Home Is Where the Court Is: Determining Residence for Child Custody Matters under the UCCJEA

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> We hesitate to essay any definition of "residence," for the word is like a slippery eel, and the definition which fits one situation will wriggle out of our hands when used in another context or in a different sense.
>
> Judge Justin Ruark[1]

INTRODUCTION

As families have become more mobile over the past fifty years, legislatures have struggled to make jurisdictional standards in child custody matters uniform across states. The attempts have been somewhat unsuccessful due in large part to the difficulty of defining a person's residence. Suppose a Texas court issues a divorce decree to John and Jane and awards Jane sole custody of the couple's daughter. But Jane moves with her daughter to Florida, wanting to be closer to her other family. John is given visitation rights under the Texas order and makes frequent trips to Florida to spend time with his daughter. If one of the parents wants to go to court to alter the custody determination, which state—Texas or Florida—has jurisdiction?

The uniform statute that both states have enacted says that Texas retains exclusive jurisdiction as long as any party "presently resides" in Texas.[2] If John spends a month in Florida for visitation with his daughter, does he still presently reside in Texas? What if he goes to Florida for two months on a work assignment? If he moves to Florida for the foreseeable future but keeps his house in Texas and eventually intends to return?

These are the questions that lawmakers and courts have dealt with—and they have attempted not only to find answers but also to make the answers uniform in all fifty states. Having well-defined jurisdictional rules is critical in child custody determinations. Before

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1 *State v Tustin*, 322 SW2d 179, 180 (Mo App 1959).

2 Tex Fam Code Ann § 152.202(a)(2); Fla Stat § 61.516(a)(2).

the passage of statutes standardizing jurisdiction in these cases, parental kidnapping was common.[3] When John lost the first custody battle in Texas, he could simply take his daughter to Florida and ask a court there to modify the custody order. If Florida would not rule for John, perhaps Oklahoma or Alabama would.[4] Forum shopping and relitigation—generally accepted as problematic in any setting[5]—are even larger concerns in child custody battles, where the parties are "impassioned and adversarial" and the child cannot protect herself.[6] With mobility and child custody issues on the rise—one in every two marriages ends in divorce, and a high number of children are born outside of wedlock[7]—the need for uniformity is greater than ever.

The most recent attempt to make jurisdictional standards uniform is the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), a model law adopted by forty-nine states.[8] The UCCJEA gives the state that makes the first child custody determination—a state referred to in this Comment as the "original state"—exclusive jurisdiction.[9] In our hypothetical, Texas, as the original state, would be the only state with jurisdiction after it gave Jane primary custody of her daughter. If John tried to go to Florida—the "new state"—to get a new order, the Florida courts could not hear his case. Because it would be unrealistic for Texas to retain jurisdiction forever, however, the UCCJEA attempts to clearly de-

3 See Christopher L. Blakesley, *Comparativist Ruminations from the Bayou on Child Custody Jurisdiction: The UCCJA, the PKPA, and the Hague Convention on Child Abduction*, 58 La L Rev 449, 464 (1998) (reporting estimates of between 25,000 and 100,000 child abductions annually in divorce situations).

4 See id at 463–64. Modifications of child custody orders are common, and courts in the new state were often willing to change the initial order. See note 20 and accompanying text.

5 See George D. Brown, *The Ideologies of Forum Shopping—Why Doesn't a Conservative Court Protect Defendants?*, 71 NC L Rev 649, 668 (1993). See also Note, *Forum Shopping Reconsidered*, 103 Harv L Rev 1677, 1691–93 (1990).

6 *Blakesley*, 58 La L Rev at 463–64 (cited in note 3).

7 See US Census Bureau, *People Who Got Married, Divorced, and Widowed in the Past 12 Months by State: 2009* 97 table 132 (2012), online at http://www.census.gov/compendia/statab/2012/tables/12s0132.pdf (visited Sept 23, 2012) (showing the 2009 national divorce rate of 9.2 per 1,000 men and 9.7 per 1,000 women); US Census Bureau, *Women Who Had a Child in the Last Year by Selected Characteristics: 1990 to 2010* 71 table 92 (2012), online at http://www.census.gov/compendia/statab/2012/tables/12s0092.pdf (visited Sept 23, 2012) (noting that, of the 3,686,000 births in the United States in 2010, nearly one-third were to unmarried mothers). See also Jennifer Marston, Comment, *Yesterday, Today, and Tomorrow's Approaches to Resolving Child Custody Jurisdiction in Oregon*, 80 Or L Rev 301, 301 (2001). For a discussion of American families' relatively high mobility rate, see Larry Long, *International Perspectives on the Residential Mobility of America's Children*, 54 J Marriage & Fam 861, 863 (1992).

8 See note 49 and accompanying text.

9 National Conference of Commissioners on Uniform State Laws (NCCUSL), Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) § 201(a)–(b).

fine the circumstances in which the original state loses exclusive jurisdiction. One way for Texas to lose exclusive jurisdiction is if John, Jane, and their daughter no longer "presently reside" in Texas.[10]

Yet even under the UCCJEA, uniform jurisdictional rules have again proven elusive. The problem arises from the difficulty of defining what it means to "presently reside" in a state, a question on which courts have come to contradictory results, even on cases with similar facts. Compare the holdings in two recent cases, one from California and one from Illinois, involving parties traveling to different countries. In *In re Marriage of Nurie*,[11] the mother and child had moved to Pakistan from California, and the father regularly traveled between California and Pakistan.[12] The *Nurie* court held that because the father maintained his house in California and considered the state his permanent residence, he "presently resided" in California.[13] The facts of *In re Marriage of Akula*[14] are similar. There, the father had moved to India from Illinois, and the mother had gone to India briefly with the child and considered moving permanently.[15] The court, however, reached the opposite result as *Nurie* and found that the mother presently resided in India despite maintaining a house in Illinois and stating an intention to make Illinois her permanent home.[16]

The *Nurie* court sets a bright line rule that is easy to apply, while the *Akula* court takes a more fact-specific approach that prevents parents from forum shopping. Some courts have acknowledged the *Akula-Nurie* discrepancy without expressing an opinion[17] while other courts deciding the residence issue have made ad hoc decisions without referencing case law or stating a definitive rule. In short, there is no accepted definition of "residence" and little case law on which to rely. Because nearly every state has enacted the UCCJEA, the

10 UCCJEA § 202(a)(2).

11 176 Cal App 4th 478 (Cal App 2009).

12 Id at 485–89.

13 Id at 500–01.

14 935 NE2d 1070 (Ill App 2010).

15 Id at 1071–72.

16 Id at 1079. Note that in some contexts other than child custody, Illinois courts define "residence" to be what is commonly accepted as "domicile." See, for example, *Maksym v Board of Election Commissioners of Chicago*, 950 NE2d 1051, 1060 (Ill 2011). The *Akula* court does not follow this definition and instead applied the normal meanings of "residence" and "domicile" as intended by the UCCJEA. *Akula*, 935 NE2d at 1075–77.

17 See, for example, *Friedman v Eighth Judicial District Court*, 264 P3d 1161, 1167 n 6 (Nev 2011) ("This case does not present the issue that led *Akula* to question *Nurie*, on which we express no opinion.").

potential range of interpretations—and the need for a uniform approach for residence determinations—is great.

Part I of this Comment explains the statutory background of the UCCJEA, detailing how lawmakers have attempted to correct ambiguities to get to the current law. Part II examines potential definitions of "residence" as compared to "domicile." Part III uses the different approaches by the courts in *Nurie* and *Akula* to explore why it is difficult to set a uniform definition of residence. It then outlines decisions from various courts to elucidate factors that might be used to determine residence. Finally, Part IV suggests a simple approach, based on the parties' intentions, to help courts determine jurisdiction through a unified framework.

I. THE ELUSIVE SEARCH FOR UNIFORMITY IN CHILD CUSTODY LAW

The UCCJEA arose out of a muddled statutory background in which lawmakers attempted for nearly half a century to make the jurisdictional standards in child custody cases uniform. To understand the purpose and challenges of the UCCJEA, it is important to understand the unsuccessful attempts at uniformity that came before it. Fifty years ago, losing a custody battle was not the end of the fight for some parents. The losing party would sometimes take the child to another state and ask a new court to rehear the custody case.[18] The "rule of seize and run" was widespread,[19] and the new court often overturned the ruling of a previous court.[20] Because forum shopping is generally frowned upon—and because forum shopping is an even larger problem when a child is used as a pawn in the battle for a new, more favorable ruling—legislators have long sought to prevent it through jurisdictional uniformity.[21]

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18 See Blakesley, 58 La L Rev at 464 (cited in note 3). This Comment assumes that all proceedings will occur in state courts because child custody cases are almost exclusively heard at that level and the UCCJEA has been enacted as state laws. See *Ankenbrandt v Richards*, 504 US 689, 695–701 (1992).

19 See Blakesley, 58 La L Rev at 464 (cited in note 3).

20 See Kelly Gaines Stoner, *The Uniform Child Custody Jurisdiction & Enforcement Act (UCCJEA)—A Metamorphosis of the Uniform Child Custody Jurisdiction Act (UCCJA)*, 75 ND L Rev 301, 302 (1999) (explaining that the new forum would rule in favor of the party that brought the child to the state because the court wished to keep the child within its jurisdiction).

21 See Melissa Crawford, Note, *In the Best Interests of the Child? The Misapplication of the UCCJA and the PKPA to Interstate Adoption Custody Disputes*, 19 Vt L Rev 99, 102 (1994) (calling the child custody situation before the UCCJA "chaos" but noting that the UCCJA's drafters recognized "the need to balance children's stability with the need for certainty in custody decisions").

A. Initial Legislative Attempts at Uniformity

There have been a number of laws enacted in the past fifty years to achieve uniformity in divorce matters. The first attempt to combat the ability of losing parents to forum shop came in 1968, when the National Conference of Commissioners on Uniform State Laws (NCCUSL) drafted the Uniform Child Custody Jurisdictional Act (UCCJA).[22] All fifty states adopted the UCCJA.[23] In all cases heard under the UCCJA, one state would have jurisdiction, and its order would be protected against changes by other states' courts unless the original state lost jurisdiction over the case.[24] The drafters aimed to reduce the ability of parents to take children to a different state to obtain a new order.[25]

For similar reasons, Congress passed the Parental Kidnapping Prevention Act[26] (PKPA) in 1980. The PKPA added two critical features that were missing from the UCCJA: priority to the child's "home state" and exclusive, continuing jurisdiction until all the parties left the state.[27] In 1992, another uniform act—the Uniform Interstate Family Support Act (UIFSA)—was written to increase uniformity in the enforcement of child support orders.[28]

The most effective way legislators have found to solve the problem of forum shopping by parents is to grant jurisdiction to one court and then make it difficult for another forum to gain jurisdiction. Exclusive, continuing jurisdiction—a feature of both the PKPA and the UCCJEA—is the mechanism through which this is effected. Take a simplified example: A Texas court can gain jurisdiction under the

22 Stoner, 75 ND L Rev at 302 (cited in note 20).

23 See id.

24 See NCCUSL, Uniform Child Custody Jurisdictional Act (UCCJA) §§ 13–14 (1968).

25 See Uniform Law Commission, *Child Custody Jurisdiction and Enforcement Act Summary*, online at http://www.uniformlaws.org/ActSummary.aspx?title=Child%20Custody%20Jurisdiction%20and%20Enforcement%20Act (visited Sept 23, 2012). The UCCJA had several stated purposes: (1) avoid jurisdictional conflicts among states; (2) encourage cooperation between states; (3) encourage litigation in the state with which the child and family have the closest connection and where there is the most evidence; (4) discourage continuing child custody battles; (5) prevent abductions; and (6) avoid relitigation. UCCJA § 1.

26 Pub L No 96-611, 94 Stat 3569 (1980), codified at 28 USC § 1738A. The Parental Kidnapping Prevention Act's (PKPA) stated purposes are, among others, to (1) encourage cooperation among states to determine the state that is best able to "decide the case in the interest of the child"; (2) facilitate the enforcement of orders; (3) discourage interstate custody battles that reduce the stability of the child's home and family; (4) avoid jurisdictional conflict; and (5) deter abductions. PKPA § 7, 94 Stat at 3569.

27 See Uniform Law Commission, *Child Custody Jurisdiction and Enforcement Act Summary* (cited in note 25).

28 See id.

UCCJEA if Texas is the home state of the child and the Texas court issues the first custody order. A court outside of Texas cannot make *any* child custody determination until Texas loses jurisdiction—which often requires all of the parties to move out of the state.[29]

Courts interpreting the statutes that preceded the UCCJEA ran into the same problems that courts interpreting the UCCJEA now face. Like the UCCJEA, both the PKPA and UIFSA have provisions for continuing jurisdiction that are based on residence.[30] And, as has been the case under the UCCJEA, courts struggled to define residence. Many courts interpreting the PKPA, for example, have found that residence depended on the intent of the person. But these courts have been unable to articulate a clear definition of residence capable of uniform application.[31] The drafters of the UCCJEA stated that they intended its residence provision—§ 202(a)(2), which divests a state of exclusive jurisdiction when none of the parties "presently reside" in the state—to use the same standard as the similar provisions in the PKPA and UIFSA.[32]

B. The UCCJEA: The Latest Attempt to Unify Jurisdictional Standards

The UCCJEA sought to eliminate the jurisdictional confusion that still existed under the UCCJA and the PKPA.[33] Drafted in 1997, the UCCJEA replaced the UCCJA[34] and attempted to clear up the confusing PKPA case law.[35] The UCCJEA—which provides more thorough rules on how a state can gain and then maintain jurisdiction

29 See UCCJEA §§ 201–02. For a complete discussion of how a state can gain and lose jurisdiction, see notes 45–47 and accompanying text.

30 28 USC § 1738A(d) (stating that a state retains continuing jurisdiction under the PKPA as long as "such State remains the residence of the child or of any contestant"); NCCUSL, Uniform Interstate Family Support Act (UIFSA) § 205(a)(1) (providing for continuing jurisdiction under the UIFSA if "at the time of the filing of a request for modification this State is the residence of the obligor, the individual obligee, or the child for whose benefit the support order is issued").

31 Compare *Ritter v Ritter*, 989 P2d 109 (Wyo 1999), with *In re Marriage of Pedowitz*, 179 Cal App 3d 992 (Cal App 1986). In *Ritter*, the court held the mother was still a resident of Wyoming, despite an absence, because she kept her parents' address and intended to return to Wyoming. This definition sets a high bar for changing residence—one that is rather similar to domicile. *Ritter*, 989 P2d at 112. In *Pedowitz*, the father had been in Florida for eleven months but then moved back to California (the original state) at the time of the later proceedings. Though this appeared to show the father's intent to keep his residence in California, the court remanded for further factual determinations of the father's intent when he originally moved to Florida. See *Pedowitz*, 179 Cal App 3d at 1001–02.

32 UCCJEA § 202, cmt. See also *Highfill v Moody*, 2010 WL 2075698, *7 (Tenn App).

33 See *Michael McC v Manuela A.*, 848 NYS2d 147, 151 (NY App 2007).

34 See id at 150–51.

35 See UCCJEA § 202, cmt.

than the PKPA—strives to prevent parental kidnapping and relitigation of child custody matters, to stop state courts from holding competing proceedings, and to encourage cooperation among states.[36] The underlying goals—to keep the child's life as stable as possible and to provide certainty to courts' determinations—remain the same,[37] but the method is more refined.[38] Perhaps the most important change from the UCCJA to the UCCJEA was the addition of exclusive, continuing jurisdiction for the original state.

The UCCJEA's jurisdictional model gives a state exclusive, continuing jurisdiction once it makes an initial child custody determination.[39] There are two important sets of rules: First, the UCCJEA establishes how a state initially gains exclusive jurisdiction. Second the UCCJEA sets a clearly defined line that must be met in order for the first court to lose jurisdiction.[40] There are four ways the original state can gain jurisdiction to make an initial custody determination and thus acquire exclusive, continuing jurisdiction. The most common is where the state is the child's "home state."[41] A home state is the place where "a child lived with a parent . . . for at least six consecutive months immediately before the commencement of a child-custody proceeding."[42] The UCCJEA prioritizes home state jurisdiction, so a court must first consider whether the child has a home state. If there is no home state, or if the home state declines ju-

36 See *In re Lewin*, 149 SW3d 727, 740 (Tex App 2004); *Harshberger v Harshberger*, 724 NW2d 148, 152 (ND 2006).

37 See UCCJEA § 101, cmt.

38 See Stoner, 75 ND L Rev at 302–05 (cited in note 20).

39 Generally, a court needs both subject matter jurisdiction (the authority to hear a particular type of case) and personal jurisdiction (the authority to issue a judgment against a particular party). The UCCJEA conveys subject matter jurisdiction. For personal jurisdiction, due process usually requires minimum contacts with the forum such that "the suit does not offend traditional notions of fair play and substantial justice." *International Shoe Co v Washington*, 326 US 310, 319 (1945) (quotation marks omitted). However, there are exceptions. Courts have treated child custody decisions as "status" determinations that are not required to meet *International Shoe*'s minimum contacts standard for personal jurisdiction. See *Shaffer v Heitner*, 433 US 186, 208 n 30 (1977); *In re Marriage of Leonard*, 122 Cal App 3d 443, 453–54 (Cal App 1981). See also Stoner, 75 ND L Rev at 306–10 (cited in note 20). There are several UCCJEA provisions that attempt to allay some of the concerns over the proper exercise of jurisdiction. These include § 110, which calls for states to communicate with each other, and § 207, which allows a court to stay proceedings if it determines that it is an inconvenient forum. Stoner, 75 ND L Rev at 307–10 (cited in note 20).

40 See *Griffith v Tressel*, 925 A2d 702, 708–09 (NJ Super Ct 2007).

41 UCCJEA § 201(a)(1).

42 UCCJEA § 102(7). Temporary absences are not deducted from this six-month period. If the child is younger than six months, her home state is the one she has lived in since birth with any parent. UCCJEA § 102(7).

risdiction, a court can acquire jurisdiction under a "significant connection" test or two fallback provisions (not at issue here).[43]

Once established, exclusive jurisdiction can only be lost via one of two ways: (1) if no party continues to have any "significant connection" with the original state or (2) if no party "presently resides" in the original state.[44] Only the original state may make the determination that parties no longer have significant connections,[45] but any state may determine that no party presently resides in the original state.[46]

It is this second way of losing jurisdiction—that no party "presently resides" in the original state—that has given rise to differing interpretations and is the main subject of this Comment. For the original state to lose exclusive jurisdiction, the provision requires a determination "that the child, the child's parents, and any person acting as a parent do not presently reside in [the original] State."[47] Again, either the original state or the new state may make the determination about where the parties presently reside—thus heightening the need for uniformity across jurisdictions for this particular provision of the UCCJEA—but the new state must have a basis for taking jurisdiction. This means that only states that would qualify to take original jurisdiction under § 201 may make a "presently resides" determination.[48]

Forty-nine states have adopted the UCCJEA since it was drafted in 1997,[49] and a bill to enact it is currently before the Massachusetts

43 UCCJEA § 201(a)(2)–(4).

44 UCCJEA § 202(a).

45 UCCJEA § 202(a)(1). To lose jurisdiction under this provision, the original state must determine that it does not have significant connections and that substantial evidence concerning the child's day-to-day life and relationships is no longer available. See UCCJEA § 202(a)(1). There is a dispute as to whether this paragraph should be read literally to require *both* significant connections and substantial evidence to be lacking or whether one of the two is sufficient. See *Griffith*, 925 A2d at 710. A full discussion and resolution of this dispute is beyond the scope of this Comment.

46 UCCJEA § 202(a)(2). A state does not actually lose exclusive jurisdiction until a court in either the original or new state makes a determination declaring that the original state has lost exclusive jurisdiction. See UCCJEA § 202(a)(2). Linking the loss of jurisdiction to a court ruling promotes the UCCJEA's goals of stability and accord among states. See *New Mexico v Donna J.*, 129 P3d 167, 171 (NM App 2006).

47 UCCJEA § 202(a)(2).

48 See *Cliburn v Bergeron*, 2002 WL 31890868, *8–9 (Tenn App) (discussing the two-pronged test the court in the new state must consider to take jurisdiction from the original state: first, that the new state would have jurisdiction under UCCJEA § 201 and second, that the original state has lost exclusive jurisdiction under UCCJEA § 202).

49 See *Vermont Enacts the Uniform Child Custody Jurisdiction and Enforcement Act* (Uniform Law Commission 2011), online at http://www.uniformlaws.org/NewsDetail.aspx?title

legislature.[50] There are slight differences in the wording enacted in each state, but all forty-nine states have language that is substantially similar to the "presently reside" language of the UCCJEA's § 202(a)(2). Thirty-eight states and the District of Columbia have adopted the section nearly verbatim, with either the exact language or slight technical changes such as putting the state's name instead of "this State" or putting "all persons" instead of "any person."[51] Seven states and the proposed Massachusetts bill have moved the negative term to make the provision require a determination "that neither the child, nor a parent, nor any person acting as a parent presently resides in this state."[52] The negative phrasing should not alter the meaning of the provision because the drafters intended it to have the same meaning as similar provisions in the PKPA and the UIFSA that do not use negative phrasing.[53] Courts have treated the two constructions as having the same meaning.[54] Other states have different modifications that do not appear to change the meaning of the "presently resides" provision.[55] Because UCCJEA § 202 has been adopted in

=Vermont%20Enacts%20the%20Uniform%20Child%20Custody%20Jurisdiction%20and%20Enforcement%20Act (visited Sept 23, 2012).

50 See Uniform Child-Custody Jurisdiction and Enforcement Act, Mass Senate, 187th General Court, S 713 (Jan 20, 2011), online at http://www.malegislature.gov/Bills/187/Senate/S00713 (visited Sept 23, 2012).

51 Ala Code Ann § 30-3B-202(a)(2); Ariz Rev Stat Ann § 25-1032.A.2; Ark Code Ann § 9-19-202(a)(2); Cal Fam Code § 3422(a)(2); Colo Rev Stat Ann § 14-13-202(1)(b); Conn Gen Stat Ann § 46b-115.l(a)(1); 13 Del Code Ann § 1921(a)(2); DC Code § 16-4602.02(a)(2); Fla Stat Ann § 61.515(1)(b); Hawaii Rev Stat § 583A-202(a)(2); Idaho Code § 32-11-202(a)(2); Ill Ann Stat ch 750, § 36/202(a)(2); Ind Code Ann § 31-21-5-2(a)(2); Iowa Code Ann § 598B.202.1.b; Kan Stat Ann § 38-1349; Ky Rev Stat Ann § 403.824(1)(b); La Rev Stat Ann § 13:1814.A(2); 19-A Me Rev Stat Ann § 1746.1.B; Md Fam Code Ann § 9.5-202(a)(2); Minn Stat Ann § 518D.202(a)(2); Neb Rev Stat § 43-1239(a)(2); Nev Rev Stat § 125A.315.1(b); NH Rev Stat Ann § 458-A:13(I)(b); NM Stat Ann § 40-10A-202(a)(2); NY Dom Rel Law § 76–a(1)(b); NC Gen Stat Ann § 50A-202(a)(2); ND Cent Code § 14-14.1-13.1.b; 43 Okla Stat Ann § 551-202.A.2; Or Rev Stat Ann § 109.744(1)(b); 23 Pa Cons Stat Ann § 5422(a)(2); RI Gen Laws Ann § 15-14.1-14(a)(2); SC Code Ann § 63-15-332(A)(2); SD Cod Laws § 26-5B-202; Tenn Code Ann § 36-6-217(a)(2); Tex Fam Code Ann § 152.202(a)(2); Wash Rev Code Ann § 26.27.211(1)(b); W Va Code Ann § 48-20-202(a)(2); Wis Stat Ann § 822.22(1)(b); Wyo Stat Ann § 20-5-302(a)(ii).

52 Alaska Stat Ann § 25.30.310(a)(2); Ga Code Ann § 19-9-62(a)(2); Mich Comp Laws Ann § 722.1202(1)(b); Mo Ann Stat § 452.745.1(2); Mont Code Ann § 40-7-202(1)(b); NJ Stat Ann § 2A:34-66.a(2); Utah Code Ann § 78B-13-202. For the text of the proposed Massachusetts bill, see Uniform Child Custody Jurisdiction and Enforcement Act, Mass Senate, 187th General Court, S 713 (cited in note 50).

53 See note 30 and accompanying text. See also *Akula*, 935 NE2d at 1079.

54 Compare *In re A.B.A.M.*, 96 P3d 1139 (Mont 2004), with *Brandt v Brandt*, 268 P3d 406 (Colo 2012).

55 Mississippi and Vermont replace "presently" with "currently." Miss Code Ann § 93-27-202(1)(b); 15 Vt Stat Ann § 1072(a)(2). Neither state has weighed in on whether "currently" means the same as "presently." Ohio uses the same "do not presently reside" language as the

substantially similar form across the country, the question regarding the meaning of its "presently reside" provision is truly one of nationwide scope. The solution proposed in Part IV would thus provide significantly more certainty to a large body of national case law.

II. WHERE DOES A PARTY LIVE? RESIDENCE VERSUS DOMICILE

Jurisdiction is often determined by where parties live, and domicile is the most common measure for where a party legally lives.[56] A party's domicile is "[t]he place at which a person has been physically present . . . [and] to which that person intends to return and remain even though currently residing elsewhere."[57] To change domicile, a person must intend to permanently stay in a new state.[58] While the personal intentions of a party may be difficult for a court to determine in a specific instance, the general definition is widely accepted and easily understood. Traditionally, domicile has been a jurisdictional requirement in family law matters such as divorce[59] and child custody.[60] But while domicile is widely accepted and commonly understood—and thus is in line with one goal of the UCCJEA—it is a static measure that does not change often, and it is not flexible enough to determine jurisdiction for child custody matters.[61]

Consider a scenario in which Texas has exclusive jurisdiction and domicile is the standard to determine whether exclusive jurisdiction is

UCCJEA but does not include the significant connections provision from UCCJEA § 202(a)(1). Ohio Rev Code Ann § 3127.16. The lack of the significant connections provision does not affect the interpretation of the separate "presently reside" provision. In fact, this makes the "presently reside" provision more important because it becomes the *only* way the original state can lose exclusive jurisdiction. Virginia also does not have the significant connections provision, and it provides that exclusive jurisdiction remains as long as any party "continue[s] to live" in Virginia. Va Code Ann § 20-146.13.A.

56 See, for example, 28 USC § 1332.

57 *Black's Law Dictionary* 558 (West 9th ed 2009).

58 See *Mas v Perry*, 489 F2d 1396, 1399 (5th Cir 1974); *Scaglione v Juneau*, 45 S3d 191, 194–95 (La Ct App 2010); *McCreary Enterprises, LLC v Hemmans*, 802 S2d 807, 810–11 (La Ct App 2001); *Perito v Perito*, 756 P2d 895, 898 (Alaska 1988).

59 See, for example, *Batchelder v Batchelder*, 14 NH 380, 381 (1843) (holding that the parties must be domiciliaries of the state to use a statute allowing divorce after three years of habitual drunkenness); *Alton v Alton*, 207 F2d 667, 671 (3d Cir 1953) (requiring domicile for divorce action), vacd 347 US 610 (1954). Although Alton was vacated as moot, the reasoning was reaffirmed in *Granville-Smith v Granville-Smith*, 214 F2d 820, 820 (3d Cir 1954) (en banc) (per curiam), affd 349 US 1 (1955). See also Rhonda Wasserman, *Divorce and Domicile: Time to Sever the Knot*, 39 Wm & Mary L Rev 1, 7–24 (1997) (discussing the history of domicile and divorce).

60 See Albert A. Ehrenzweig, *Interstate Recognition of Custody Decrees: Law and Reason v. the Restatement*, 51 Mich L Rev 345, 347–48 (1953); Blakesley, 58 La L Rev at 501–02 (cited in note 3).

61 See Blakesley, 58 La L Rev at 449–50 (cited in note 3).

maintained. If the parents and child move to Florida for several years but intend to eventually return to Texas, then Texas would retain jurisdiction. Any modification to the custody order would require that the parties return to Texas, even though it is clear that Florida is the more convenient—and probably appropriate—forum. For this reason, the drafters of the UCCJEA specified that "presently reside" does not mean "domicile,"[62] departing from the relatively uniform body of case law concerning "domicile" in order to achieve more convenient results.

Residence, on the other hand, can generally change more easily than domicile. But there is no accepted and uniform definition of "residence." While it is comparatively easy for courts to determine a party's domicile, a party's residence "connotes [a] factual place of abode"[63] and is more likely to capture reality. Conceptually it is easy to see that residence requires something less than domicile because *permanent* intent to stay is not required. For this reason, residence is an appealing standard for child custody jurisdiction. It is more closely aligned with the realities of life and thus provides a more convenient forum, which is of particular concern when children are involved in the litigation.[64] And the switch from domicile to residence as the standard in child custody disputes is in line with the larger conflicts of law movement over the last fifty years. The Second Restatement of Conflicts of Law, adopted in 1971, has a large number of similar "open-ended general provisions" that give judges more discretion over issues such as personal jurisdiction and choice of law.[65] Likewise, the residence standard gives judges more discretion than would a domicile standard.

The problem is figuring out how much permanence is required to establish residence. Where along the spectrum from merely stepping foot in a state to fully establishing domicile there does residence fall?

There are many definitions for "residence" and "reside," but none offer concrete guidance on how to draw a line on the spectrum.

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62 UCCJEA § 202, cmt 2 ("The phrase 'do not presently reside' is not used in the sense of a technical domicile. The fact that the original determination State still considers one parent a domiciliary does not prevent it from losing exclusive, continuing jurisdiction after [all parties] have moved from the State.").

63 *In re Marriage of Amezquita & Archuleta*, 101 Cal App 4th 1415, 1419–20 (Cal App 2002).

64 See Stoner, 75 ND L Rev at 302 (cited in note 20) (noting that excessive litigation is particularly harmful to the children involved).

65 Patrick J. Borchers, *Courts and the Second Conflicts Restatement: Some Observations and an Empirical Note*, 56 Md L Rev 1232, 1233 (1997).

The official comment to the UCCJEA states that the parties no longer "presently reside" in a state when they "physically leave the State to live elsewhere."[66] It is ambiguous as to whether anything is needed to "live elsewhere," such as a period of time or intent. A Tennessee court was equally vague, describing residence as "where one actually lives for the time being."[67] The rule as stated in Pennsylvania, for example, seems to be as far away from domicile on the spectrum as possible: "The classic legal definition of the term 'residence' in this Commonwealth is 'living in a particular place, requiring only physical presence.' "[68] On the other hand, *Black's Law Dictionary* suggests that some amount of time is needed: "reside" means to "settle oneself or a thing in a place, to be stationed, to remain or stay, to dwell . . . for a time."[69]

The explanations are ambiguous, and questions remain: Does a party reside in a location while there for vacation?[70] While on a business trip?[71] While attending college[72] or law school?[73] While staying in a hotel after one's house burns down?[74] While serving as chief of staff for President Barack Obama?[75]

One solution is to waive the proverbial white flag and define residence to mean the same as domicile.[76] The Second Restatement of

66 UCCJEA § 202, cmt 2.

67 *Highfill v Moody*, 2010 WL 2075698, *9 (Tenn App).

68 *Hunter v Erb*, 9 Pa D & C 5th 320, 326 (Pa Ct Common Pleas 2009). See also *Wagner v Wagner*, 887 A2d 282, 286 (Pa Super Ct 2005).

69 *Jordan v Jordan*, 2003 WL 1092877, *7 (Tenn App) (discussing the proper interpretation of the UCCJEA's use of the term "presently resides"), quoting *Black's Law Dictionary* 1176 (5th ed 1979). The definition also includes to "[l]ive, dwell, abide, sojourn, stay, remain, lodge." *Black's Law Dictionary* at 1176 (cited in note 69).

70 *Rosenshine v Rosenshine*, 377 NE2d 132, 135–36 (Ill App 1978) (finding that a wife abandoned residence in Illinois when she moved to Israel and subsequent vacations to Illinois did not reestablish residence in the state).

71 *Powell v Commissioner*, 10 Tax Ct Mem Dec (CCH) 928 (1951) (holding that a party took up residence in Canada when he went there for work and did not return when his work project was completed).

72 *Ballas v Symm*, 351 F Supp 876, 885–88 (SD Tex 1972), affd 494 F2d 1167 (5th Cir 1974) (discussing residence in the context of a college student seeking to register to vote).

73 *Lister v Hoover*, 655 F2d 123, 125–28 (7th Cir 1981) (analyzing residence in the context of law school students seeking residence for tuition purposes).

74 *Stein v County Board of School Trustees of DuPage County*, 229 NE2d 165, 167–70 (Ill App Ct 1967) (considering residence in the context of an action to detach territory from a school district).

75 *Maksym v Board of Election Commissioners of Chicago*, 950 NE2d 1051, 1065–66 (Ill 2011) (holding that Rahm Emanuel met the city of Chicago's residence requirement for mayoral candidates, although he had lived and worked out of state for the Obama administration the year prior to the election, because he had continued to own a home in the city).

76 See, for example, *Wright v Goss*, 494 SE2d 23, 26 (Ga App 1997) ("One's legal residence for the purposes of [a probate] statute is the same as his domicile."); *Bixby v Bixby*, 361

Conflict of Laws notes that residence often means the same thing as domicile, though it can be used as "something more than domicil[e]" or "something else than domicil[e]."[77] In one case, a litigant even argued that a statute was unconstitutionally vague because it used residence to make a determination.[78] The only thing that is clear about residence is that it lacks a set definition. The Restatement recognizes this as well: "Residence is an ambiguous word whose meaning in a legal phrase must be determined in each case."[79] The challenge for state courts interpreting "presently reside" in the UCCJEA is to determine one definition for the statute and then apply it uniformly across cases.

III. INCONSISTENT INTERPRETATIONS OF THE UCCJEA

Although courts have articulated different rules for determining a party's residence under the UCCJEA, their approaches cannot be easily or cleanly categorized. Rather, the decisions vary greatly, with each court emphasizing different factors. While a few courts explain their analyses in thorough detail, most others appear to engage in ad hoc determinations based on their intuitions about what it means to "presently reside" in a state. For this reason, it is difficult for subsequent courts or attorneys to even place cases along a spectrum or draw meaning from the previous holdings.

A. Contradictory Outcomes in *Nurie* and *Akula*

The difficulty of defining "presently reside" and maintaining a uniform rule for jurisdiction across fifty states is exemplified by the opposite outcomes in two similar cases. Both *Nurie* and *Akula* involved a party spending time outside of the original state but maintaining a home, and intending to live permanently, in that original state. Despite these similar facts, the *Nurie* court determined that the party *did* presently reside in the original state while the *Akula* court ruled that the party *no longer* presently resided in the original state.[80] The divergent reasoning of the two courts illustrates two competing

P2d 1075, 1077 (Okla 1961); *Merriam-Webster's Collegiate Dictionary* 1060 (Merriam-Webster 11th ed 2004).

77 Restatement (Second) of Conflict of Laws § 11.

78 See *Fagiano v Police Board of Chicago*, 456 NE2d 27, 29 (Ill 1983).

79 Restatement (Second) of Conflict of Laws § 11, cmt k.

80 *Nurie*, 176 Cal App 4th at 500–01; *Akula*, 935 NE2d at 1079. That both of these cases involve a foreign country as the potential new residence of the party in question does not affect the analysis of the residence rule because UCCJEA § 105(a) directs courts to treat a foreign country as if it were a different state in the United States.

concerns when interpreting the UCCJEA: the desire for a rule that can be applied evenly across cases and the desire to determine what is most equitable and intuitively accurate in each case.

1. Substantially similar facts but different outcomes.

Nurie involved a father traveling between California and Pakistan. While the parents were still married, the mother took the couple's son and moved to her native Pakistan. When the father petitioned a California court for custody, the court determined that California was the child's home state. The court granted the father sole custody—an initial determination that gave California exclusive jurisdiction. But the mother refused to return the son to California, so the father frequently traveled to Pakistan over the course of four years for visitation with his son while retaining a house in California.[81] The father claimed his visits were temporary and that he intended to permanently live in California, while the mother asserted that he lived in Pakistan almost continuously and that he had even purchased a house there.[82]

In *Akula*, the parties reached a more amicable settlement before battling over residence. An Illinois court had granted the mother sole custody of her son, and Illinois thus established exclusive jurisdiction. The father was chairman of a microfinance company in India and negotiated an agreement with the mother under which she would move with the son to India. In August 2009, the son was enrolled in an Indian school, and the mother signed a lease on a house and obtained a residential permit in India. However, that October the mother returned to Illinois—she still had a house in Illinois and stated that this was her permanent home—and requested that the son return as well. One month later, an Indian court found that the parties were "now ordinarily residing" in India and issued an order that the current custody arrangement was not to be disturbed and prevented the son from being removed from his Indian school for at least three school years.[83]

The facts of the two cases are substantially similar. In both, the court determined that the party whose residence was at issue retained a physical home in the original state and stated an intention to return to the original state as his or her home. Although the lease signed by the mother in *Akula* provided evidence of intent to live in India for an extended period of time, the father in *Nurie* likely spent

81 *Nurie*, 176 Cal App 4th at 485–90, 499 (detailing that the father maintained ownership of his California home, did not rent it out, kept a car there, and paid taxes and utilities).

82 Id at 487.

83 *Akula*, 935 NE2d at 1070–74.

significantly more time in Pakistan.[84] Yet despite the similar facts, the Illinois and California courts articulated different rules and thus reached opposite outcomes.

The *Nurie* court held that the father presently resided in California throughout the duration of the case and thus that California maintained exclusive jurisdiction.[85] The rule that the California court articulated was that while intent alone might not be sufficient to presently reside in a state, if a party "maintains a functioning residence in the [original] state, available for his own use at all times, he continues to 'presently reside' in that state."[86] Conversely, the *Akula* decision—which came after *Nurie*—found that the mother no longer "presently resided" in Illinois, and the state had not retained exclusive jurisdiction.[87] After rejecting the *Nurie* rule, the Illinois court stated that parties do not presently reside in the original state when they leave to live elsewhere but also noted that "residing connotes some degree of permanency beyond a temporary sojourn."[88]

2. How the courts reached contradictory results.

The *Nurie* court began its analysis by looking to the primary purposes of the UCCJEA, which it stated were to "encourage states to respect and enforce the prior custody determinations of other states, as well as to avoid competing jurisdiction and conflicting decisions."[89] The court then framed the question as when the father had "*stopped* residing in California" as opposed to whether he resided in Pakistan.[90] The

84 Neither opinion provides definitive dates for when the parties were present in the new states. We can infer that the mother in *Akula* spent somewhere between 1.5 to 3.5 months in India. She went to India at some point between when the court entered the agreement on June 18 and when she signed a lease in India on August 17. She returned to Illinois on October 7. Id at 1071. The court in *Nurie* makes even fewer findings on specific dates but notes that the father was "in Pakistan for prolonged periods." *Nurie*, 176 Cal App 4th at 499–500.

85 See *Nurie*, 176 Cal App 4th at 501–02.

86 Id.

87 *Akula*, 935 NE2d at 1079. As a point of procedure, the Illinois court was determining "whether the Indian family court's order substantially conforms to the UCCJEA." Id at 1075. The Indian court made the determination that the parties no longer presently resided in Illinois (or, as the Indian court put it, they "now ordinarily reside" in India), but the Illinois court had to determine whether the Indian court's concept of residence was consistent with the specific "presently reside" requirement of the UCCJEA. See UCCJEA § 105(b). Therefore, the Illinois court first determined the meaning of "presently reside" in the UCCJEA and then decided if the Indian court's ruling conformed to that meaning. See *Akula*, 935 NE2d at 1075–79.

88 *Akula*, 935 NE2d at 1078.

89 *Nurie*, 176 Cal App 4th at 496–98.

90 Id at 499–501 (noting it is possible to "presently reside" in both places at the same time).

answer it reached was that the father had never stopped residing in California because he continued to maintain a home there, and thus the state had not lost exclusive jurisdiction.

Turning to the word "presently," the *Nurie* court did not interpret it to require "actually living" in the original state but rather that a "determination of relocation must be made during the period of non-residence in the decree state."[91] That is, it was not enough for the parties to no longer "presently reside" in a state—a *determination* had to be made that the parties did not presently reside there.[92] This requirement might be seen as preventing confusion when parties move around because it sets a definite point—when a court makes a determination—at which residence changes.

Nevertheless, the *Nurie* court's discussion regarding the requirement of a determination was not necessary. There was never a time when the father did not reside in California under the court's stated rule because he maintained his house in the state continuously; thus there was never an opportunity for a determination that he no longer presently resided there. This tension might illustrate that the court did not feel fully comfortable with its stated rule, or it might simply reflect the court's definitive rejection of the mother's arguments. Either way, the decision does not provide a clear path for subsequent courts to follow, even after stating what seems to be a clear rule.

In the *Akula* decision, the Illinois court responded to the *Nurie* court. First, the *Akula* court noted that the *Nurie* court had not explained how the father—even if he could have more than one residence—could presently reside in more than one state at the same time.[93] The *Akula* court then argued that because the drafters of the UCCJEA had intended residence to differ from domicile, they intended for it to be possible for a party to be simultaneously domiciled in a state even though not presently residing there.[94] This line of reasoning seems to suggest that the *Akula* court would have found that, on the facts of *Nurie,* the father there was domiciled in California but did not presently reside in that state.

The *Akula* court's argument is persuasive insofar as the rule in *Nurie* is, indeed, similar to domicile. But the argument does not

91 Id at 499–500.

92 See id at 500–03. There is strong statutory support for this assertion, as the statute divests exclusive jurisdiction when a court "determines that the [parties] do not presently reside in this State." UCCJEA § 202(a)(2).

93 *Akula*, 935 NE2d at 1078.

94 Id.

suffice to show that the California rule necessarily conflicts with the UCCJEA drafters' intent or the language of the statute. It is possible for a party to be domiciled in a state and not "presently reside" there under the California rule. If, for example, the father in *Nurie* had sold his house while taking trips to Pakistan, the court would have found under its stated rule that he was domiciled in California because he intended to return but that he did not reside there.

The *Akula* court stated as a rule that a party no longer "presently resided" in a state when he leaves that state "to live elsewhere"[95]—a rule that echoed the language in the UCCJEA commentary.[96] To provide some content to the rule and to counter the mother's argument that the court's interpretation would permit forum shopping—such as a parent going to a summer home for a few days and then claiming she "presently resided" in a new state as a result—the court held that "residing connotes some degree of permanency beyond a temporary sojourn."[97] The *Akula* reasoning, however, provided no definite limit, or even substantial guidance, on the meaning of present residence.

Despite hearing cases with substantially similar facts, the California and Illinois courts came out with opposite results and different rules. The basic fact pattern is common: one parent moves out of state with the child while the second parent maintains a home in the original state and travels to the new one. In California, courts reason that the second parent can have more than one present residence and that the home in the original state is sufficient to maintain a present residence there. In Illinois, courts would ignore the home and ask whether the second parent has left the original state to live elsewhere. The *Nurie* and *Akula* opinions demonstrate how the UCCJEA can fail without uniform interpretation.

B. Ambiguous Case Law from around the Nation

Courts in a number of other states have also interpreted the "presently reside" language in UCCJEA § 202(a)(2), but their opinions are mostly ad hoc decisions, reflecting nothing close to a consensus. One court has provided a list of suggested factors to consider but did not demonstrate how its proposed test might work when applied to the facts of a case. Other courts do not cite the same set of factors to support their determinations of residence, and many pro-

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95 Id.

96 See UCCJEA § 202, cmt 2 (stating that exclusive jurisdiction continues unless all parties "physically leave the State to live elsewhere").

97 *Akula*, 935 NE2d at 1078.

vide little support for what appears to be an intuition-based judgment. Even the facts of the case are sparsely relayed in the opinions. *Nurie* and *Akula* are unique in that their analyses are set forth in detail; very few courts have ventured to define "residence" or to state a rule beyond the facts of the particular case. This lack of clarity and transparency makes it nearly impossible for attorneys and judges in subsequent cases to effectively utilize case law. The uncertain case law and sparsely written opinions also make it impossible to even place the cases on a spectrum. The cases can be split into rough groups, but even doing this provides little help in determining what residence rule is correct.

1. Totality of the circumstances test.

A recent decision from the Colorado Supreme Court noted "the split among states" in interpreting present residence and held that a totality of the circumstances test is the correct approach.[98] In *Brandt v Brandt*,[99] the initial custody order was issued in Maryland, but the parents moved frequently for military service. The father settled in Colorado while the mother served in Iraq and was later stationed at Fort Hood in Texas. The parties' son split time between the two parents. As the mother was being reassigned from Fort Hood in Texas to Fort Meade in Maryland, the father initiated action in Colorado, asserting that Maryland had lost jurisdiction under the UCCJEA because no party presently resided in Maryland.[100]

After discussing the confusion in defining present residence, the court provided a non-exclusive list of factors for the lower court to analyze on remand. The factors are:

> the length and reasons for the parents' and the child's absence from the issuing state; their intent in departing from the state and returning to it; reserve and active military assignments affecting one or both parents; where they maintain a home, car, driver's license, job, professional licensure, and voting registration; where they pay state taxes; the issuing state's determination of residency based on the facts and the issuing state's law; and any other circumstances demonstrated by evidence in the case.[101]

98 *Brandt v Brandt*, 268 P3d 406, 414–16 (Colo 2012).
99 268 P3d 406 (Colo 2012).
100 See id at 408–09.
101 Id at 415.

To formulate this list of factors, the court drew from other Colorado statutes that used residence—though not *present* residence—including statutes on voter registration, jury duty, and military service.[102] While the opinion gives many factors to consider when determining residence, it does not apply the test (instead remanding for the lower court to do so).[103] Thus it is difficult to determine what factors are most important and how the factors interact with each other.

Brandt is a compelling case because, unlike most other opinions, it clearly articulates factors to consider and a coherent framework. However, because the court did not apply the test and the list of factors is lengthy and non-exhaustive, it is unclear how much guidance the case will provide to future attorneys and judges.

2. Courts minimizing or ignoring stated intent.

Another group of cases can be described as opinions that are similar to *Akula*—those that do not consider or minimize the importance of the parties' stated intent and make it relatively easy to find that a party no longer "presently resides" in the original state. These cases describe few if any factors that affected their outcomes. The Montana Supreme Court in *In re A.B.A.M.*,[104] for example, discussed a Pennsylvania determination that stripped Montana of exclusive jurisdiction on the basis of the "presently reside" provision.[105] In determining that the father no longer "presently resided" in Montana, the court gave little weight to the father's claim that he intended to continue living there.[106] Similarly, in *Jordan v Jordan*,[107] a Tennessee court held that the father was presently residing in Massachusetts, even though he insisted that he was only working there temporarily and maintained his home, possessions, and driver's license in Alabama.[108] In *New Mexico v Donna J.*,[109] the court noted that intent *could* be relevant but found that an involuntary relocation for a prison sentence means that the party is presently residing where incarcerated.[110]

102 Id.

103 See *Brandt*, 268 P3d at 416.

104 96 P3d 1139 (Mont 2004).

105 Id at 1142–44.

106 Id.

107 2003 WL 1092877 (Tenn App).

108 Id at *7 (holding that the deciding factor was not the husband's subjective intent or maintenance of a home in Alabama but rather the fact that he could not "presently reside" in Alabama while living and working in Massachusetts).

109 129 P3d 167 (NM App 2006).

110 Id at 171–72.

Likewise, in *Piccioni v Piccioni*,[111] an Arkansas court drew only selectively from a mother's stated intentions in what turned out to be a rather confusing decision. Arkansas made the initial custody determination, after which all of the parties moved to Pennsylvania. At the time the mother filed a motion for reconsideration in Arkansas, however, she had moved back to her parents' house in Arkansas with the child and was looking for a permanent home in Arkansas.[112] The Arkansas court declined jurisdiction, finding that the mother and child did not "presently reside" in Arkansas. Their stay with the mother's parents in Arkansas was temporary, the court held, even though the two planned to move to a new home within the state.[113] The court was selective in its consideration of the mother's stated intent—taking it into account insofar as it evinced only a temporary desire to stay with her parents but not insofar as it evinced her future plans to stay permanently in the state (albeit in a different house). With courts ignoring intent or only partially considering it, this group of cases gives no clear guidance for future courts to determine residence.

Courts interpreting the similar PKPA provision have also considered intent of the parties, though they also failed to state a clear rule concerning intent.[114] Cases discussing the relevant PKPA or UIFSA provisions are helpful for understanding the UCCJEA provision because the UCCJEA drafters stated that the provisions should have the same meaning.[115] However, the PKPA and UIFSA case law is not helpful in the search for a uniform interpretation of "reside" because that case law is equally unclear and does not define a rule for residence.

3. Courts considering length of time.

A final group of opinions focuses on the length of time parties are in a particular state, though no consensus has been reached even along such a simple metric. In *Staats v McKinnon*,[116] a child was determined to presently reside in Tennessee after living there for eleven months.[117] But in *Highfill v Moody*,[118] a different panel of judges on

111 2011 Ark App 177, slip op (Ark App).

112 Id at 1–2.

113 Id at 5–6.

114 See note 31.

115 See UCCJEA § 202, cmt 2. See also *Highfill v Moody*, 2010 WL 2075698, *7 (Tenn App). It is unclear why the UCCJEA drafters chose to incorporate the same meaning as the previous statutes.

116 206 SW3d 532 (Tenn App 2006).

117 Id at 544, 549.

118 2010 WL 2075698 (Tenn App).

the Tennessee appellate court subsequently decided, without reference to other factors, that a mother staying in a new state for thirteen weeks was sufficient.[119] A Pennsylvania court, in *Hunter v Erb*,[120] decided that six months was long enough to presently reside in a state.[121] In the latter two cases, the courts dismissed several factors that countered their residence determinations: In *Hunter*, the mother's ownership of a condominium in California (the original state) was held insufficient for her to presently reside there.[122] This differs from the *Nurie* court's approach, which took into account the fact that the father had maintained a home in the original state.[123] Similarly, in *Highfill*, the court found that the mother presently resided in Tennessee while on a thirteen-week temporary work assignment, despite maintaining her nursing and driver's licenses, and a leased apartment, in Arkansas.[124] These time-based decisions do not offer much guidance to the next court trying to take advantage of precedent. The courts neither articulated a cut-off for the time a party must be in a state to presently reside there, nor explained how (or even *if*) the other factors interacted with the time variable. The *Highfill* court stated only that "the question here is simply this: where was Ms. Moody residing when this action commenced?"[125]

The *Highfill* court's articulation, however, only leads to another, not-so-simple question—What does "residing" mean?—thus leaving the line-drawing problem unresolved. If the mother were on an overnight work assignment to Tennessee or were there for an hour making a delivery, it would be absurd to say she resided in Tennessee.[126] There must be some point in between the hypothetical hour and the actual thirteen-week assignment at which she begins to presently reside—but the court did not define that line. It is possible that other factors affect how long is necessary to presently reside, but, again, none of the courts discussed this potential interaction.

Thus, the decisions discussed in this Part provide little guidance to future courts because they do not draw lines or state a guiding

119 Id at *10–12.

120 9 Pa D & C 5th 320 (Pa Ct Common Pleas 2009).

121 Id at 326–27.

122 Id. *Hunter* demonstrates the lack of uniformity in practice. If the question had arisen in California as opposed to Pennsylvania, the determination would have come out the other way.

123 *Nurie*, 176 Cal App 4th at 500–01.

124 *Highfill*, 2010 WL 2075698 at *11–12.

125 Id at *12, citing *Jordan*, 2003 WL 1092877 at *7.

126 This is the type of "temporary sojourn" described in *Akula* that would not lead to a change in residence. *Akula*, 935 NE2d at 1078. See also *Brandt*, 268 P3d at 416 (noting that if residence was determined by physical presence alone, the rule would encourage a "race to the courthouse" when one party left the original state).

rule. The case law is a jumbled mix of differing and indeterminate rules, making it impossible for courts to uniformly apply the UCCJEA.

IV. A FRAMEWORK TO UNIFY THE CASE LAW

There is no elegant answer to the ambiguity of the term "presently reside"—no one statement of the rule that will clear up all confusion.[127] Indeed, any clear-cut definition of residence would be artificial and misguided, as it would fail to track reality while simultaneously inviting gamesmanship.

Still, there is much room for improvement from the current, muddled state of the case law. Courts have been applying substantively different rules or making what appear to be intuition-based judgments without stating a rule. While every determination will be fact-specific to some extent, courts' intuitions about the specific facts should at least be guided by universally applicable principles.

This Comment proposes an approach that strikes a middle ground between the *Nurie* court's desire for certainty and the *Akula* court's practicality. This approach has two main aspects: First, based on *Nurie*, courts should begin the analysis with the presumption that the party's residence has *not* changed as long as he maintains a home in the original state. Second, to overcome the presumption, courts should follow the practical approach of *Akula* and several other cases and consider the party's intentions and the convenience of the court.[128]

By giving courts a common process with which to make residence decisions, the suggested approach provides a structure through which decisions of precedential value can be rendered. The result will not be certainty in all cases. Indeed, there is no way to create certainty without undermining flexibility. Still, courts can achieve far more certainty because the logic will be applicable across cases. In other words, courts can create greater predictability through a common law-type process while at the same time retaining a significant degree of flexibility.

Attempting to speak a common language is a familiar response when an issue has a disjointed case law, even when interpreting a

127 For discussion of the difficulty of defining residence, see Part II. Also consider that the UCCJEA drafters did not define residence—even though they noted that the UCCJA and PKPA were inconsistently interpreted in part *because* of the ambiguous nature of the word "reside." See UCCJEA § 202, cmt 2.

128 The presumption will not create a burden-shifting regime. The burden to prove a change in residence is on the party asserting that there is a change in jurisdiction. See *Brandt*, 268 P3d at 413. See also *Delgado v Combs*, 2012 WL 639120, *5 (Ga App), citing *Brandt*, 268 P3d at 413.

statute. For example, the Fifth Circuit faced a similar problem in *Biedenharn Realty Co v United States*[129] when trying to decipher the appropriate test to determine if income is, for tax purposes, ordinary wage income or a capital gain.[130] The court noted that the classification problem "stems from ad-hoc application of the numerous permissible criteria set forth in our multitudinous prior opinions."[131] The court's solution to provide more clarity was to "more precisely define [the test] and suggest points of emphasis" based on the common themes in the case law.[132]

Subsequent courts followed the outline provided by *Biedenharn*, allowing the case law to develop into a clearer and more uniform thread. For example, the Fifth Circuit in *Houston Endowment, Inc v United States*[133] commented that the *Biedenharn* court "went to great lengths to identify the common themes running through previous decisions and to clarify" the tests used.[134] A year later, in *Suburban Realty Co v United States*,[135] the court acknowledged that "[o]ur analysis of this case must begin with *Biedenharn*."[136]

The concept is that courts should do the same thing here as they do when fashioning the common law. As then-Judge Benjamin Cardozo eloquently explained in *The Nature of the Judicial Process*, in the common law system, a judge "must first extract from the precedents the underlying principle, . . . [and] then determine the path or direction along which the principle is to move and develop."[137] Similarly, state courts need a common underlying principle to determine a party's residence, and from there the judges can guide the case law to the correct outcome.

In the UCCJEA context, the goal is to find the right balance between the two competing forces at play: the need for uniformity and the desire to leave judges enough discretion to avoid an absurd or inconvenient result in any particular case. The suggested approach provides courts with a common framework to achieve both.

129 526 F2d 409 (5th Cir 1976).

130 Id at 414–15 (noting the repeated litigation over whether real estate sales should be considered a capital gain and thus taxed at a lower level than ordinary income).

131 Id at 414.

132 Id at 415.

133 606 F2d 77 (5th Cir 1979).

134 Id at 81.

135 615 F2d 171 (5th Cir 1980).

136 Id at 176.

137 Benjamin N. Cardozo, *The Nature of the Judicial Process* 28 (Yale 1921).

A. A More Explicit Approach to Yield Consistent Results

Several pitfalls and points of contention emerge in the various opinions interpreting "presently reside." But if every court, at a minimum, took the same analytical approach to the problem, a more consistent case law would result. The approach proposed below is grounded in the certainty of the *Nurie* court's opinion but supplemented by the practical concerns of the *Akula* court.

1. Starting with a presumption.

This Comment suggests that courts should begin their analyses with the presumption that a party's residence has remained unchanged as long as he maintains a home in the state. If the party does not maintain a home in the original state, there is no presumption for or against a change in residence. Such an approach, grounded in the *Nurie* court's analysis, is both easily administrable and supported by the general goals of the UCCJEA.

To determine if a party maintains a home in the original state, a court can look to several factors. The *Nurie* court noted that the father kept "furnishings and other personal possessions" in his house, meaning he maintained a "fully functional household."[138] Other important evidence would include a lease for another person to inhabit the home. In that case, the home would not be "available for [the party's] own use at all times,"[139] and thus the party would not be entitled to the presumption. Conversely, a lease for an apartment that is available for the party's use would demonstrate that the party maintained a home and would establish the presumption. Evidence of an out-of-state home or apartment would not bear on whether a party maintained a home in the original state; rather, this would be evidence of a party's intent, which may be considered in the next step of the analysis.[140]

This common starting point for the analysis would go a long way toward achieving uniformity in the standard for determining present residence. To this end, the *Nurie* court's analysis provides a starting point that is easily applied and supports the general goals of the UCCJEA's exclusive jurisdiction. Specifically, the court in *Nurie* presumes that a party continues to reside in the original state as long as he maintains a physical home available for use in the state.[141]

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138 *Nurie*, 176 Cal App 4th at 499–500.
139 Id at 500–01.
140 See Part IV.A.2.
141 See text accompanying note 86.

The *Nurie* court's rule in favor of unchanged residence as long as a party maintains a physical home furthers some of the UCCJEA's central goals. It should be adopted as an initial presumption—though not a dispositive rule—for three reasons. First, from a practical standpoint, the presumption it selects is simply an easy place to ground a court's analysis. This common starting point does not require any complicated factual analysis.

Second, the presumption furthers the UCCJEA's goal of giving certainty to the jurisdiction determination. The *Nurie* court emphasized that residence for UCCJEA purposes does not change when the party moves but rather when a judicial *determination* of that move is made, evincing a strong intent by the UCCJEA's drafters to provide certainty and clarity to a change in residence.[142] Similarly, the presumption adopted here decreases the uncertainty surrounding residence and jurisdiction.

Third and most importantly, the presumption furthers the UCCJEA's goal of exclusive jurisdiction. The purposes of exclusive jurisdiction in the UCCJEA scheme are to give certainty to the initial court's substantive custody determination and to prevent a losing parent from looking for a new decision in a new state.[143] An initial presumption in favor of a party's residence remaining unchanged when the party maintains a home in the original state makes exclusive jurisdiction a stronger device. First, a presumption against a change in residence will force courts to approach the issue with caution and restraint. Second, the presumption will make it harder for a party to underhandedly seek a new custody ruling in a new state. Before uniform jurisdiction laws in child custody, the party attempting to forum shop would move to a new state in the hopes of obtaining a ruling before a more favorable court. An initial presumption against a residence change makes exclusive jurisdiction stronger because it makes it more difficult for a party to move the case to a new state's court.

For these reasons, once a custody determination has been made and an original state has established exclusive jurisdiction, courts should be wary of a party's attempt to alter the custody order in a new state. By setting an initial presumption, courts can fulfill the UCCJEA's goal to prevent jurisdiction from changing at a party's whim.

142 See *Nurie*, 176 Cal App 4th at 500–03. In line with these goals, courts have found that a party asserting that the original state has lost exclusive jurisdiction bears the burden of proof. See *Brandt*, 268 P3d at 413; *Delgado*, 2012 WL 639120 at *5.

143 See *Donna J.*, 129 P3d at 171. See also Part I.B.

2. Overcoming the initial presumption with the party's intent.

The next step in the approach advocated here is to provide common guidelines for when the initial presumption of unchanged residence is overcome; the appropriate inquiry is into the party's intent regarding her travels out of the original state.[144] While the *Nurie* court was correct to set a presumption, the rule it expounds for overcoming the presumption is too rigid. As outlined by the *Akula* court, the *Nurie* rule—which allows a party to maintain a present residence simply by keeping a physical home in the state—veers too close to a standard requiring domicile.[145] The *Nurie* rule thus does not accurately reflect the reality of where parties actually reside—entirely defeating the purpose of allowing jurisdiction to change when parties leave the state. Further, it allows parties to engage in gamesmanship by keeping a house in the original state solely to maintain residence there (and, accordingly, might also favor those with the financial resources to keep a second home). A more accurate framework can be developed for when a court should reject the initial presumption, based on the *Akula* court's practical approach, which aims to reflect the reality of where parties live.

a) What intent means, and why it should matter. Although the reasoning and facts from the case law interpreting the UCCJEA's "presently reside" requirement provide only a bare and often confusing record, there are a few lessons that can be drawn from the cases. When these case law observations are combined with the legislative intent of the UCCJEA, comparisons to other sections in the model act, and analogies to other family law settings, it becomes clear that courts should look to a party's intent to determine residence. Intent is the best tool to decide the close cases, and it will lead to both a uniform overall approach and the correct result in a greater number of cases. The weight to be given to a party's intent is one of the major sources of confusion among courts interpreting the UCCJEA's "presently reside" requirement. The *Akula* court did not discuss the mother's stated intent,[146] and the official comment to the UCCJEA

144 If the party does *not* maintain a home in the original state, there would be no presumption created and the court would move to the intent inquiry with no thumb on the scale. Practically, however, the absence of a functioning home in the original state will likely be strong evidence of an intent to presently reside elsewhere.

145 See text accompanying notes 93–95.

146 See generally *Akula*, 935 NE2d 1070. For examples of other courts that have similarly ignored or minimized the importance of a party's stated intent, see notes 104–113 and accompanying text.

does not explicitly mention intent.[147] On the other hand, a number of courts have found that the intent of the parties does matter.[148]

It is possible that the lack of uniformity regarding how to treat a party's intent stems from a desire to avoid replicating a domicile requirement. Domicile is determined mostly by intent;[149] to avoid conflating residence with domicile, courts might understandably shy away from considering intent at all. But the fact that both domicile and residence might include some intent requirement does not mean that courts should ignore intent. Rather, courts should look to the party's intent, while recognizing that the intent necessary for present residence is *distinct* from the intent required for domicile. Domicile inquiries ask where the party intends to make her *permanent home*, while the proposed solution's residence inquiry asks what her *purpose of traveling* is.

That is not to say that a party's *stated* intent should necessarily be dispositive of the residence inquiry. There are some instances where intent is not needed to determine present residence—such as when a party is incarcerated or has lived in a new state for years—because even if the party truly intends to eventually return to the original state, the length of time away is too long to seriously maintain that the individual "presently resides" in the original state.[150] Similarly, a party's intent to eventually move back to a state might not be sufficient to establish present residence in the original state; the court must look to the actual circumstances to determine how long the party has been present in the new state.[151] When a party has been in a new state for a long period of time, the court should see that as strong evidence of an intention to presently reside in the new state. While lengthy absences with a stated intent to return are sufficient to maintain domicile in a state, they are not enough to maintain present residence. These cases to which intent is largely irrelevant, however, are the routine cases—those that are not in doubt under

147 See UCCJEA § 202, cmt 2 (stating that parties no longer "presently reside" in a state when they "physically leave the State to live elsewhere").

148 See, for example, *Donna J.*, 129 P3d at 171 (stating that while intent was not necessary to "presently reside" in a state, a party's intent could be a relevant factor). See also *In re Parentage, Parenting, & Support of A.R.K.-K. and N.J.K.*, 174 P3d 160, 163 (Wash App 2007) (noting that "[a] party's intent is relevant in determining whether an absence is temporary or permanent" for purposes of a home-state determination).

149 See notes 57–58 and accompanying text.

150 See, for example, *Donna J.*, 129 P3d at 171–72.

151 See, for example, *Highfill*, 2010 WL 2075698 at *10 ("Mere intent to make a particular place one's residence is insufficient to establish domicile. 'An appropriate action harmonizing with intent is necessary.'"), quoting *Anene v Anene*, 1996 WL 557802 (Tenn Ct App). The same reasoning applies to establishing residence.

the current state of the case law and that will remain easy cases under the suggested approach. The same evidence that makes these cases easy now—such as a lengthy period of time[152] or a party legally changing his address[153]—will be strong enough to clearly show a party's actual intent.

Where residence is truly in doubt, considering intent can make the critical difference, and indeed it may be necessary to avoid absurd results. Suppose, in the introductory example, that Jane and her daughter have moved from Texas to Florida and that John travels to Florida on a Tuesday. The same day, Jane has a motion before a Florida court to modify her child custody determination. To determine if Texas has lost exclusive jurisdiction, the Florida court must ask where the parties presently reside—only if none presently resides in Texas may it exercise jurisdiction. Jane and her daughter do not, but does John? One way to begin answering the question is to look to John's intent in visiting Florida. The case will come out differently if John intends his trip to be an overnight visitation date with his daughter than if he intends to move into a new apartment that day and stay in Florida for a long period of time. If the court did not consider John's intent, however, the two situations would be indistinguishable—all the court would see was that John was present in the state on that Tuesday. Such a result is inconsistent with the bare consensus that exists, given that courts generally agree that a "temporary sojourn," such as an overnight visit, is not enough to change one's present residence.[154] Intent would be the dispositive factor in the court's decision.

b) Determining intent. This example also shows why length of time should not, as some courts have suggested,[155] be the sole determinative factor. It is likely that if John sold his Texas house, packed up his possessions, and moved into a new house in Florida, he would no longer presently reside in Texas even if he has been in the new house for only a weekend. It is also easy to see that if John leaves Texas for a weekend vacation to Florida, he would still presently reside in Texas. A purely time-based rule would be wrong on one of these hypotheticals. Time is still relevant, however, because it can evince a party's intent. If John claimed he was on a two-year vacation and thus still

152 See, for example, *Lander v Ackles*, 2010 WL 5058628, *1–3 (Ariz App) (finding the parties no longer "presently resided" in Arizona after moving away about six months prior to the determination).

153 See, for example, *In re Lewin*, 149 SW3d 727, 738 (Tex App 2004).

154 See *Akula*, 935 NE2d at 1078.

155 See notes 116–125 and accompanying text.

resided in Texas, the court would be skeptical. Likewise, if John claimed he had permanently moved after only a week away from the original state, the court would be wary that John was trying to use the "seize and run" approach.[156] While length of time can provide strong support of intent, a rule that specifically defined amount of time would be arbitrary and unworkable.

Another critical part of any court's inquiry into the intent of a party is whether the party is acting in good faith. In giving meaning to residence requirements, courts naturally look at the purpose of the particular statute defining "residence."[157] Here, the UCCJEA's goal of preventing forum shopping provides meaning to its residence requirement and also lends further support to the use of intent in the residence analysis. It is well established that the UCCJEA drafters were particularly worried about parents moving their children as pawns in a national game of custody chess.[158] In recognition of that concern, courts should consider whether a parent is acting in good faith when determining his present residence.

If, for example, John wants a Florida court to modify his custody order and rents a Florida apartment that he only plans to keep for a month, the court should see through his scheme and determine that he "presently resides" in Texas. Conversely, if John permanently moves to Florida but Jane returns to Texas with their daughter for a month or two, solely to avoid having Texas lose exclusive jurisdiction, the court should not find that Jane "presently resides" in Texas. That is, courts should not respect a party's intent when it stems solely from a desire to forum shop; instead, the residence issue should be decided against parties who try to game the system.

Comparisons to another UCCJEA section and other child custody principles also support the inclusion of good faith in the residence analysis. Courts have considered whether a party is attempting to forum shop when determining a child's home state under UCCJEA § 201. In *In re Brilliant*,[159] for example, a Texas court had to determine whether a temporary absence from the state affected the six-month period required for home state jurisdiction.[160] The court

156 See Blakesley, 58 La L Rev at 464 (cited in note 3).

157 See Major Wendy P. Daknis, *Home Sweet Home: A Practical Approach to Domicile*, 177 Milit L Rev 49, 58 (2003). See also *Briggs v Superior Court of Alameda County*, 183 P2d 758, 762 (Cal App 1947) ("To determine [residence's] meaning, it is necessary to consider the purpose of the act."); *State v Tustin*, 322 SW2d 179, 181 (Mo App 1959) ("The meaning of the word 'resident' depends upon the purpose in the law where the word is employed.").

158 See notes 18–21, 36–37 and accompanying text.

159 86 SW3d 680 (Tex App 2002).

160 Id at 689–90.

noted that it "might be more inclined to find [the] absence temporary" had the mother's move appeared to be something other than an attempt to gain a favorable jurisdiction result.[161]

Similarly, gamesmanship is a consideration when courts make actual child custody determinations. The Illinois Supreme Court, in *In re Marriage of Eckert*,[162] held that one of the factors in a balancing test to determine whether to allow a custodial parent to relocate with a child was the motive of the parent requesting the relocation.[163] When the party requesting the relocation has a frivolous or malicious motive, "a court should be loathe to interfere with" the current arrangement.[164] The reliance on a party's good faith as a factor in cases involving § 201 of the UCCJEA and other child custody matters suggests that good faith should play a similar role in determinations of present residence under UCCJEA § 202.

Length of time and good faith are just two possible factors courts could consider to determine intent. Other factors could include the purpose of the trip, a party's job, or the state in which the party has a driver's license. The purpose of this overall approach is to give the court discretion to weigh factors based on the specific facts of the case. This will allow every court to accurately determine where the party intends to presently reside. The uniformity of the approach comes from all courts asking the same question, and the discretion comes from allowing courts to set their own path in finding the answer.

c) Viewing Nurie *and* Akula *through an intent-based analysis*. Indeed, an intent-based analysis might explain the differing results reached by the *Nurie* and *Akula* courts. It is possible that the California court in *Nurie* felt that the father intended only to make short, temporary trips to Pakistan that did not rise to the level of presently residing there.[165] The *Akula* court, on the other hand, might have seen the mother's agreement to lease a house in India as strong evidence that the intent of her trip was to presently reside in India.[166] Thus, even though her time spent out of Illinois was relatively brief,

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161 Id.

162 518 NE2d 1041 (Ill 1988).

163 Id at 1045 (stating that the court should "determine whether the removal is merely a ruse intended to defeat or frustrate visitation").

164 *D'Onofrio v D'Onofrio*, 365 A2d 27, 30 (NJ Super Ct 1976).

165 The court stated that the father "always intended to return to California, not to move to Pakistan." See *Nurie*, 176 Cal App 4th at 498–99. The court did not expand on this statement, however, and it is unclear whether the father's intent to return to California was more long-term and in line with the concept of domicile or more short-term and in line with the idea of "presently residing."

166 *Akula*, 935 NE2d at 1071–72.

the purpose of her trip was to spend a significant amount of time in India.

The two courts might have also been concerned that the parties were not acting in good faith. The mother in *Nurie* began the custody dispute by pretending to take a vacation with the couple's son and then never returning.[167] The court might have felt that the mother was trying to use the "seize and run" approach that prevailed before the uniform custody acts and thus imposed a strong presumption against giving up exclusive jurisdiction to her advantage. In *Akula*, the Illinois court might have seen the mother's quick change of heart—from leasing a house in India to moving back to Illinois in the span of two months[168]—as an attempt to pick the court she felt would be most favorable to her. At the very least, there did not appear to be forum shopping by the father in *Akula*, who genuinely lived in India and negotiated an agreement with the mother to move with their son.[169]

d) Possible criticism. Finally, the use of intent might be susceptible to criticisms that subjective intent is difficult to determine, and even then, a court would still be looking to the same facts cited in the previous ad hoc decisions. Thus, it might be argued, the new approach does not add much. Still, framing the analysis in terms of intent provides a useful step toward uniformity. By considering the facts of a case in light of intent, a court can determine the appropriate weight to assign each factor rather than making one factor arbitrarily more important than the others. Determining intent might be difficult, but it will be easier than determining present residence with no guiding principle.

Take, for example, the evidence of a physical house. Suppose John was in Florida but maintained his house in Texas, ready for him to live in if he returned. Under the *Nurie* rule, this would provide dispositive evidence that he presently resided in Texas. But properly considering intent, the house would merely be one piece of evidence—one that could be overcome by showing that John planned to rent an apartment in Florida and leave his Texas home empty for a year. The proposed approach not only avoids the arbitrary and inconvenient result from *Nurie*, but also provides more structure to the body of case law than the *Akula* rule. By allowing the intent of the party to rebut the initial presumption, courts can better achieve the accuracy and consistency that the UCCJEA demands.

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167 *Nurie*, 176 Cal App 4th at 485.

168 *Akula*, 935 NE2d at 1071–72.

169 Id at 1071.

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To summarize, courts would engage in a two-step analysis under the proposed approach. First, the court would look to see if a party maintains a functioning home in the original state available for her use. If the party does, a presumption is created in favor of unchanged residence. If not, no presumption is created. Second, the court would look to the party's intent to see if the presumption is rebutted (or, if no presumption was created, to see where the party presently resides from a clean slate). Factors like the length of the trip, the party's good faith, and the reason for traveling can be important but only inasmuch as they evince the party's intent to presently reside in a state.

B. Finding the Right Mix of Uniformity and Discretion

The approach articulated above aims to strike a balance between the competing goals of uniformity and discretion. Moving too far toward a uniform rule—such as domicile, which courts in different jurisdictions can consistently apply—would increase the number of inconvenient results. A hard-and-fast rule would be over- or underinclusive, resulting in the original court ceding exclusive jurisdiction too easily or holding it too long for efficient adjudication of substantive child custody issues. On the other hand, an interpretation that gives each judge expansive discretion in the name of avoiding absurd results would defeat the purpose of uniformity.

This situation reflects the traditional debate between rules and standards, in which the error costs from explicit rules are weighed against the decision costs from ambiguous standards.[170] To illustrate the costs at issue, recall the "residence" interpretations of the courts in our case study: the *Nurie* court expounded a more rigid rule while the *Akula* court used a flexible standard. The *Nurie* court's rule—that a party can keep a present residence by maintaining a functioning house available for use[171]—could lead to absurd results. If the father stayed in Pakistan for ten years but maintained his California house, he would presently reside in California, and the prolonged litigation would harm the child. But the *Akula* standard—that parties no longer presently reside in a state when they leave to live elsewhere[172]—is subject to a broad range of interpretations, thus defeating the very

170 See, for example, Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 Harv L Rev 22, 57–69 (1992). For an ardent presentation of the need for rules, see Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U Chi L Rev 1175, 1179 (1989).

171 *Nurie*, 176 Cal App 4th at 500–01.

172 *Akula*, 935 NE2d at 1078.

purpose of a uniform act. The costs are very high at the extremes, with either an inconvenient result that harms the child or a lack of uniformity in the case law that defeats the purpose of a uniform act.

The proposed approach achieves the middle ground between a rule and a standard to avoid the harsh results of both extremes. The approach provides courts with a framework with which to view the case. This not only facilitates uniform analyses but also allows sufficient room to weigh differently the relevant factors as an individual case requires. As a New Jersey court stated, one of the ways the UCCJEA "addresses the problem of competing jurisdiction and potentially conflicting orders" is "by specifying the *substantive* standards."[173] The approach articulated above makes the substantive standard of residence more specific. It both gives judges an underlying rule to apply, and, like Cardozo's common law, allows judges to situate the particular case within the spectrum of other cases also applying the identical standard. Residence determinations will be more uniform and accurate—two of the UCCJEA's goals for jurisdiction determinations—under the new approach than the current case law.

By focusing on intent, the proposed approach provides much more uniformity, and perhaps even more accuracy, than the totality of the circumstances test outlined in *Brandt*.[174] While the *Brandt* test can be stated uniformly in each case, it provides neither direction for the analysis nor uniform results. Courts will still be free to point to one factor—perhaps length of time or possession of a house—as dispositive. Even if courts consider all the factors, there is no indication as to why a given factor is important and how important it should be relative to other factors. If courts are unrestrained to consider all factors and circumstances, the case law will remain a smattering of ad hoc decisions. Further, the *Brandt* test might even provide less accurate results because its definition of present residence is based on statutes unrelated to child custody or family law. The definition is derived from statutes on voter registration, jury duty, and military service,[175] but the rationale and purpose behind these statutes differ from those of the UCCJEA. Comparisons to definitions in other statutes might lead to a residence determination that is appropriate for voter registration but not for child custody disputes.[176] The *Brandt*

173 *Griffith v Tressel*, 925 A2d 702, 708 (NJ Super Ct 2007) (emphasis added).

174 See text accompanying notes 98–102.

175 *Brandt*, 268 P3d at 415.

176 Further, the other statutes are specific to Colorado, which would make comparisons inconsistent across states. See id, citing Colo Rev Stat § 1–2–102; Colo Rev Stat § 13–71–105(1), (2)(e); Colo Rev Stat § 14–10–103(3).

test does not provide analytical direction to reach uniform results, and it is not grounded in the goals of the UCCJEA.

It is true that the approach proposed in this Comment does not always or immediately yield a clear result either. If John stated that the purpose of his trip to Florida was a three-week business trip and the court determined he was not forum shopping, it is unclear if those factors, even in the aggregate, are sufficient to support a change in John's present residence to Florida. Intent can also, admittedly, be an uncertain concept. Even if a court can determine intent, there is no explicit rule regarding what constitutes present residence. The length of time needed to change residences could change if the purpose of the trip is business or vacation or staying with a sick relative. But line-drawing problems such as these will exist as long as residence is one of the standards used in determining jurisdiction. At some point, a court's individual judgment on what it means to "presently reside" must kick in to determine the close cases.

The proposed approach, at a minimum, improves the uniformity of these decisions because it permits courts to speak the same language. As compared to a totality of the circumstances test that allows courts to decide what factors are important and why, the proposed approach directs courts to all ask the same initial question about intent. This ensures all courts are weighing various factors for the same reason. As the same analytical framework is applied in every case, it will be easier for courts to situate the particular facts of a case within the larger framework of the case law. Eventually, consensus will begin to form and lines will be able to be drawn based on collective intuition. Without this common approach, courts will draw lines on different spectrums or use concepts that other courts do not understand, much less utilize. The next court to make a similar decision will see a disjointed landscape and will not be able to apply precedent, thus perpetuating the cycle of ad hoc decisions and uncertainty.

CONCLUSION

Over the past half century, lawmakers have turned to uniform acts to prevent forum shopping and gamesmanship in child custody battles. Uniformity in jurisdiction has been difficult to achieve, however, because of the ambiguous meaning of residence. Trying to interpret what it means to "presently reside" in a state for jurisdiction under the UCCJEA has led to conflicting decisions and a muddled case law. There is no clear statement to define residence, but courts can begin to develop a clear case law by adopting an approach that not only provides guidance to ensure uniformity but also allows

courts sufficient discretion to reach the correct result in each case. By adopting a uniform approach, courts will begin to speak the same language. This will give the opinions greater precedential value and allow subsequent courts to apply the standard uniformly. In other words, the proposed approach suggests a method for finally fulfilling the purpose of the UCCJEA.