspanne anerkenne.")

Simply put, the child had been in France for more than six months and thus acquired habitual residence in France. These cases indicate a temporal standard in at least two European Union Member States.

(d) A Two-Pronged Analysis: The French Approach

France's Supreme Court has heard several cases on this issue.[436] Evolving case law reveals the uncertainty that habitual residence cases retain. In the seminal 1992 Abduction Convention decision, the *Cour de cassation* applied a parental shared intent analysis.[437] In that case, a young child had been living in Canada for a year when the family visited France at the beginning of the summer. At the end of the summer, the father stayed in France with the child, and the mother returned to Canada. In September, the mother sought the child's return.

The father argued that the move was permanent. However, he could not produce evidence to convince the *Cour de cassation* that the mother intended a permanent move to France. Thus, because the parents lacked a shared intent, the child retained habitual residence in Canada.

This case reached the right result, but it could have done so without appealing to the supreme appellate court with two improvements to Abduction Convention. First, a time-based standard for habitual residence, if more than three months, would have objectively preserved habitual residence in Canada. Second, a categorical definition of "temporary absence" to prevent children from acquiring habitual residence during vacations would likely have streamlined the mother's arguments. Unfortunately, these standards do not exist in private international family law. As a result, the French courts have consistently relied on parental intent.

In another case, the Court used a two-pronged analysis: the circumstances surrounding the child and the father's intent that the child live in England.[438] In that 2006 decision, the *Cour de cassation* held that the children had residence in England after a year because the children enrolled in school, the mother had a job in England, and the residence was not provisional. Furthermore, the father did not previously

436. See, e.g., Cass Civ 1ère 16/12/1992 (N° de pourvoi : 91-13119); Cour de cassation [Cass.][Supreme Court for Judicial Matters] 1e ch., November 14, 2006 (N° de pourvoi : 05-15692).

437. The *Cour de Cassation* is the supreme appellate court in France for non-public law cases. Cass Civ 1ère 16/12/1992 (N° de pourvoi : 91-13119).

438. Cour de cassation [Cass.][Supreme Court for Judicial Matters] 1e ch., November 14, 2006 (N° de pourvoi : 05-15692).

challenge the children's move to England and visited them there twice. Thus, the French court has examined objective facts and parental intent.

C. CONCLUSIONS REGARDING HABITUAL RESIDENCE IN INTERNATIONAL LAW

International case law demonstrates the inconsistent treatment of habitual residence by courts across the globe. While the Abduction Convention strives for unanimity, courts determine habitual residence on their own terms. Some look to parental intent, some look to time, some look to the child's integration, and some weigh all of the facts in the case. Courts have necessarily embedded their own brands of habitual residence as a result of the Abduction Convention's limited guidance, a shortcoming that the 1996 Convention retains. Parents thus face a lack of uniformity among international courts. They further face uncertain determinations in the courts that lack a time-bound and categorical approach to habitual residence. Private international law therefore demands a uniform, concrete standard for jurisdiction in cross-border cases.

V. TIME FOR A TEMPORAL AND CATEGORICAL STANDARD FOR JURISDICTION

A uniform concrete standard is well within reach. Until the Hague Conference, the National Conference, and the European Union unify the international standard, domestic courts must lead the way in applying jurisdictional standards. This article presents a two-fold solution to concretize court decisions in this area of law.

First, private international law should adopt a temporal standard for habitual residence. A temporal standard will promote the best interests of children, increase legal certainty, and promote uniformity. This type of standard has some precedent, as international family law uses strict time limits for jurisdiction in some cases. Moreover, temporal standards have already worked in some countries' jurisdictional schemes. For these reasons, cross-border jurisdiction should embrace a temporal standard.

Second, international family law should establish categories of temporary presence to define temporary moves. United States, European Union, and international family law each generally lacks specific guidelines regarding temporary presence. By providing precise definitions, parents and children would enjoy more opportunities to exercise their rights to contact.

Though this two-part solution will not provide a panacea for all cross-border custody disputes, it furnishes a more uniform, autonomous, and legally certain standard for jurisdiction. Until private international law instruments concretely define habitual residence, courts should adopt this approach to serve cross-border families and, most importantly, the best interests of children.

A. A TEMPORAL HABITUAL RESIDENCE STANDARD

For most cross-border cases, a temporal standard for habitual residence would concretely determine habitual residence. Such a standard would serve three crucial purposes. Primarily, a temporal standard will best serve children's interests because time is the central factor toward integration. Children should remain in the environment where they enjoy stability, support, and integration. Courts with close proximity to the child's integrated environment have better access to evidence of the child's best interests. Granted, many factors will contribute to a child's integration, including schooling, family ties, social networks, and linguistic knowledge. However, these factors require the most fundamental catalyst of integration – time.

Second, and closely related to the best interests of the child, a temporal standard will maximize legal certainty in these cases. Legal uncertainty has negative effects on families in these situations both in practical and legal terms. From the practical perspective, uncertainty requires more legal help, which means more costs. These costs include monetary expenditure, which one parent, both parents, or the state must pay.

These costs are also non-monetary. Parents who struggle through litigation have less time to care for their children, move on with their lives, and foster healthful environments. Instead of improving prospects for employment, personal relationships, and healthy living, parents suffer the stresses of attorneys, courts, and dysfunctional ex-partnerships. Considering the flurry of child abduction-related cases that have made it all the way to the European Court of Human Rights ("ECHR"),[439] parents can delay proceedings for years – a move that in one recent case prompted the ECHR to determine that, considering the lengthy duration of pending litigation, a child's rights would be harmed if he was returned

439. *See, e.g.*, *Trdan and C. v. Slovenia*, 28708/06 2010 [ECHR] 1978 (7 December 2010); *Sakewitz v. Germany*, 21369/07 [2010] ECHR 1910 (2 November 2010); *Van Den Berg and Sarri v. the Netherlands*, 7239/08 [2010] ECHR 1947 (2 November 2010); *Raban v. Romania*, 25437/08 [2010] ECHR 1625 (26 October 2010); *MM v. the United Kingdom*, 24029/07 [2010] ECHR 1588 (6 October 2010); *Sylvester v. Austria*, 36812/97 [2010] ECHR 1447 (15 September 2010); *Neulinger and Shuruk v. Switzerland*, 41615/07 [2010] ECHR 1053 (6 July 2010).

to his parent.[440] As seen, the stress of litigation will likely take its toll on the very people international family law should protect: children.

With a temporal standard, parents would escalate litigation in fewer cases. Instead of weighing many subjective factors, courts would make a factual determination – time in country. Thus, a temporal standard would provide practical benefits by increasing legal certainty.

From the legal deterrent perspective, uncertainty incentivizes wrongful removals. If parents can find sympathetic national courts that may decide in their favor after abductions, parents will be more likely to abduct children. Subjective tests allow the possibility that if parents abduct, a court will loosely apply the habitual residence standard. A temporal standard, however, offers less room for courts' discretion. Thus, a temporal standard will deter child abductions.

Finally, a temporal standard would better serve the international family law framework by adding uniformity – and thus legitimacy – to cross-border custody cases. Despite international family law's steps toward uniformity, the current lack of uniformity communicates a sense of arbitrariness in international family law. The current legal standard has resulted in varying judicial application with too much discretion for uniformity.

The best way to increase uniformity among national court decisions is by relying on the clearest objective factor – time. All stakeholders – parents, courts, lawyers, governments, and communities – would thus play by the same rules.

Time toward integration is an admittedly blunt tool with which to gauge a child's integration, but social science can help. Research on child integration would inform courts as to how much time leads to integration. If social science determines that children of different ages integrate after different periods, courts could craft an age-based temporal standard. Experts in child development are best qualified to set such standards. Several countries have decided that six months' presence in a country assures integration in an environment. This six-month period provides a tested standard to determine habitual residence.

A temporal jurisdictional standard is not an entirely novel concept. As we have seen, laws in the United States and courts in Austria and Germany apply a six-month standard for jurisdiction in child custody

440. *Neulinger and Shuruk v. Switzerland*, 41615/07 [2010] ECHR 1053 (6 July 2010).

cases. In international family law, time also exists. Most notably, abduction cases under the Abduction Convention and BII*bis* preserve jurisdiction in abduction cases for one year after abductions. Additionally, BII*bis* preserves jurisdiction over rights of access for three months after legal removals. European Union laws regarding family reunification also apply strict time restrictions.[441] Thus, a temporal standard for primary jurisdiction would build on a concept that already protects children in some cross-border situations.

In sum, a temporal jurisdictional standard in international family law would protect children *en masse* by increasing legal certainty and uniformity in cross-border custody cases. For these reasons, a time-based standard should apply for most international custody disputes.

B. A CATEGORICAL TEMPORARY PRESENCE STANDARD

The time-based standard would not be appropriate in temporary presence cases. Under the current framework, however, courts have little guidance regarding temporary presence. Though the negotiations of the 1996 Convention indicate that temporary absences will not establish a habitual residence, the 1996 Convention leaves courts to their own devices to determine whether a move was temporary. Courts can begin fashioning specific guidelines surrounding temporary presence with subcategories and evidentiary requirements to show temporary presence.

As seen above, these determinations often turn on parental intent – usually only one parent's intent. When courts rely on one parent's word, they risk making arbitrary, erroneous, or biased decisions on criteria that may have little to do with the child's actual integration. Worse still, some courts blatantly disregard agreements between parties stipulating temporary presence. This leaves parents with little security when they allow their children to travel abroad.

That uncertainty deters parents from allowing their children to travel abroad. Moreover, this uncertainty deprives valuable parent-child contact, in violation of children's human rights to family life in almost all countries.[442] Categorical definitions for temporary presence offer a solution.

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441. See *Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification* [2003] O.J. L251 12.

442. UN General Assembly, *Convention on the Rights of the Child* at art. 7, 20 November 1989, 1577 U.N.T.S 3.

Children have temporarily residences for various, but limited, reasons. For example, a child's presence is temporary when it is for the child's education, a parent's education, a parent's time-limited employment, shuttle custody arrangements, vacation, summer camp, visitation, emergency supervision, and medical services. If the primary purpose of the travel is any of these reasons, then, with sufficient evidence, courts should presume that the presence was temporary.

Each of these types of temporary presence will have some evidentiary support. Instead of divining parental intent, courts could require evidence that supports temporariness. For example, courts could require parents to produce enrollment paperwork, travel itineraries, correspondences, or medical bills. Such evidence could reliably indicate temporary presence and simultaneously provide parents with ways to protect their children when sending them abroad.

Further, parents should be able to build in some protection when they allow their children to reside temporarily with parents abroad. Courts should recognize party agreements that stipulate a limited stay. If the parent abroad retains the child past the agreed time, then the other parent would have one year past that time to file a Hague return petition. Thus, categories of temporary presence would provide parents with protection when allowing their children to go abroad.

In any event, these categorical definitions of temporary absence should not extend for unreasonably long periods. Specific categories could have built-in time limits to account for the child's potential integration despite parental intent. For example, a category for vacation could include a three-month time limit so that parents could not simply argue that an extended presence was a vacation. Such temporal limits would add objectivity to temporary presence.

If a move is for an indefinite amount of time, then the general temporal standard should apply. Certain evidentiary standards of indefinite presence, such as return travel arrangements, retention of a previous residence, or enrollment in school, could add a measure of certainty.

Procedures surrounding these time-limited moves could further protect parent and child rights. Signatory states could collaborate on form agreements that parents could use and register with the Central Authorities when the children go abroad. Parents could simply access these forms online and enjoy peace of mind knowing that courts would respect these agreements.

In sum, a temporal standard for child custody jurisdiction that categorically defines temporary presence would best serve the best interests of children. Because habitual residence presently lacks definition, courts should adopt such a standard in international family law.

C. CONCLUSION

This tour of two continents has outlined jurisdiction in cross-border custody cases and the body of law that has increasingly developed over the past several decades. Jurisdictional determinations have room for improvement under United States, European Union, and international law.

United States domestic law applies a time-based jurisdictional standard. The UCCJEA boasts several bright line tests that foster consistency. Two primary weaknesses in United States law are temporary absence's breadth and the rigid application of requirements that disadvantages foreign parties and foreign courts. International family law can solve both problems with categorical definitions of temporary presence and uniform jurisdictional standards. At its core, however, the UCCJEA offers parties a certain and uniform six-month jurisdictional standard.

In Europe, parties face a different situation. Unlike the rigid rules in the United States, the CJ has endorsed an all-the-facts-in-the-case standard, leaving parties with less certainty or predictability in front of foreign judges. Despite the recent ruling in *A*, parties and attorneys must rely on guesswork and extended litigation in close cases. Thus, a refined temporal standard would better solve the lack of uniformity and uncertainty in European Union family law.

In international law, the habitual residence standard is even less certain. In the United States, a three-way split complicates the analysis. In Europe, a similar split among European Union courts has left habitual residence determinations largely dependent on the jurisprudence of the court seized. Thus, jurisdiction hides among the wavering habitual residence definitions of national courts.

Considering the impressive work of the National Conference, the European Union, and the Hague Conference towards modernizing and streamlining jurisdiction, they should combine their efforts to fashion a concrete definition of habitual residence. Until these bodies work together, courts will be unable to inject uniformity and certainty in determining jurisdiction. A more synthesized definition of habitual residence would save parents' and courts' resources which, in turn, would ultimately promote the best interests of children.