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Habitual Residence, Home State, and Cross-Border Custody Jurisdiction: Time for a Temporal Standard in International Family Law

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

The article covers three areas of international family law. First, the article provides a history of family law jurisdiction in the United States and thoroughly reviews home state jurisdiction in United States domestic law. While domestic family lawyers know this standard, the standard’s rigidity and fragmented application among the states baffles many foreign family lawyers.

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

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

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

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

Section II of this article begins by reviewing U.S. family law jurisdiction, with a focus on today’s “home state” jurisdiction. In a sense, U.S. family law begins and ends with bright line tests. Now, jurisdiction exists primarily in the child’s “home state”—a time-based concept.

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

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

This comprehensive look at the primary jurisdictional factors illuminates a need to concretize jurisdictional determinations with a firmer standard. Accordingly, this article’s second goal is to provide more legal certainty for all families in cross-border custody disputes in Section V with a new standard in private international family law—a temporal standard complemented by categorical definitions for temporary presence in a jurisdiction.

II. From Father’s Rights to home state jurisdiction under the UCCJEA

In the U.S., each of the 50 states generally follows its own family laws. For child custody jurisdiction however, large uniformity exists under the Uniform Child Custody Jurisdiction and
Enforcement Act (“UCCJEA”). The UCCJEA embodies three centuries of evolution. This Section explains U.S. family law history, the UCCJEA, and home state jurisdiction in several states.

A. U.S. family law before the UCCJEA

1. Early history

Child custody determinations in the U.S. have changed drastically over the past three centuries. During most of the 18th century, fathers in North America had “an almost unlimited right to the custody of their minor legitimate children.”\(^1\) This preference gave way during the legal and cultural shift after the colonies formed the United States of America.

After the American Revolution, U.S. law challenged fathers’ rights with respect for individual rights.\(^2\) The law began to recognize the important role of mothering in child development.\(^3\)

Using common law, judges took the reins in family law as a matter of social policy.\(^4\) The courts’ role in family law stemmed from the English *parens patriae* doctrine, which provided jurisdiction in the name of the king to oversee transfers of feudal duties.\(^5\) In the 1800’s, courts used this doctrine to intervene in familial disputes to protect the best interest of the child.\(^6\)

The best interests of the child is a key concept in family law. This longstanding principle\(^7\) permeates family law internationally.\(^8\) The best interests of the child is “[a] standard by which a court determines what arrangements would be to a child’s greatest benefit….\(^9\) Though courts do not define this standard alone. Rather, legislatures have long attempted to best position the courts to protect children.

\(^2\) Id.
\(^3\) Id (citing *Bedell v. Bedell*, 1 Johns. Chan. 605 (N.Y. 1815) (granting custody to mother instead of alcoholic father).
\(^4\) Id at 6 – 9, 14, 18
\(^5\) Id at 235.
\(^6\) Id at 239.
\(^7\) *Prather v. Prather*, 4 Desau. 33 (S.C. 1809) (giving custody to mother based on child’s interest despite the strong presumption for father’s custody rights).
U.S. society in the early 1800’s, concerned about the familial institution whose legal problems rested solely in judges’ hands, called upon lawmakers to intervene. Marriage, viewed only in part as a private contract, was squarely under state control. In the federal system, state lawmakers shaped law and policy. Balancing tests emerged in state courts to determine the best interests of the child and state legislators began to codify these standards.

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

As state custody laws developed, commentators sought unified family law principles. Early U.S. family law treatises tried to synthesize family law. However, such uniformity failed as, following popular and professional preference, judges shaped the codified family law. Thus in practice, courts retained the leading role in this area of law for the rest of the nineteenth century.

In time, custody disputes increased. Yearly U.S. divorces increased nearly fivefold from 1890 to 1920. In response, state legislatures regulated custody determinations. By 1936, all

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10 *Id.* See also, J. Story *Commentaries on the Conflicts of Law* (Boston, 1834) (describing marriage as “something more than a mere contract. It is rather to be deemed as an institution of society founded upon the mutual consent and contract of the parties, and in this view has some obligation, different than what belongs to ordinary contracts.”

11 See, e.g., 2 revised New York Statutes 562, art. 2 (1830); *Ahrenfeld v. Ahrenfeldt*, 1 Hoffm. Chan. 497, 502 (N.Y. 1840); *People v. Nickerson*, 19 Wend. 16 (N.Y. 1837); *People v. Mercein*, 25 Wend. 64 (N.Y. 1840); *State v. King*, 1 Ga. Dec. 93 (1841).

12 Grossberg at 239.


14 Grossberg at 241.


16 Grossberg at 241.

17 M. Mason, *From Father’s Property to Children’s Rights: The History of Child Custody in the United States* 112 (Columbia: 1994) (reporting an increase in divorces from 33,461 – 167,105 during these years) (“Mason”).
states had codified their own custody laws. As state courts applied their unique family law statutes, their orders could clash with other state courts’ orders.

2. Problems with jurisdiction

In 1953, a child custody case of conflicting jurisdiction offered the U.S. Supreme Court a rare chance to address custody jurisdiction. In *May v. Anderson*, a mother retained her three children in Ohio despite a Wisconsin court’s *ex parte* order that granted the father a divorce and custody of the children. An Ohio trial court held that it was constitutionally bound to give full faith and credit to the Wisconsin order and ordered the children’s return.

On appeal, the U.S. Supreme Court considered whether the Ohio court had to honor the Wisconsin court’s order, which lacked personal jurisdiction. Thus, the Court’s analysis turned on whether a state court had to recognize another’s custody order that lacked personal jurisdiction.

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

Justice Jackson’s dissent foresaw problems that this decision would create with conflicting orders. The dissent would have held the father and children’s presence gave the Wisconsin court

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20 345 U.S. 528 (1953).
21 Id at 529.
22 Id.
23 Id at 531.
24 Id at 533.
26 Id.
27 Id.
custody jurisdiction.\textsuperscript{28} Though custody rights were indeed more precious than property rights, Jackson viewed custody as a status issue that “Wisconsin had a far more real concern with” than Ohio.\textsuperscript{29} Justice Jackson’s recognized the decision’s effect was that the:

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

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

Moreover, that case demonstrated that jurisdiction in interstate child custody matters was on the national radar by the 1950’s. With increased mobility and the 1960’s divorce revolution on the way,\textsuperscript{30} courts needed uniform guidance on interstate jurisdiction. Without full faith and credit, \textit{May v. Anderson} encouraged forum shopping in the U.S.—the first of three reasons that turned forum shopping and child abductions into pressing national problems.

Second, these problems continued because of flexible jurisdictional requirements for custody disputes.\textsuperscript{31} Wide jurisdictional bases made jurisdiction in multiple courts an unfortunate possibility. Courts variously exercised jurisdiction based on: the child’s physical presence, the child’s

\textsuperscript{28} Id at 538.
\textsuperscript{29} Id at 540.
\textsuperscript{30} Grossberg at 224.
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domicile, one or both parents’ domicile, original jurisdiction, the best interests of the child, or *parens patriae.* Thus for mobile families, conflicting orders were readily available.

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

B. The UCCJA

The National Conference of Commissioners on Uniform State Laws (“National Conference”) is the main U.S. institution that collaborates the interstate legal system. Over 300 commissioners represent their states to support the federal system, modernize laws, and facilitate legal issues.

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

The first factor that provided jurisdiction involved a judicial determination of the child’s “home state,” a term that the UCCJA defined concretely—if somewhat arbitrarily. The child’s home state was the “state in which the child immediately preceding the time involved lived with

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32 *Id.*  
33 *Id.* at 16.  
34 *Id.*  
37 UCCJA, Prefatory note.
his parents, a parent, or a person acting as parent for at least six consecutive months.”

This objective definition provided a clear standard for most cases.

Second, the UCCJA provided jurisdiction if the child and at least one parent had a “significant connection” with the state, indicated by “substantial evidence concerning the child's present or future care, protection, training, and personal relationships” in the state. UCCJA comments indicated that home state would take priority over significant connection.

Third, the UCCJA attempted to extinguish parens patriae—jurisdiction based solely on the child’s best interests—by making it available only in exceptional cases of child abandonment or emergency. Finally, courts could exercise jurisdiction if no other court had jurisdiction on the previous three bases. These four jurisdictional bases simplified interstate jurisdiction, but time would add complexity to the UCCJA’s application.

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

In light of these conflicting Federal laws, persistent potential for conflicting orders, and the differing applications of the UCCJA among the states, the National Conference moved towards a new uniform act—the Uniform Child Custody Jurisdiction and Enforcement Act (“UCCJEA”).

C. The UCCJEA

1. General overview of the UCCJEA

After almost 30 years of the UCCJA, the National Conference acted again to streamline jurisdiction. In 1998, the National Conference passed the UCCJEA. Now, the UCCJEA applies in every state except Vermont and Massachusetts, where legislatures have introduced the legislation. Once adopted, the UCCJEA will unanimously set a uniform jurisdictional standard.

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

Home state remains the primary factor in determining jurisdiction under the UCCJEA. The term retains its six-month time-based definition. A home state court has exclusive, continuing jurisdiction over parental responsibility matters. Courts can get jurisdiction in other situations.

For initial jurisdiction, the UCCJEA provides three exceptional bases for jurisdiction. First, when a child has no home state or a court has declined jurisdiction, another court with a sig-

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44 UCCJEA § 102 (7).
45 UCCJEA § 202.
46 A home state court may decline jurisdiction for forum non conveniens (§ 207) or misconduct (§ 208). The UCCJEA and its comments define wrongful conduct as “unjustifiable conduct.” The comment helps define this standard as “where parents, or
significant connection to the child may exercise jurisdiction. A court must have substantial evidence\(^{56}\) of this significant connection in the state. If two states have substantial evidence, the first filed has jurisdiction but also a duty to communicate with the sister state.\(^ {57}\)

Second, if a home state court declines jurisdiction, it can transfer jurisdiction based on \emph{forum non conveniens}.\(^ {58}\) Finally, if no jurisdiction exists in any court, a court may exercise jurisdiction.\(^ {59}\) Personal jurisdiction and presence are not required.\(^ {60}\) A party cannot waive subject matter jurisdiction.\(^ {61}\) Thus, the UCCJEA provides a rigid jurisdictional hierarchy for initial jurisdiction.

Another type of jurisdiction is modification jurisdiction. One of the UCCJEA’s distinct traits in contrast to international and E.U. jurisdiction is continuing, exclusive jurisdiction. Continuing, exclusive jurisdiction generally means that only the court that made a previous order can modify.\(^ {62}\) Two situations provide jurisdiction to modify a previous court order.

First, if a child, parent, and person acting as parent have no connection with the initial state, then a court in another state can modify previous orders.\(^ {63}\) As seen below, many U.S. courts strictly require that a court determine no connection with the previous state.

Second, temporary emergency jurisdiction exists “if the child is present in this State and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or

\(^{56}\) UCCJEA § 201 (a) (2) (A).
\(^{57}\) See comment to \textit{id}.
\(^{58}\) UCCJEA § 207 – 208.
\(^{59}\) UCCJEA § 201 (a) (4).
\(^{60}\) UCCJEA § 201 (a) (4) (C).
\(^{62}\) UCCJEA § 202.
\(^{63}\) UCCJEA § 203.
abuse." Courts must communicate during simultaneous proceedings. Thus, while exceptions exist, home state is the primary factor for interstate jurisdiction.

2. Initial jurisdiction

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

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

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

a. “Immediately before” or “six months before?”

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

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

Lawyers soon pointed out the disharmony between these provisions.

After Arizona adopted the UCCJEA, an appellate court addressed this issue. In Welch-Doden v. Roberts, a mother and child had moved back and forth between Oklahoma and Ari-

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64 UCCJEA § 204. This section conforms with the PKPA.
65 UCCJEA § 204 (d).
66 UCCJEA § 102(7).
67 UCCJEA § 201 (a) (1).
zona, eventually staying in Oklahoma for six months. The mother and child then moved to Arizona, where she said they intended to remain. However, the father never joined them in Arizona, where in four months, she filed for divorce.

The mother argued that the child had no home state. Because those four months had passed, the child had not lived in Oklahoma “immediately before” the proceedings. The court noted the potential discrepancy and examined the UCCJEA’s purpose and background.

The court sought to promote certainty, aiming “to strengthen (rather than dilute) the certainty of home state jurisdiction.” As such, “six months before” enlarged the definition of “immediately before,” meaning that “home state” persists for “six months before the commencement of the [child custody] proceeding.” Therefore, despite four months in Arizona, Oklahoma remained the child’s home state.

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

b. Temporary absence

This objectivity however wavers in temporary absence cases. The UCCJEA states that time spent temporarily outside of a jurisdiction will count towards time spent in the home state. This awkward concept contains a legal fiction that corrodes the otherwise straightforward home

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69  Id.
70  Id.
71  Id at 1171.
72  Id at 1173.
73  Id.
75 UCCJEA § 102 (7).
state standard. Unfortunately, temporary absence lacks any definition in the UCCJEA. Consequently, courts have been less than uniform in determining whether a move was temporary.

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

Some courts have avoided mind-reading exercises by focusing on the time. One court rejected an argument characterizing “an absence, with the exception of a few days, of almost seventeen months to be a ‘temporary’ absence.” Other courts have similarly looked at duration.

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

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

Consider Shepard v. Lopez-Barcenas, an Oregon appellate case between a Mexican mother and a U.S. father. Their child was born in 1998 and lived in Mexico. The family moved to Oregon in 1999, where the mother pursued a one-year degree. One month into her degree, the mother ended the relationship, telling the father that she would move to Mexico after

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76 See T.H. v. A.S., 938 S.W.2d 910 (Mo. App. 1997).
77 Sareen v. Sareen
78 See, e.g., Ogawa v. Ogawa, 221 P.3d 699, 704 (Nev. 2009) (holding time-limited three-month stay in Japan was temporary); Felty v. Felty 66 A.D.3d 64, 70 (N.Y.A.D. 2009) (holding despite her expressed intent to remain in Kentucky, child’s six-week presence there was a temporary absence from the home state in New York); Chick v. Chick, 596 S.E.2d 303 (noting six week absence from Vermont “was a temporarily absent period of time, especially when compared to the fact that the children had spent almost the entire previous year in Vermont.”)
79 For a totality of the circumstances approach, see, e.g. Chick v. Chick, 596 S.E.2d 303 (N.C.App. 2004).
81 Id at 255.
82 Id at 255.
In January 2000, the father sought custody in Oregon. After the mother waived personal jurisdiction, the court gave the mother custody and visitation rights to the father.

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

The appellate court disregarded the father’s intent, pinning temporary absence on the mother’s intent. The court posited: “[a]ny temporary absence of any of the mentioned persons’ is considered to be part of the period during which [the child] lived in Mexico.” Here, the mother intended a temporary move. Thus, her unilateral intent kept Mexico as the home state.

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

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

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83 Id.
84 Id.
85 Id.
86 Id.
87 Id.
88 Id at 256.
89 Id.
90 Id (citing ORS 109.704(7)) (emphasis in original).
91 Id.
The decision was unfair because the court focused solely on the time “during which [the] mother was temporarily absent”\textsuperscript{92} and her purported intent regarding the child’s residence. Allowing one parent to decide home state based on subjective intent creates uncertainty. This subjective analysis encourages parties to litigate over intent. Further, this blanket rule may not benefit the best interests of the child after extended stays where a child may fully integrate in a new home state despite one parent’s subjective intent that the child’s presence was temporary.

Unfortunately, some courts have similarly looked to parental intent regarding temporary absence, creating questionable results in cases with extended “temporary” stays.\textsuperscript{93} Courts can instead determine temporary absence based on concrete facts. As seen in Sections III and IV, temporary absence’s trickiness begs for a firm definition internationally as well.

c. Newborns—born into the UCCJEA

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

For children under six months, “[home state] means the State in which the child lived from birth with any [parent].” The case \textit{In Re Calderon-Garza} involved a mother who left Mexico to give birth in Texas.\textsuperscript{94} The mother enjoyed dual U.S.-Mexican citizenship and stayed at her parents’ home in the U.S. before giving birth to her son.\textsuperscript{95} Eleven days later, she notified the fa-
ther, who visited from New Jersey. The mother and child stayed five months in Texas before going to Mexico. The day after they left, the father filed for paternity in Texas.

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

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

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

Second, the analysis effectively solved a problem the UCCJEA addressed—home state for newborns. When parental responsibility disputes arise so early that the child has not lived in a state for six months, the newborn has unique interests. Unlike older children who integrate in an environment, newborns are unlikely to integrate in the same sense, absent school, activities, and social and familial relationships. This decision offers parents a measure of legal certainty regarding jurisdiction in cases over newborns—without slighting the best interests of children.

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96 *Id.*
97 *Id.*
98 *Id.*
99 *Id.* at 903.
100 *Id.*
101 *Id.*
102 *Id.*
Moreover, this case demonstrates how a precise category for jurisdictional determinations can provide certainty. After all, without the UCCJEA newborn provision, this could have been a messy determination. The court would have had to determine the child’s significant connections because he had no home state or might have entertained the temporary absence argument.

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

d. International initial jurisdiction

As the above case subtly demonstrated, the UCCJEA applies straightforwardly in international cases. It simply treats foreign countries as states.\(^{104}\) This strict standard, like the other strict standards, has worked well by adding predictability to comity issues.\(^{105}\) Albeit straightforward, it potentially burdens foreign courts and counsel. In order to issue a recognizable order, foreign courts must have initial jurisdiction under UCCJEA standards. Thus, if foreign courts do not follow the UCCJEA, U.S. courts may not subsequently recognize those foreign court orders.

An Indian court order faced such problems in *In Re Marriage of Sareen*.\(^{106}\) In that case, a family lived in New York State and travelled to India.\(^{107}\) Within a week of arriving there, the husband filed for divorce and custody after taking the mother and the child’s passports and residency documents.\(^{108}\) Over a year later, the mother and child moved to California.\(^{109}\) Three months later, she filed for divorce and custody in California.\(^{110}\)

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104 UCCJEA § 105(a) – (c). The NCCUSL modeled 105(c) after the Hague Convention. Huff, n. 48 (1998).
106 62 Cal Rptr.3d 687 (2007).
107 Id.
108 Id.
109 Id.
110 Id.
In considering the previous Indian order, a California appellate court examined whether the Indian trial court had initial jurisdiction. The father argued that because Indian law provided jurisdiction, the California courts could not exercise jurisdiction. However, the California appellate court concluded that Indian law would not suffice—India was a UCCJEA state.

Because the father filed suit after only nine days in India, jurisdiction there did not substantially conform to the UCCJEA. Further, the child’s time in India during the Indian court proceeding did not count towards home state time. New York, not India, was the child’s home state when he filed suit. As a result, the California court rejected the Indian court’s order.

This case demonstrates that courts in foreign jurisdictions must follow the UCCJEA. Based on the facts of the case, this decision was fair, but it indicates that parties seeking custody in foreign courts face significant hurdles. After all, foreign courts will not likely consider the UCCJEA’s provisions. Nonetheless, they must follow the UCCJEA or else a U.S. court may reject a foreign order. Similar problems arise when modifying orders in foreign courts.

e. Modification jurisdiction

Modification jurisdiction applies tight restrictions. Continuing, exclusive jurisdiction gives the court with initial jurisdiction the exclusive power to modify custody orders, even if a child acquires a new home state. A court in a different jurisdiction can only modify another court’s order if “neither the child, nor the child and one parent, nor the child and a person acting as a parent have a significant connection with the” previous state or if “the child, the child’s parents, and any person acting as a parent do not presently reside in” the previous state. Further,

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111 Id at 691.
112 Id at 690.
113 Id at 691.
114 Id.
116 Id.
117 UCCJEA §202.
the court must judicially determine that this factual situation no longer exists—an requirement that has created problems for some litigants.

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

In August 2006, the mother petitioned a New York court for an order to modify the Italian order to suspend the father’s visitation rights. In March 2007, she returned to Italy with the child, violating the New York court’s ne exeat order. The father continued the New York action, but the mother initiated another suit in Italy. After the New York trial court mixed up the Hague Convention and the UCCJEA, issued a bogus arrest order, and ignored the Italian order’s notification requirement, it dismissed the case.

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

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

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118 Id.
120 Id. at 92.
121 Id.
122 Id. at 93.
123 Id.
124 Id.
125 Id. at 94.
126 Id. at 96.
127 Id.
128 UCCJEA § 201.
Ignoring that formal requirement, the court presented a public policy argument. Declining jurisdiction would have given “the mother a choice of jurisdictions, and thus the concomitant right to disregard any orders of the court of which she availed herself when she failed to obtain the desired outcome.” The argument was unnecessary. Regardless of policy, only courts with exclusive continuing jurisdiction can modify orders. The court should have resolved the case within the UCCJEA’s established structure—not based on policy.

In buttressing this argument, the court further erred by citing case law that dealt with the Hague Abduction Convention. Though the court probably reached the right result, it did so by diluting the UCCJEA requirements and confusing future courts. Judge Lippman’s dissent verifies more of the decision’s shortcomings because the:

Italian proceeding respecting custody [began] when, as the majority recognizes, Italy was indisputably the “home state” of the child; and that proceeding evidently continues, the father having filed within it an apparently still-pending appeal challenging the Italian court’s award of sole custody to respondent mother.

Thus, the majority’s order was, “at the very least, premature.” The court should have waited for the Italian court’s ruling on the case.

Other courts have gotten the issue right, recognizing exclusive continuing jurisdiction’s far reach. The case In Re Marriage of Nurie involved “kidnapping, fraud, and domestic violence, all set against a backdrop of INTERPOL warrants, armed gunmen, and flights from justice,” but like most of these cases, “[t]he issue on appeal, however, [was] the far less dramatic

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130 Id (citing Croll v. Croll, 229 F.3d 133 (3rd Cir. 2000)). Further, the court noted the definition of a wrongful Hague Convention removal and the Second Circuit’s holding in Croll that a ne elexut order alone does not confer rights of custody. The court differentiated between wrongful Hague Convention removals from wrongful UCCJEA removals—a potentially problematic conclusion, considering these issues’ legal proximity and the UCCJEA’s purpose to conform to ICARA. Further exposing its misunderstanding of international family law, the court made a weak attempt to distinguish this case from Croll because this child was a U.S. resident.
131 Id at 100 (Lippman, J., dissenting).
132 Id.
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one of jurisdiction under the [UCCJEA].” In this case, a six-year-old divorce order provided exclusive, continuing jurisdiction in the California courts, invalidating a Pakistani court order.

Setting aside the case’s peculiar facts, the mother took the child to Pakistan and secured custody under Pakistani law. The father then spent significant amount of time in Pakistan but maintained a California residence. He abducted the child back to California. In response, the mother sought recognition of the Pakistani order in the California courts.

The appellate court held that when a parent maintains a residence in the child’s previous home state, a court there that exercised initial jurisdiction maintains exclusive continuing jurisdiction until a court determines that all parties have stopped residing in that jurisdiction. Therefore, the court disregarded the Pakistani court orders because the Pakistani court did not consider, let alone determine, whether the father gave up his residence in California. The failure to meet this subtle requirement preserved California’s exclusive jurisdiction after six years.

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

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134 Id at 484 – 485.
135 Id at 498.
136 Id.
138 The case law in other jurisdictions supports this conclusion. See Nurie at 500 – 501 (citing In Re Lewin, 149 S.W.3d 727, 736 (Tx. Cl. App. 2004); State of N.M. ex rel CYFD v. Donna J., 129 P.3d 167, 171 (N.M. Cl. App 2006)
To U.S. counsel however, the required determination provides an extra measure of legal certainty because a court may not go forward with an order to modify without removing obstacles to modification. Thus, the UCCJEA’s required court determination is yet another bright line test to increase legal certainty in custody jurisdiction.

f. Conclusions about jurisdiction under the UCCJEA

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

If a court exercises initial jurisdiction, then it has exclusive jurisdiction until another court determines that no party remains in the previous state. Those bright line tests create a jurisdictional scheme that differs significantly from the less certain cross-border jurisdiction in E.U. and international law’s habitual residence standard.

III. From E.U. economic integration to family law jurisdiction under Brussels IIbis

E.U. law determines jurisdiction for custody cases between E.U. Member States—a legal reality that has existed for only a decade. Simply stated, Member State courts in the child’s habitual residence have jurisdiction. However, the uncertainty of that term in EC Regulation

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Those efforts have gradually increased but still unsettle some E.U. citizens.\footnote{Lord Scott of Foscote questioned, regarding EU initiatives regarding mutual recognition in civil matters, “what has it necessarily got to do with the European Union?” House of Lords, European Union Committee, 10th Report of Session 2004-2005, The Hague Programme: a five-year agenda for EU justice and home affairs, report on the examination of witness Baroness Ashton of Upholland, Q71; see also Vesna Lazic, “Recent Developments in Harmonizing ‘European Private International Law’ in Family Matters” 10 Eur. J. L. Reform 75, 76 (2008).} After all, the E.U. exists to facilitate the internal market; how does family law serve that purpose?\footnote{Johan Meeusen, “‘What Has it Got to Do Necessarily with the European Union’: International Family Law and European (Economic) Integration,” 9 Cambridge Y. B. Eur. Legal Stud. 329 (2006 – 2007).} E.U. family law now resides comfortably within E.U. legislative competence, related to free movement of persons and the area of freedom, security, and justice.\footnote{Treaty on the functioning of the European Union (“TFEU”), Article 81(3).} While a review of E.U. law rests outside the scope of this article, this Section reviews the events that led to BIIbis.\footnote{See Dickinson, supra at 200 – 206.}

This Section also reveals habitual residence’s uncertainty in parental responsibility cases by analyzing BIIbis habitual residence cases in the European Court of Justice and UK courts.

1. A convention on jurisdiction in civil and commercial matters

Today’s E.U. family law is rooted in private international law conventions. The E.U. initially waded into this legal area five decades ago,\footnote{Brussels Convention on Jurisdiction and Recognition of Judgments in Civil and Commercial Matters, O.J. L299/32 (“Brussels I”).} with the Brussels I Convention on jurisdiction and recognition of judgments in civil and commercial matters.\footnote{Dickinson 209 – 217 supra; Eleanor Ritaine, “Harmonizing European Private International Law: A Replay of Hannibal’s Crossing the Alps,” 34 Int’l J. Legal Info. 419 (2006).} This allowed the European Economic Community to simplify “the formalities governing the reciprocal recognition and
enforcement of judgments of courts or tribunals."\textsuperscript{148} Brussels I aimed to streamline jurisdiction, recognition, and enforcement in cross-border civil matters among national courts.

However, the only family law matter that Brussels I covered was maintenance. Parental responsibility cases enjoyed no streamlining.\textsuperscript{149} For those matters, Member States could only negotiate on their own to simplify recognition and enforcement of foreign custody orders.\textsuperscript{150} Nonetheless, Brussels I provided the bedrock for today’s E.U. jurisdiction, recognition, and enforcement principles in divorce and custody matters.\textsuperscript{151}

For over two decades following Brussels I, the European Economic Community avoided family law. Forces outside the Community however developed international family law.

Two multilateral conventions in 1980 addressed international child abduction. The Council of Europe produced the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and Restoration of Custody of Children,\textsuperscript{152} and the Hague Conference on Private International Law completed the related Hague Convention on the Civil Aspects of International Child Abduction.\textsuperscript{153} In short, these conventions protected parental responsibility jurisdiction in the child’s habitual residence. If someone wrongfully removed a child from its habitual residence to another signatory country, a custodial parent could petition a court to immediately order the child’s return to the previous habitual residence.

These treaties promoted harmonization and the role of habitual residence in international family law. Still, the Community could not force Member States to sign these conventions or


\textsuperscript{149} The drafters excluded divorce because:

[the most serious difficulty with regard to status and legal capacity is obviously that of divorce, a problem which is complicated by the extreme divergences between the various systems of law. Report on the Convention on jurisdiction and the enforcement of judgments in civil matters, [1968] OJ., C59/10 (“Jenard Report”); see also Explanatory Report on the Convention, drawn up on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters, [1998] O.J. C221/29 (“Borras Report”).]

\textsuperscript{150} EEC Treaty, supra at Article 220.

\textsuperscript{151} Nigel Lowe, International Movement of Children 13 (Jordan: Bristol, England, 2003)

\textsuperscript{152} 20 May 1980, E.T.S. 105

legislate regarding family law jurisdiction. European heads of state pushed for increased Community power, which resulted in the 1986 Single European Act.\textsuperscript{154} Though this ensured “an area without frontiers [and] the free movement of goods, persons, services and capital” in the internal market,\textsuperscript{155} it did not yet confer Community competence in family law.

Then, in 1992—after 35 years of free movement—the Community gained competence to regulate family law. The Treaty on European Union\textsuperscript{156} broadened Community competence\textsuperscript{157} by requiring “judicial cooperation in civil matters.”\textsuperscript{158} This mandated communication and cooperation between Member States and the Council of Ministers (“the Council”) to achieve that goal.

Based on those communications, the Council could “draw up [and recommend conventions] to the Member States for adoption in accordance with their respective constitutional requirements.”\textsuperscript{159} In turn, Member States communicated their family law needs to the Council, demanding in requests and questionnaires recognition and enforcement of family court orders.\textsuperscript{160}

In October 1993, the European Group on Private International Law proposed a convention on the recognition of judgments in family matters.\textsuperscript{161} Member States voiced support, and the European Council instructed the Council to draft a convention on family law.\textsuperscript{162}

The Council completed a draft, which it presented to the European Parliament. The European Parliament delivered its opinion,\textsuperscript{163} the Council approved Brussels II on May 28, 1998, which all Member States signed,\textsuperscript{164} and Brussels II had direct effect in national courts.\textsuperscript{165}

\textsuperscript{154}Paul Craig and Grainine De Burca, \textit{EU Law: Text, Cases and Materials} 12 (Oxford University Press, 2008).
\textsuperscript{156} Id.
\textsuperscript{157} Lowe, supra at 9.
\textsuperscript{158} \textit{EU supra at Article K.1 (6).} See also Dickinson, supra at 207.
\textsuperscript{159} Id.
\textsuperscript{160} Lowe, supra at 12. See also Borras Report, supra at para 7.
\textsuperscript{161} Borras Report, supra at para 8.
\textsuperscript{162} Id.
This treaty applied to jurisdiction, enforcement, and recognition. It differentiated between jurisdiction for divorces and parental responsibility cases. For divorce, a wide range of jurisdictional determinants existed, but fewer grounds existed for parental responsibility jurisdiction.

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

In child abduction cases, courts had to “exercise their jurisdiction in conformity with the [Abduction Convention],” which also required habitual residence determinations. Accordingly, habitual residence began as the most important jurisdictional factor under Brussels II.

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

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164 Borras Report, supra at para 11.
166 For matrimonial proceedings, Brussels II, Art. 2 provided a relatively broad determination of jurisdiction where:— the spouses are habitually resident, or— the spouses were last habitually resident, in so far as one of them still resides there, or— the respondent is habitually resident, or— in the event of a joint application, either of the spouses is habitually resident, or— the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or— the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or is ‘domiciled’ there.
167 Brussels II, supra (applying only to “civil proceedings relating to parental responsibility for the children of both spouses on the occasion of matrimonial proceedings.”); Borras Report, supra at para 20, (“civil proceedings” encompassed judicial and non-judicial proceedings, such as administrative proceedings such as those in Denmark and Finland but not religious proceedings.
168 Meeusen, supra at 329.
169 See Hague Convention, supra at Article 3.
170 Brussels II, supra at Articles 3 (1) & (2).
171 See Id at Articles 8 – 11.
172 Id at Article 4; Borras Report, supra at para 41.
173 See Hague Abduction Convention, supra at Article 3.
2. Brussels II becomes Regulation 1347/2000

Even before Brussels II’s completion, a major shift in the Community would soon make the family law convention format obsolete. The 1997 Treaty of Amsterdam changed the structure and substance of the E.U. Treaties and bolstered the Community institutions’ legislative powers.\textsuperscript{174} EC Treaty Article 2 expanded E.U. power in the area of “freedom, security, and justice,” which the Community would implement to facilitate free movement of persons.\textsuperscript{175}

To ensure freedom of movement, the EC Treaty required the Council to adopt “measures in the field of judicial cooperation in civil matters,” including jurisdiction, recognition, and enforcement in civil matters.\textsuperscript{176} To achieve this end, the Council had to “act unanimously on a proposal from the Commission … after consulting the European Parliament.”\textsuperscript{177}

Under these mandates, the Commission began the legislative process to turn Brussels II into a Council Regulation.\textsuperscript{178} On May 29, 2000, the Council adopted Council Regulation 1347/2000, which entered into force with direct effect on 1 March 2000.\textsuperscript{179} This Regulation—Brussels II Regulation (“BIIR”)—exhibited largely formal differences from Brussels II, while sharing most of its substance. Nonetheless, it marked family law’s shift under E.U. legislation.

Granted, the E.U. had protected family life before BIIR. For example, families enjoyed protection under Regulation 1612/68,\textsuperscript{180} which allowed free movement to families of migrating workers.\textsuperscript{181} Further, the ECJ addressed family-related matters concerning free movement in

\textsuperscript{174} Craig and De Burca, supra at 21 – 22.
\textsuperscript{177} Id at Art. 67(1).
\textsuperscript{181} See Meeusen, supra at 330.
However, compared to these previous efforts, BIIR signaled expanded legislative competence in family law to promote free movement of persons.\textsuperscript{185} Despite this apparent competence, BIIR’s substance retained most of Brussels II’s inadequacies. Thus, BIIR would remain in effect for only five years.\textsuperscript{186} In fact, even before its adoption, the European Council and Member States prodded continued E.U. family law progress.

B. Today’s jurisdiction under Brussels II\textit{bis}

Before BIIR’s adoption, the European Council catalyzed further family law legislation. European heads of state in the Tampere European Council placed the “European judicial area” at the “very top of the political agenda,” expressing a need to make parental access rights enforceable in Member States.\textsuperscript{187} Seizing on this momentum in 1999, France presented an initiative to the Commission to enforce parental access rights in all Member States.\textsuperscript{188} The Commission responded, as it was obliged to make proposals on Member State initiatives in cross-border civil matters.\textsuperscript{189} Instead of a new act, the Commission proposed repealing and replacing BIIR.

That proposal contained several important changes. Most notably, the Commission included all parental responsibility matters to “ensure equality for all children.” This proposal made its way through the legislative process.\textsuperscript{191} On November 27, 2003, the Council adopted

\begin{footnotesize}
\begin{thebibliography}{9}
\item \textsuperscript{182} \textit{Netherlands v. Reed}, Case 59/85, [1986] ECR 1283 (extending legal residence for unmarried companions of workers who were nationals of another Member State).
\item \textsuperscript{183} \textit{Konstantinidis v. Stadt Altensteig-Standesamt}, Case C-168/91, [1993] ECR I-1191 (involving family name).
\item \textsuperscript{184} \textit{Dafeki v. Landesversicherungsanstalt}, Case C-336/94, [1997] ECR I-6761 (involving recognition of status documents from other Member States).
\item \textsuperscript{185} See Meeusen, supra at 334 – 339.
\item \textsuperscript{186} Clare McGynn, \textit{Families and the European Union} 109 – 110 (Cambridge University Press 2006).
\item \textsuperscript{187} Presidency Conclusions, Tampere European Council, 15 October 1999, para 5, point 33.
\item \textsuperscript{188} [2000] O.J. C234/07.
\item \textsuperscript{189} EC Treaty, supra Article 67(1).
\end{thebibliography}
\end{footnotesize}
Habitual residence maintains its primary jurisdictional position, with some provisions for exceptional jurisdiction. Courts that have initial jurisdiction enjoy a relatively tiny measure of continuing jurisdiction. If a child moves lawfully to another Member State, courts in the previous habitual residence have continuing jurisdiction only over access rights for three months after the move, and only if one parent still resides in the former habitual residence. The parent in the previous habitual residence can waive continuing jurisdiction by appearing in a custody action in the new habitual residence without contesting jurisdiction.

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

Other situations arise when children have no habitual residence. In these relatively rare situations, presence determines jurisdiction. When no court has jurisdiction, the national laws of the Member State court seized with the action determine jurisdiction. Even if a court has jurisdiction, it may declare forum non conveniens. In such an exceptional case, the court may

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192 See BIIbis, supra.
194 OJEC (2003) L338 1 at Art. 9(1).
195 Id at Art. 9(2).
197 Brussels IIibis Art. 13.
request the court of another Member State with which the child has a close connection to take the case in the best interests of the child.\textsuperscript{199}

Child abduction cases preserve jurisdiction in the habitual residence at the time of the wrongful removal for one year—a departure from the general habitual residence standard. For one year, courts in the previous habitual residence retain jurisdiction, unless all parties with parental responsibility acquiesce in jurisdiction in the new habitual residence.\textsuperscript{200} After a year, a court in the new habitual residence may take jurisdiction once the wrongfully removed child has settled in the new environment, if one of four additional conditions exists.\textsuperscript{201}

Even after a court determines habitual residence and exercises jurisdiction, another court may have the power to issue provisional orders.\textsuperscript{202} The CJ recently handed down a decision dealing with a provisional order,\textsuperscript{203} holding that the case must be urgent, the order must be temporary, and it must relate to persons or property in the state. This decision limits provisional orders’ availability. Thus, habitual residence remains the primary jurisdictional factor.

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\begin{itemize}
\item \textsuperscript{199}Id at Art. 5(3) (defining close connection as a subsequent habitual residence, former habitual residence, child’s nationality, habitual residence of a custodial parent, or a place where the child have property subject to a court order); Id at Art. 15.
\item \textsuperscript{200}Id at Art. 10 (a). This provision matches that in Article 12 of the Abduction Convention.
\item \textsuperscript{201}Id at Art. 10(b): (i) within one year after the holder of rights of custody has had or should have had knowledge of the whereabouts of the child, no request for return has been lodged before the competent authorities of the Member State where the child has been removed or is being retained; (ii) a request for return lodged by the holder of rights of custody has been withdrawn and no new request has been lodged within the time limit set in paragraph (i); (iii) a case before the court in the Member State where the child was habitually resident immediately before the wrongful removal or retention has been closed pursuant to Article 11(7); (iv) a judgment on custody that does not entail the return of the child has been issued by the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention.
\item \textsuperscript{202}BII\textsuperscript{bis}, Art. 20 provides that: In urgent cases, the provisions of this regulation shall not prevent the courts of a Member State from taking such provisional, including protective, measures in respect of the person or assets in that State as may be available under the laws of that Member State, even if, under this Regulation, the court of another Member State has jurisdiction as to the substance of the matter.
\item \textsuperscript{203}Detiček v Maurizio Sgueglia, C-403/09 PPU (2009).
\end{itemize}
\end{footnotesize}
C. Habitual residence in the E.U. courts

Brussels IIbis does not define habitual residence. This regrettable omission leaves habitual residence as a “question of fact to be appreciated by the judge in each case.” Habitual residence is a term with wide application in private international law that generally determines jurisdiction. The term lacks a legal definition, instead representing a factual determination that is “simple to apply and flexible, changing as the circumstances of an individual, or family, changes over time.” Thus, a court must consider the facts of each individual case to determine habitual residence—a vague standard that required the CJ’s attention.

1. Habitual residence in the Court of Justice of the European Union

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

In the central question, the Finnish court asked how to determine the peripatetic children’s habitual residence. Advocate General Kokott proposed a precise BIIbis habitual residence definition in the best interests of children. Distinguishing between presence and habitual residence, Kokott referenced private international law to interpret the issue.

Following the CJ’s judgment in Rinau, Kokott used the Abduction Convention’s guiding principles to determine habitual residence “by reference to all the relevant circumstances…distinguished from the legalistic concept of domicile.”

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

Further, Kokott rejected habitual residence’s definition in social law. The CJ included intent in determining habitual residence in Swaddling, a social security benefits case, and na-

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216 Id at para 8.
217 The ECJ has jurisdiction over questions referred by national courts that concern the interpretation of the Union’s legislative acts under TEU, supra at Art. 267.
218 AG Opinion, supra at para 9.
219 Advocate General opinions provide more details regarding the facts, arguments, and law involved in ECJ cases.
220 Id at paras 13 – 18.
221 Id at paras 21 – 25.
223 AG Opinion at paras 30 - 31.
224 Id at para 33 (“the place of habitual residence is that in which the [person] concerned has established, with the intention that it should be of a lasting character, the permanent or habitual centre of his interests. For the purposes of determining habitual residence, all the factual circumstances which constitute such residence and, in particular, the actual residence of the [person] concerned must be taken into account.”) (citing Borras Report).
225 AG Opinion, supra at para 31.
226 AG Opinion at paras 31, 36.
tional courts had applied the *Swaddling* definition for BIIbis cases.\footnote{See e.g. *Marinos v. Marinos*, [2007] EWHC 2047 (UK) at para 24; *M.(P.) v. Devins*, [2007] IEHC 380 (Ireland); see also *Lamont*, supra at 262 (suggesting intent as a habitual residence determination factor).} The Advocate General—and the CJ—however, shifted from intent and established an autonomous, fact-based habitual residence definition for parental responsibility cases. That fact-based examined two factors: (1) the “duration and regularity of residence” and (2) the “child’s familial and social integration.”\footnote{AG Opinion, supra at paras 38, 40.}

First dealing with duration and regularity of residence, the Advocate General rejected any strict time limit.\footnote{Id at para 41.} Instead, time related to the children’s ages and their familial and social circumstances.\footnote{Id.} While habitual residence tolerates interruptions, children lose a previous habitual residence when “a return to the original place of residence is not foreseeable.”\footnote{Id.}

Further, Kokott noted that habitual residence can shift quickly, as evidenced by BIIbis’ three-month period of continuing jurisdiction for access rights.\footnote{Id at para 42 (providing national courts continuing jurisdiction over access rights after legal removals in BIIbis Article 9).} Parental intent can play a role in assessing the regularity of the residence, but only when intent manifests towards the child’s integration—e.g., by enrolling the child in school, leasing or purchasing property, or changing addresses.\footnote{Id at para 44.} Kokott thus defined the stay’s duration and regularity.

Second, Kokott examined factors surrounding a child’s familial and social integration. These factors can vary with the child’s age, but contact with relatives, “school, friends, leisure activities and, above all, command of language are important.”\footnote{Id at para 48.} Considering these factors, courts must determine whether a habitual residence exists.

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\footnote{228}{See e.g. *Marinos v. Marinos*, [2007] EWHC 2047 (UK) at para 24; *M.(P.) v. Devins*, [2007] IEHC 380 (Ireland); see also *Lamont*, supra at 262 (suggesting intent as a habitual residence determination factor).}
\footnote{229}{AG Opinion, supra at paras 38, 40.}
\footnote{230}{Id at para 41.}
\footnote{231}{Id.}
\footnote{232}{Id.}
\footnote{233}{Id at para 42 (providing national courts continuing jurisdiction over access rights after legal removals in BIIbis Article 9).}
\footnote{234}{Id at para 44.}
\footnote{235}{Id at para 48.}
The CJ largely adopted Kokott’s opinion regarding the need for uniform and autonomous interpretation, a unique habitual residence definition in parental responsibility cases, and habitual residence’s relevant factors. Instead of examining intent, the CJ held habitual residence:

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

Thus, the CJ named roughly eight factors to consider when determining habitual residence: (1) duration, (2) regularity, (3) conditions, (4) reasons for the child’s presence, (5) school attendance, (6) linguistic knowledge, (7) family relationships, and (8) social relationships. Without reference to parental intent, the CJ returned the case to the Finnish court.

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

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

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237 Id at para 38 (considering intent perhaps only on this issue of whether the child’s presence was temporary).
238 Id at para 44.
The last four factors are somewhat more objective, but they do not provide readily objective answers. School attendance is probably a good measure of a child’s integration, but the children in A did not appear to attend school in Finland. Linguistic knowledge is objective, but some E.U. countries share languages and European children normally learn several languages. Finally, family and social relationships may exist in several E.U. countries. Thus, even in courts that follow these factors, E.U. parents still face uncertainty. Worse still, some courts have already chosen a much broader reading of this CJ decision.

2. Habitual residence in the General Court

Most recently, the General Court (“GC”) of the European Union addressed habitual residence, loosely applying A’s test. The case Mercredi involved a mother who removed her infant child from England to Réunion Island, a French territory. An English court asked the CJ to clarify the habitual residence test, which the GC answered.

The GC noted habitual residence’s supposed “independent and uniform interpretation throughout the European Union” as “the place which reflects some degree of integration by the child in a social and family environment … taking account of all the circumstances of fact specific to each individual case.” The GC then handpicked from A’s criterion, holding that “particular mention should be made of the conditions and reasons for the child’s stay on the territory of a Member State, and the child’s nationality.” In addition, “other factors must also make it clear that that presence is not in any way temporary or intermittent.”

Then, the GC unwisely magnified the CJ’s mention of parental intent in A, holding:

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240 Formerly the Court of First Instance, the renamed General Court has competence in cases not involving a “decision of principle likely to affect the unity or consistency of Union law.” TFEU, Art. 256.
241 Case C-497/10 PPU, Mercredi (Court of First Instance 22 December 2010).
242 Id at para. 45.
243 Id at para. 47 (citing A at para 44).
244 Id at para. 48.
245 Id at para. 49.
that the intention of the person with parental responsibility to settle permanently
with the child in another Member State, manifested by certain tangible steps such
as the purchase or rental of accommodation in the host Member State, may consti-
tute an indicator of the transfer of the habitual residence.\textsuperscript{246}

The GC further divorced the habitual residence definition from duration by stating that “duration
of a stay can serve only as an indicator in the assessment of the permanence of the residence.”\textsuperscript{247}

The court added that the child’s young age in this case was also of particular importance.\textsuperscript{248}
Thus, the GC reframed the test in \textit{A} as heavily relying on parental intent and the child’s age.

Applying the facts of the case, the GC seemingly endorsed that the mother’s intention to
change the infant’s habitual residence affected an immediate habitual residence change. The GC
pointed out the “the languages known to the mother,” her “geographic and family origins[,] and
the family and social connections which the mother and child have with [the] Member State.”\textsuperscript{249}
Thus, \textit{Mercredi} shifts \textit{A}’s test towards intent, giving courts leeway to examine facts and shortening
the time to establish habitual residence for infants. This shift only weakens habitual residence’s certainty but follows similar previous applications in UK courts.

3. Habitual residence in two post-A UK cases

Previously, the UK courts also included parental intent in habitual residence. A loose fo-
cus on “all the circumstances specific to each individual case”\textsuperscript{250} subverts uniform interpretation
among national courts. The following two UK cases show habitual residence’s slipperiness.

First, in \textit{S(A Child)}, a court did not effectively apply the CJ’s decision in \textit{A}.\textsuperscript{251} A Belgian
father and an Australian mother had a daughter in December 2005 in Australia, who spent most

\begin{flushright}
\textsuperscript{246} \textit{Id} at para. 50. \\
\textsuperscript{247} \textit{Id} at para. 51. \\
\textsuperscript{248} \textit{Id} at para. 52. \\
\textsuperscript{249} \textit{Id} at paras 55 – 56. \\
\textsuperscript{250} ECJ Judgment, \textit{supra} at para 37. \\
\textsuperscript{251} \textit{S(A Child)}, [2009] EWCA Civ 1021 (UK).
\end{flushright}
of her life in a small Belgian village with her parents and grandmother. In February 2007, the father signed a three-year lease in that Belgian village.

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

Then, the father’s English friend offered his England home for the family’s use. In August 2007, the family moved in but left most of their possessions in Belgium. The daughter spent two weeks with her grandmother in Belgium in September. Unfortunately, the free housing fell through, and the family had to give up their English digs by the end of September.

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

Affirming, the appellate judge repeatedly emphasized the indeterminate three to nine months that the family planned at the borrowed English home, despite the primary Belgian home. The judge opined that the “constancy of that primary home [did] not prevent the acquisition of habitual residence in the work country if the other elements within the defined princi-

\[252\] Id at para 4.
\[253\] Id.
\[254\] Id.
\[255\] Id.
\[256\] Id.
\[257\] Id.
\[258\] Id at para 5.
\[259\] Id.
\[260\] Id.
\[261\] Id.
\[262\] Id at para 6.
\[263\] Id.
\[264\] Id at para 13.
\[265\] Id at paras 5, 13, 14.
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ples of acquisition [were] satisfied.” The court noted the father’s “very substantial” English connection through employment, tax contributions, and work permits. Based on these connections and intent, the child acquired English habitual residence in six interrupted weeks.

This analysis is troubling. Those connections and intent had little to do with the child’s integration. Thus, the decision ignores A’s analysis. The decision relied heavily on the trial court’s balancing, but the trial occurred before A clarified an autonomous habitual residence test.

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

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

In a second UK appellate case, a mother lawfully took her children from Spain to Wales to live with their grandparents and go to school for a year. After that year, they returned to Spain and enrolled in school. About two months later, the mother unlawfully removed the children back to Wales. A Welsh trial court ordered their return to Spain.

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266 Id at para 13.
267 Id at para 13.
268 Id at para 15.
269 P-J (Children), [2009] 2 FLR 1051 (UK).
270 Id at para 3.
271 Id at para 4.
272 Id at para 8.
273 Id at para 21.
On appeal, the mother argued that the first move established Wales as the children’s habitual residence. Lord Justice Ward noted that “acquiring habitual [residence] … permits a stay of comparatively short time [whereas] domicile … requires an intention to remain [] indefinitely.” Without setting a fixed time limit, habitual residence “depends ‘more upon the evidence of matters susceptible of objective proof than upon evidence as to state of mind.’” However, the court recalled that “[h]abitual residence of young children of married parents all living together as a family is the same as the habitual residence of the parents themselves and neither parent can change it without the express or tacit consent of the other or an order of the court.”

Applying this definition, the court decided that the children’s:

ordered way of life was Spanish. Their education had been undertaken there and with the mother’s collaboration it was arranged that it should continue in Spain upon their return. Their schooling in Wales was for a temporary period and for the limited purpose of improving their English. Their home was in Spain, not with their grandparents in Wales. The visit to Wales was a convenient respite to meet the dual objectives of increasing their language skills and refurbishing the Spanish home. The mother actively participated in the planning of the work even whilst she was in Wales. The essential dental work was carried out in Spain.… [The f]amily life was centred on Spain, which is simply another way of saying Spain was the regular order of their life.

The court thus concluded that the habitual residence was Spain.

That conclusion was correct. However, the court’s analysis reveals two problems. First, the court only loosely applied the factors from A. Under A, the same conclusion follows because the mother could not likely show that the children’s “presence [was] not in any way temporary.” Instead, the court examined precedent in UK tax law cases, thereby obscuring habitual

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274 Id at para 23.
275 Id at para 26.
276 Id (citing Reg. v Barnet London Borough Council, ex parte Nilish Shah [1983] 2 A.C. 309 (UK)).
277 Id at para 26.
278 Id at para 34.
279 ECJ Judgment, supra at para 38.
residence’s autonomous meaning in parental responsibility cases. While the factors may be similar, the court misguidedly referenced the wrong context for parental responsibility cases.

Second, the case exposes an additional source of uncertainty in BIIbis—temporary absence. Temporary absence complicates these determinations by relying on parental intent. As in this case, parents often contest whether an absence was temporary. Courts strain to discover parental intent. Thus, the temporary absence issue increases uncertainty in BIIbis cases.

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

After all, the children were present in Wales for a substantial duration and regularity. They stayed with their grandparents for a year. They acquired language skills and attended school—two explicit factors in A. They developed relationships with family and classmates. These factors combine to at least suggest a Welsh habitual residence. The two UK cases above demonstrate problems that arise from a broad habitual residence test. Even after A, parents still face great uncertainty in E.U. Member State’s national courts.

D. Conclusions regarding BIIbis

As this section demonstrates, BIIbis marks a significant milestone in E.U. private international family law. This development supplies a necessary component for free movement of persons and a functioning area of freedom, security, and justice. Habitual residence’s role in cross-border jurisdiction seems cemented into place. However, the fact-based standard leaves many families and courts with a malleable, uncertain, and sometimes puzzling standard.

Hopefully, A will provide a level of uniformity to this enigmatic term. While uniformity may be achievable, A leaves substantial uncertainty. Further, perhaps only E.U. citizens will

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280 See BIIbis, Articles 9 & 10; see also infra.
reap the minimal benefits of the uniformity from A. As seen below, habitual standard under private international family law treaties remains out of reach of the CJ—fractured and uncertain.

IV. Habitual residence under the Hague Conventions

A. The 1996 Hague Child Protection Convention

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

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

With 19 Contracting Parties and 28 signatories so far, this multilateral treaty will likely play a major role in future cross-border parental responsibility cases. All E.U. Member States have signed the 1996 Convention, and the U.S. is taking steps towards signing. The 1996 Convention will determine parental responsibility jurisdiction between signatories.

The Hague Conference’s Special Commission drafted this treaty to update its 1961 predecessor and conform to the 1993 United Nations Convention on the Rights of the Child. The 1996 Convention broadly defines parental responsibility as “parental authority, or any analogous rela-

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282 Id.
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...tionship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives in relation to the person or the property of the child.\footnote{285}{See 1996 Convention at Art. 1 para. 2}

The key jurisdictional factor in these parental responsibility matters is habitual residence.\footnote{286}{See 1996 Convention at Id at Art. 5.}

Other bases exist in relatively rare cases where no habitual residence exists, a new habitual residence exists due to a wrongful removal, a court declares \textit{forum non conveniens}, or jurisdiction in divorce proceedings exists under strict conditions.\footnote{287}{See \textit{Id} at Arts. 6 – 9, 10:} Additionally, any protective orders in other States require cooperation with authorities in the child’s habitual residence.\footnote{288}{Id at Arts. 11 & 12.}

The term habitual residence was not a newcomer to the Hague Conference. The Hague Conference has used habitual residence to determine jurisdiction in many areas of private international law.\footnote{289}{See P. Stone, “The Concept of Habitual Residence in Private International Law,” 29 Anglo-American L.R. 342 (2000).} Considering its well-established usage, the drafters unanimously approved primary jurisdiction in the child’s habitual residence,\footnote{290}{Lagarde Report at ¶ 40.} maintaining identical language from the 1961 Convention that the authorities in the state of the child’s habitual residence have jurisdiction.\footnote{291}{\textit{Id}.}

The drafters considered adding a definition of habitual residence in the Convention,\footnote{292}{\textit{Id}.} but declined to do so, based on its prior practices and potential interpretation problems for other Ha-
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gue Conventions. This was an unfortunate omission because it missed the opportunity to clear up the uncertainty that the term has in international family law.

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

This fact-based determination aligns with BIIbis—and not coincidentally. Because the E.U. modeled the Brussels II Convention on the 1996 Convention, the offspring BIIbis largely shares substantive traits regarding jurisdiction. However, BIIbis applies between E.U. Member States whereas the 1996 Convention applies between signatories.

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

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

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293 Id.
294 Id.
295 Id.
296 See 1996 Convention at Art. 5(2).
297 Lagarde Report at ¶ 40.
The 1996 Convention preserves jurisdiction in child abduction cases. After abduction, the court in the previous habitual residence generally keeps jurisdiction, but a court in the new habitual residence can exercise jurisdiction if certain conditions exist. The 1996 Convention provides an immediate return under conditions like the Hague Abduction Convention, affecting the child’s return between 1996 Convention signatories.

Courts will otherwise apply the Abduction Convention when the 1996 Convention is not in force. For a return under either convention, the courts must determine the child’s habitual residence. Without much 1996 Convention case law available, the Abduction Convention’s extensive case law shows the uncertain habitual residence definition that the 1996 Convention inherits.

B. The Hague Abduction Convention

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

298 1996 Convention, Art. 7 (1):

(1) In case of wrongful removal or retention of the child, the authorities of the Contracting State in which the child was habitually resident immediately before the removal or retention keep their jurisdiction until the child has acquired a habitual residence in another State, and

a) each person, institution or other body having rights of custody has acquiesced in the removal or retention; or

b) the child has resided in that other State for a period of at least one year after the person, institution or other body having rights of custody has or should have had knowledge of the whereabouts of the child, no request for return lodged within that period is still pending, and the child is settled in his or her new environment.

(2) The removal or the retention of a child is to be considered wrongful where -

a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph a above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

299 See 1996 Convention at Art. 50.

300 Elisa Perez-Vera, Explanatory Report at 428 - 429.
For an abduction to occur, someone must remove the child from its habitual residence. Thus, for abduction cases, courts must always determine the child’s habitual residence. As a result, cases under the Abduction Convention provide a wealth of case law among its 81 contracting States’ national courts. A review of Abduction Convention cases nicely frames the habitual residence definition in U.S. and E.U. national courts. Generally, courts agree that habitual residence is a largely factual determination distinct from legalistic notions of domicile. This formal consensus generally marks the end of a functional consensus in close cases.

Many courts have addressed this issue over the past two decades, developing divergent definitions for habitual residence. However, the U.S. Supreme Court has not defined habitual residence for Abduction Convention cases, despite a three-way fracture in the Federal Circuits.

1. Three standards for habitual residence in the U.S.

   a. Parental shared intent

   Among the three standards in the U.S. Federal Circuits, the least certain habitual residence standard relies primarily on parental intent. In the influential Mozes case, a mother took her children from Israel to California with the father’s permission to stay for 15 months. After 12 months, she filed for divorce in California. In seeking a return, the father argued that the mother wrongfully retained the children in California from their habitual residence in Israel.

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301 Hague Abduction Convention, Art. 3.
303 Mozes v. Mozes, 239 F.3d 1067, 1069 (9th Cir. 2001).
304 Id.
305 Id.
The appellate court sought a consistent definition of habitual residence and a uniform interpretation to promote legal certainty based on the Abduction Convention’s enabling legislation. Unfortunately, the court focused on elusive parental intent. Though some courts examine objective facts such as “whether a child is doing well in school, has friends, and so on,” the court rejected such objective tests as “superficial.”

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

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

For example, in *Holder v. Holder*, this paradigm questionably preserved two children’s U.S. habitual residence. A husband, wife, and their sons had lived in Texas, Japan, and Califor-

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306 *Id* (recognizing parents’ vital interest in “knowing under what circumstances a child’s habitual residence is likely to be altered, and [the] cold comfort to be told only that this is ‘a question of fact to be decided by reference to all the circumstances of any particular case.’” (citing *C v. S*, [1990] 2 All E.R. 961, 965).
307 *Id* at 1071 (“We are mindful that Congress has emphasized ‘the need for uniform international interpretation of the Convention.’” (citing 42 U.S.C. § 11601(b)(3)(B)).
308 *Id* at 1076.
309 *Id* at 1079 (citing *Y.D. v. J.B.* (Droit de la famille — 2454), [1996] R.J.Q. 2509, 2523 (Quebec Ct. App.) (“L’approche axée sur la réalité que vivent les enfants permet d’éviter d’avoir à sondier les reins et les coeurs des parents.”); *Shah*, [1983] 1 All E.R. at 235-36 (“The legal advantage of adopting the natural and ordinary meaning ... is that it results in the proof of ordinary residence ... depending more on the evidence of matters susceptible of objective proof than on evidence as to state of mind.”)).
310 *Id*.
311 *Id*.
312 *Id* at 1083.
313 392 F.3d 1009 (9th Cir. 2004).
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nia when the family moved to a German military base for the husband’s four-year assignment. Eight months later, the mother took the kids back to the U.S. The father claimed that both parents intended a four-year stay in Germany. The mother on the other hand claimed she had no intention to abandon a U.S. habitual residence.

On appeal, the Ninth Circuit held, in an admittedly close case, that the parents lacked a shared intent to move permanently. “Despite the factual focus of [the] inquiry, ultimately [the] conclusion rests on a legal determination,” that relied on Mozes’ analysis and the parents’ settled intent. “With parental intent as the starting point,” the court determined parents did not jointly intend to abandon “the children’s habitual residence and shift it to Germany.”

The court then glossed over—and rejected—the children’s “acclimatization” in Germany despite all the family belongings in Germany, the older child’s eight months in German school, a planned four-year stay, and no U.S. residence. Thus, because the mother contended that she did not intend to stay in Germany, the children did not acquire habitual residence there.

Again, the shared parental intent test creates shocking results. Essentially, this test allowed the mother to change her mind, remove her children, and leave the father in Germany, tied to his post. This skewed analysis may serve one parent’s best interests but not children’s best interests, instead ignoring acclimatization in favor of unilateral whim and purported intentions.

Further demonstrating this test’s weaknesses, Eleventh Circuit courts have reached absurd results in even longer stays. In Ruiz v. Tenorio, the appellate court held that a child who stayed 32 months in Mexico was still habitually resident in the U.S. In Tsarbopoulos v. Tsar-

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314 Id at 1012.
315 Id.
316 Id.
317 Id at 1013.
318 Id at 1018 (“We acknowledge this is a close case.”).
319 Id at 1015.
320 Id at 1018 – 1019.
321 Id at 1019.
322 392 F.3d 1247 (11th Cir. 2004).
Under this test, one parent faces miserable odds. Courts should abandon this illogical and uncertain test that ignores children’s best interests. Fortunately, not all courts rely on parental intent.

b. Child-centered analysis

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

The father petitioned for a Hague return. On appeal, the Sixth Circuit court performed a child-centered analysis. It began by declining to determine a U.S. habitual residence based on the child’s legal residence or the mother’s intent to return to Ohio. Instead, the court looked back in time to the facts in the child’s life. The court held that a child’s “habitual residence can be ‘altered’ only by a change in geography and the passage of time, not by changes in parental affection and responsibility.” Based on the child’s time in Germany—regardless of the mother’s intentions or the father’s actions—the child’s habitual residence was in Germany.

This analysis is far superior to parental intent. Instead of entertaining arguments over who did, said, or intended what, the court narrowed its analysis to the two most important factors—time and geography. This test focuses solely on the child’s integration in the environment,

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324 983 F.2d 1396, 1401 (6th Cir. 1993).
325 Id.
326 Id.
327 Id.
328 Id.
329 Id at 1401 – 1402.
not his parents’ ability to persuade a court of their intentions in the past. Thus, the child-centered test takes a step towards the standard that this article argues for—a time-centered test.

The Sixth Circuit has reaffirmed its child-centered test. After a family moved back and forth between France and the U.S. for six years and then split up, they argued their previous intentions in court to establish their twin boys’ habitual residence. The District Court in Ohio held that the child’s residence was not in France because the parents lacked a shared intent.

The Court of Appeals however rejected the Mozes test whose shared intent analysis “has ‘made seemingly easy cases hard and reached results that are questionable at best.’” Instead, the court focused “exclusively on the child’s experience” to determine habitual residence.

The court weighed the children’s last extended stay in the U.S. before their short return to France, school attendance, and contact with relatives in the U.S. In contrast, the court noted little contact with their father and French relatives while in France. Thus, the court held that the preponderance of the evidence indicated habitual residence in the U.S.

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

Courts in the Third and Eighth Circuits have attempted to balance those two conflicting analyses. In the 1995 case *Feder v. Evans-Feder*, a family had lived in Pennsylvania for three years when the father gained employment in Australia.\(^{338}\) Apparently, the mother had misgivings about moving to Australia and did not intend to remain there permanently,\(^{339}\) but the family moved there nonetheless. Six months later, the mother returned to Pennsylvania with the child for an alleged vacation but filed for divorce and custody in Pennsylvania.\(^{340}\)

In overturning the District Court’s decision, the Third Circuit held that the child’s habitual residence was Australia. The Court of Appeals considered habitual residence a mixed question of law and fact.\(^{341}\) The court defined habitual residence as:

> the place where [the child] has been physically present for an amount of time sufficient for acclimatization and which has a “degree of settled purpose” from the child’s perspective. … [A] determination of whether any particular place satisfies this standard must focus on the child and consists of an analysis of the child's circumstances in that place and the parents' present, shared intentions regarding their child's presence there.\(^{342}\)

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

In applying that definition, the court noted that the child was supposed to live in Australia for the foreseeable future.\(^{343}\) The six months he spent there were significant in his four years of life.\(^{344}\) Further, the parents had enrolled the child in pre-school for the upcoming year.\(^{345}\) The

\(^{338}\) *Feder v. Evans-Feder*, 63 F.3d 217, 217 - 219 (3rd Cir. 1995).

\(^{339}\) *Id* at 219.

\(^{340}\) *Id*.

\(^{341}\) This determination, however, drew a dissenting opinion from Judge Sarokin, who reasoned that the determination of habitual residence is a question of pure fact that an appellate court should not review absent clear error. *Id* at 227.

\(^{342}\) *Id* at 224.

\(^{343}\) *Id*.

\(^{344}\) *Id*.

\(^{345}\) *Id*. 
couple’s house and the father’s job in Australia indicated “the couple’s settled purpose to live as a family in [Australia].” Thus, the child’s habitual residence was Australia.

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

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

After eleven months, the father consent for the boys to take a vacation with their mother in the U.S. At the airport in Israel, the mother decided not to return. She sought custody in Minnesota. In hearing the father’s Hague return case on appeal, the Eighth Circuit Court of Appeals, determined that habitual residence was a legal standard requiring the application of facts. The court supported this determination with a policy argument that:

[i]f habitual residence [were] treated as a purely factual matter, to be decided by an individual judge in individual circumstances unique to each case, parents

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346 Id.
348 Id.
349 Id.
350 Id at 890.
351 In Jewish divorce law—which is applied to all Jewish couples’ divorces in Israel—a presumption exists that a parent will get custody over children of that parent’s sex if the child is over the age of six. Generally speaking, divorce actions in Israel favor the husband. See Karin Yefet, “Unchaining the Agunot: Enlisting the Israeli Constitution in the Service of Women’s Marital Freedom,” 20 Yale J.L. & Feminism 441 (2008 – 2009).
352 Silverman at 890.
353 Id.
354 Id at 891.
355 Id at 896.
[would] never be able to guess, let alone determine, whether they are at risk of losing custody by allowing their children to visit overseas or in allowing them to make international trips with an estranged spouse. With such uncertainty, parents experiencing marital difficulties will be less likely to allow children to travel with one parent and less likely to allow children to maintain relationships with families in other countries. Congress must have intended that there be enough consistency in these cases to prevent such a result. Indeed, we find it difficult to believe that American legislators intended to launch American citizens into such uncharted waters.\textsuperscript{356}

True to form, the U.S. Court of Appeals wanted a more concrete definition of habitual residence.

To reach this end, the court sculpted its habitual residence definition. The court distinguished habitual residence from domicile, but stated that a person may only have one habitual residence.\textsuperscript{357} Then, the court adopted the test in \textit{Feder}.\textsuperscript{358} The court examined the facts:

from the children's perspective, including the family's change in geography along with their personal possessions and pets, the passage of time, the family abandoning its prior residence and selling the house, the application for and securing of benefits only available to Israeli immigrants, the children's enrollment in school, and, to some degree, both parents' intentions at the time of the move to Israel.\textsuperscript{359}

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

The Third Circuit added a layer to habitual residence that further divorced the analysis from parental intent. In \textit{Karkkainen v. Kovalchuk}, a divorced couple’s child lived with her mother in Finland.\textsuperscript{360} To facilitate contact with the father in the U.S., the mother consented for the child to become a permanent U.S. resident for immigration purposes.\textsuperscript{361} At age 11, she expressed wishes to move to the U.S., and the parents agreed that she visit there for a summer.\textsuperscript{362}

Her mother and stepfather did not challenge her wishes, so she thought she had “permission to move permanently to the United States if she wished.”\textsuperscript{363} She bid farewell to her friends

\begin{footnotes}
\item[356] Id at 897.
\item[357] Id.
\item[358] Id.
\item[359] Id at 898.
\item[360] \textit{Karkkainen v. Kovalchuk}, 445 F.3d 280, 285 (3rd Cir. 2006).
\item[361] Id.
\item[362] Id at 285 - 286.
\item[363] Id.
\end{footnotes}
and family, applied for a school in the U.S., and left for the U.S.\textsuperscript{364} In July, she decided to stay in the U.S., but the mother removed her consent.\textsuperscript{365} In August, the mother sought a return.\textsuperscript{366}

On appeal, the Third Circuit examined whether the mother’s permission to go to the U.S. indefinitely had changed the daughter’s habitual residence. In applying the \textit{Feder} two-pronged standard, it examined the child’s acclimatization and degree of settled purpose.\textsuperscript{367}

In regards to the child’s acclimatization, the court noted that the daughter took classes and participated in activities in the U.S. and seemingly abandoned Finland.\textsuperscript{368} Though her time in the U.S. was short, the parents’ agreed intention that she would choose her residence lessened the time necessary to establish habitual residence.\textsuperscript{369} The overarching factor in this part of the test was the daughter’s remarkable maturity.\textsuperscript{370} Thus, the court held that, from the child’s perspective, the daughter had established significant roots in the U.S.\textsuperscript{371}

In regards to the parent’s shared intent, the court altered the shared intent consideration by making it relative to the child’s age. The court gave “somewhat less weight to shared parental intent in cases involving older children … capable of becoming ‘firmly rooted’ in a new country.”\textsuperscript{372} Considering the daughter’s age and the shared intent to reside indefinitely, the court held that the U.S. was the daughter’s habitual residence.\textsuperscript{373} Thus, this case adds the child’s maturity to the judicial definition of habitual residence.

\textsuperscript{364} \textit{Id.}  
\textsuperscript{365} \textit{Id} at 294, 290.  
\textsuperscript{366} \textit{Id.}  
\textsuperscript{367} \textit{Id} at 294.  
\textsuperscript{368} \textit{Id.}  
\textsuperscript{369} \textit{Id.}  
\textsuperscript{370} \textit{Id.}  
\textsuperscript{371} \textit{Id.}  
\textsuperscript{372} \textit{Id} at 296.  
\textsuperscript{373} \textit{Id.}
In theory, this two-pronged analysis provides some balance between the opposing child-centered and parental intent standards. However, this awkward balancing may be “more like judging whether a particular line is longer than a particular rock is heavy.” After all, any parent knows that what they intend for their child often differs from how their child develops.

Instead, the objective standard of the Sixth Circuit rings truest to the “factual determination” that the Abduction Convention envisions. However, the split is likely to remain until it reaches the U.S. Supreme Court. This Federal Circuit split has analogous E.U. counterparts.

2. Habitual residence approaches in European Abduction Convention cases

Courts in E.U. countries seem comfortable with broad notions of a fact-based test. At first glance, the recent CJ case A might facilitate a uniform standard among E.U. Member States. However, three reasons indicate why a uniform definition may remain out of reach.

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

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a. Parental intent: The UK approach

Courts in the United Kingdom take an intent- and time-focused approach towards habitual residence under the Abduction Convention. In the seminal case before the UK’s supreme appellate court, the House of Lords followed the national definition for habitual residence. In *Re J.*, the House of Lords largely followed the Court of Appeals opinion that held that a young child’s habitual residence relied on two factors: his custodial parent’s intent and presence for an “appreciable period of time.”

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

While acknowledging that acquiring a habitual residence takes time, a child can lose his habitual residence in an instant. The House of Lords followed this definition on appeal:

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

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

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378 [1990] 2 A.C. 562 (see also http://www.hcch.net/incadat/fullcase/0002.htm).
379 *Id.*
380 [1984] F.L.R. 922
Further, the child’s young age made his mother’s and his habitual residence the same. Thus, “the mother ceased to be habitually resident in Western Australia from the moment when she left Western Australia bound for England, with the intention of remaining permanently.”

This case demonstrates the import of intent in UK Abduction Convention cases. This approach problematically allows a parent to unilaterally terminate a habitual residence.

Further, the court removed factual analysis by looking solely at the mother’s intent. Though it nodded towards the “appreciable period of time” requirement—a vaguely constructed concept indeed—, the court eliminated time from the analysis by endorsing an immediate loss of habitual residence. This deference to unilateral intent defied the interests of the child and the left-behind parent. Nonetheless, this influential decision focused squarely on parental intent.

The House of Lords revisited the issue in 1998. In Re S., the court distinguished from Re J., finding a wrongful retention based on custody rights awarded after the child’s removal.

The House of Lords adopted the appellate Judge Butler-Sloss’s opinion below that:

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

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

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

However, this focus on time has not prevailed in U.K. case law. Rather, the courts focus primarily on a parental intent test that remains ingrained in UK jurisprudence, as the cases that followed A have shown.\(^{385}\) Other E.U. courts apply a child-centered approach.

b. Child-centered: The Swedish and Danish approach

Sweden and Denmark generally apply a child-centered test in analyzing habitual residence, but also look to parental consent. Early lower Swedish court decisions put an absurd amount of weight on parental intent,\(^ {386}\) but the supreme appellate court of Sweden refined the habitual residence analysis for Abduction Convention cases.

The seminal Supreme Administrative Court case on habitual residence in Sweden came in 1995\(^ {387}\) and involved a series of abductions that took the child back and forth between Sweden and the United States, spurring litigation on both continents.\(^ {388}\)

The child eventually rested in Sweden where the Supreme Administrative Court refused the return based on Swedish habitual residence. The court noted that, evidenced by Article 12, a

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\(^{385}\) See supra, pp. 56 – 62.

\(^{386}\) The early Swedish focus on intent lives in infamy in the Gothenburg appellate court decision on 14 November 1990. The Swedish court had a case with a mother who moved to Netherlands with the intent to remain there. She had been there 12 days when the father removed the children to Sweden. The Swedish court held that the children acquired a habitual residence in the Netherlands after 12 days, based on the mother’s intent to remain.

\(^{387}\) RA 1995 ref 99, Regeringsrätten (Supreme Administrative Court, Sweden), decision of 20 December 1995, case number 4936-1995.

\(^{388}\) Ohlander v. Larson, 114 F.3d 1531 (10th Cir. 1997).
child can acquire habitual residence in a country after a wrongful removal. The child spent two years in Sweden after one abduction and acquired habitual residence in Sweden before the father re-removed her to the U.S. Sweden remained the habitual residence when the mother removed the child again. Thus, the mother’s final removal was not wrongful.

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

In a case before the same court in 2000, habitual residence however turned on intent—or rather, consent. A child had lived in Sweden with his unmarried parents until age five. Then, the mother removed the child against the father’s wishes to England and intended to stay. A year later, the mother let the child visit Sweden with her father, who retained him.

Noting the that a child can acquire a habitual residence after abduction, the court held that the father had not acquiesced in the removal, despite his failure to file a return petition in England. Despite time in England, the court held found a Swedish habitual residence because he was in Sweden for most of his life. The case drew a dissent from a Judge Wennerström.

This case demonstrates conflicting views on habitual residence among signatories. The House of Lords would have likely held that the child’s habitual residence shifted because “the

389 Id.
390 Id.
391 Id.
392 Supreme Administrative Court (Regeringsrätten) (Sweden), decision of 12 September 2001, Case number 7624-2000. RÅ 2001 ref. 53
393 Id.
394 Id.
395 Id.
396 Id.
397 Id.
mother continued to care for the child without opposition.” The Swedish court however, looked past the father’s apparent acquiescence. These contrasting cases indicate the lack of uniformity regarding parental intent.

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

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

primarily a matter of making an overall assessment of circumstances which may be observed objectively such as the length of sojourn, existing social ties, and other circumstances of a personal or occupational nature which may indicate a more permanent attachment to one country or the other. In the case of a small child, the habitual residence of person who has custody, and other family and social aspects, must be the decisive factors.

The child had been in Sweden with her mother, who was habitually resident in Sweden, for over two years, she had adjusted to life in Sweden and was supposed to spend 8 out of 12 years there, and put no weight on the parties’ stipulated U.S. Thus, the court applied a child-centered test.

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400 “Om en person är bosatt i Sverige bör han (alltså) anses ha hemvist här, om bosättningen med hänsyn till vistelsens varaktighet och omständigheterna i övrigt måste anses stadigvarande.”
401 “Allmänt kan sägas att det vid en prövning av hemvistfrågan enligt konventionen i första hand blir fråga om en helhetsbedömning av sådana objektivt konstaterbara förhållanden som en vistelsens längd, föreliggande sociala bindningar och andra förhållanden av personlig eller yrkesmässig karaktär så som kan peka på en mera stadigvarande anknytning till det ena eller andra landet. När det gäller ett litet barn får vårdnadshavarens hemvist och de familjemässiga och sociala förhållandena i övrigt avgörande betydelse.”
402 Id.
On the one hand, this analysis was sound because it focused on the facts of the case. Lacking agreed parental intent, the court had no choice but to examine the most logical, practical and common sense method of analyzing a child’s integration—time spent in the environment.

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

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

Denmark likewise applies a child-centered analysis. Like Sweden, earlier case law in Denmark muddled the habitual residence determination by considering amount of time spent in the jurisdiction in addition to other factors. In a 1997 case with parallel proceedings in New Jersey, the court refused a return from Denmark to the U.S.\(^\text{403}\)

Primarily, the court recognized that the children spent a majority of their lives in Denmark as opposed to several months in the U.S.\(^\text{404}\) In addition, the court noted that, according to the Danish national register, the children were settled in Denmark throughout.\(^\text{405}\) Further, the court noted the father’s request for the children to go to Denmark contributed to the habitual residence determination.\(^\text{406}\) Thus, the court considered parental intent and the facts of the case.

\(^{403}\) V.L. 3. marts 1997, 11. afdeling, B-2511-96 (Vestre Landsret; High Court, Western Division (Denmark); Superior Appellate Court).

\(^{404}\) Id.

\(^{405}\) Id.

\(^{406}\) Id.
The Danish court could have decided this case solely on the short time spent in the U.S. compared with the major part of the children’s lives in Denmark. The children’s registration on the national register added little. Whether formally registered or not, children may still integrate in a new environment. Besides, parents may register their children in a country for many reasons, but establishing habitual residence should not be one of them.

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

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

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

Similarly, time played a starring role in a 2002 Danish appellate case. In that case however, a time-limited agreement preserved the child’s Danish habitual residence. The child had lived in England for her first seven years when her mother agreed that the child stay in Denmark for one year. After a year, the father retained the child. The Danish court honored the time-limited agreement and thus ordered the child’s return to England.

407 Ø.L.K. 23. juni 1998, 16. afd., B-1391-98 (Østre Landsret: High Court, Eastern Division (Denmark); Appellate Court).
408 Ø.L.K, 5. April 2002, 16. afdeling, B-409-02 (Østre Landsret (High Court, Eastern Division, Denmark)).
This outcome seems appropriate. Parents should be able to protect themselves while affording their children time with their other parent and a different culture. Without guidance in the Abduction Convention however, parents will enjoy such protection at national courts’ whims.

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

c. Temporal standards: the Austrian and German approaches

The Supreme Court of Austria has contributed a concrete habitual residence determination standard for Abduction Convention cases. In Austria, six months presence generally establishes habitual residence. In 2003 case, a child had spent time in Austria and Serbia.\(^{409}\)

At the heart of the case was whether the child’s time in Serbia had established habitual residence. The child spent five months in Austria, eight months in Serbia, and seven months in Austria, when the father took the children to Serbia.\(^{410}\) The following month, the mother took the child back to Austria. The father then sought a return.

The supreme Austrian court defined habitual residence\(^{411}\) as identical to its 1996 Convention definition in Austria.\(^{412}\) The court held that, in general, six months presence establishes ha-

\(^{409}\) Ob121/03g, Supreme Court of Austria, 30/10/2003 (see also http://www.incadat.com/index.cfm?fuseaction=convtext.showFull&code=548&lng=1).

\(^{410}\) Id.

\(^{411}\) Demgemäß kommt es für die Ermittlung des ”gewöhnlichen Aufenthaltes“ darauf an, ob jemand tatsächlich einen Ort zum Mittelpunkt seines Lebens, seiner wirtschaftlichen Existenz und seiner sozialen Beziehung macht. Der Aufenthalt bestimmt sich ausschließlich nach tatsächlichen Umständen.

\(^{412}\) Der Begriff des gewöhnlichen Aufenthaltes im Sinn des Art 3 des Übereinkommens ist gleich auszulegen wie in den diesen Begriff enthaltenden Bestimmungen der JN und des Haager Minderjährigenschutzübereinkommens (1 Ob 220/02p)
habitual residence, regardless of parental intent. Because the child had been in Austria for more than six months followed by at most three weeks in Serbia, Austria was the habitual residence.

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

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

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

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

The Constitutional Court denied the return but nonetheless found that the child had obtained a French habitual residence. Despite the nature of the removal, the court’s determination was purely factual. The court looked to whether the child achieved social inclusion, which—as a

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413 Die Dauer des Aufenthalts ist für sich allein kein ausschlaggebendes Moment, doch ist im Allgemeinen nach einer Aufenthaltsdauer von sechs Monaten anzunehmen, dass ein "gewöhnlicher Aufenthalt" vorliegt. Ein gewöhnlicher Aufenthalt kann auch gegen den Willen eines Sorgeberechtigten begründet werden, weil es auf den tatsächlichen Daseinsmittelpunkt ankommt (1 Ob 220/02p; 2 Ob 80/03h; vgl auch RIS-Justiz RS0109515).

414 Id.

“rule of thumb” in the German federal courts—occurred after six months. The child had been in France for more than six months and thus acquired habitual residence in France. These cases indicate a temporal standard in at least two E.U. Member States.

d. A two-pronged analysis: the French approach

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

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

This case reached the right result but could have done so before reaching the supreme appellate court with two improvements to Abduction Convention. First, a time-based standard for habitual residence—if more than three months—would have objectively preserved habitual residence in Canada. Second, a categorical definition of temporary absence that prevented habitual residence acquisition during vacations would likely have streamlined the mother’s arguments. Unfortunately, these standards do not exist in private international family law. As a result, the French courts have consistently relied on parental intent.

416 Id at 32 (“In der Rechtsprechung werde ‘als Faustregel’ häufig eine Aufenthaltsdauer von sechs Monaten angenommen, welche der Bundesgerichtshof im Regelfall als angemessene Zeitspanne anerkenne.”)
In another case, the Court used a two-pronged analysis—the circumstances surrounding the child and the father’s intent that the child live in England. In that 2006 decision the Cour de cassation decided the children had residence in England after a year because the children enrolled in school, the mother had a job in England, and the residence was not provisional. Furthermore, the father did not previously challenge the children’s move to England and visited them there twice. Thus, the French court has examined objective facts and parental intent.

C. Conclusions regarding habitual residence in international law

In sum, case law demonstrates the divergent concept of habitual residence. While the Abduction Convention strives for unanimity, courts determine habitual residence on their own terms. Some look at parental intent, some look at time, some look at the child’s integration, and some look at all the facts in the case. Courts have necessarily embedded their own brands of habitual residence due to the Abduction Convention’s limited guidance, a shortcoming the 1996 Convention retains. Parents thus face a lack of uniformity among national courts. They further face uncertain determinations in the courts that lack a time-bound and categorical approach to habitual residence. Thus, private international law demands a uniform, concrete standard for jurisdiction in cross-border custody cases.

V. Time for a temporal and categorical standard for jurisdiction

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

418 Cass Civ 1ère 14 November 2006 (N° de pourvoi : 05-15692).
First, private international law should adopt a temporal standard for habitual residence. A temporal standard will promote the best interests of children, increase legal certainty, and promote uniformity. This type of standard has some precedent, as international family law uses strict time limits for jurisdiction in some cases. Moreover, temporal standards have already worked in some countries’ jurisdictional schemes. For these reasons, cross-border jurisdiction should embrace a temporal standard.

Second, international family law should establish categories of temporary presence to define temporary moves. U.S., E.U., and international family law all generally lack specific guidelines regarding temporary presence. By providing precise definitions, parents and children will enjoy more opportunities to exercise their right to contact with one another.

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

A. A temporal habitual residence standard

For most cross-border cases, a temporal standard for habitual residence will concretely determine habitual residence. Such a standard would serve three crucial purposes.

Primarily, a temporal standard will best serve children’s because time is the central factor towards integration. Children should remain in the environment where they enjoy stability, support, and integration. Courts with close proximity to the child’s integrated environment have better access to evidence of the child’s best interests. Granted, many factors will contribute to a child’s integration, including schooling, family ties, social networks, and linguistic knowledge. However, these ingredients require the most fundamental catalyst of integration—time.
Secondly—and related to the best interests of children—, a temporal standard will maximize legal certainty in these cases. Legal uncertainty has negative effects on families in these situations both in practical and legal terms. From the practical perspective, uncertainty requires more legal help, which means more costs. These costs of course include monetary costs, which one parent, both parents, or the state must pay.

These costs are also nonmonetary. Parents who struggle through litigation have less time to care for their children, move on with their lives, and foster healthful environments. Instead of improving prospects for employment, personal relationships, and healthy living, parents suffer the stresses of attorneys, courts, and dysfunctional ex-partners. Considering the flurry of child abduction-related cases that have made it all the way to the European Court of Human Rights, parents can delay proceedings for years—a move that in one recent case prompted the ECHR to determine that, considering the lengthy duration of pending litigation, a child’s rights would be harmed if he was returned. As seen, the stress of litigation will likely take its toll on the very people international family law should protect—children.

With a temporal standard, parents will escalate litigation in fewer cases. Instead of postulating on any number of subjective factors, courts will look at a factual determination—time in country. Thus, a temporal standard will provide practical benefits by increasing legal certainty.

From the legal deterrent perspective, uncertainty incentivizes wrongful removals. If parents can find sympathetic national courts who may decide in their favor after abductions, parents will be more likely to abduct children. Subjective tests encourage parents to abduct in the hopes


that a court will loosely apply the habitual residence standard. A temporal standard however offers less room for courts’ discretion. Thus, a temporal standard will deter child abductions.

Finally, a temporal standard will better serve the international family law framework by adding uniformity—and thus legitimacy—to cross-border custody cases. One of the major aims of international family law is to promote uniformity. The current lack of uniformity communicates a sense of arbitrariness in international family law. The current legal standard has resulted in varying judicial application with too much discretion for uniformity.

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

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

A temporal jurisdictional standard is not an entirely novel concept. As we have seen, laws in the U.S. and courts in Austria and Germany apply a six-month standard for jurisdiction in child custody cases. In international family law, time also exists. Most notably, abduction cases under the Abduction Convention and BIIBis preserve jurisdiction in abduction cases for one year after abductions. Additionally, BIIBis preserves jurisdiction over rights of access for three months after legal removals. E.U. laws regarding family reunification also apply strict time re-
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Thus, a temporal standard for primary jurisdiction would build on a concept that already protects children in some cross-border situations.

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

B. A categorical temporary presence standard

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

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

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

Children have temporarily residences for various but limited reasons. For example, a child’s presence is temporary when it is for the child’s education, a parent’s education, a parent’s time-

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limited employment, shuttle custody arrangements, vacation, summer camp, visitation, emergency supervision, and medical services. If the primary purpose of the travel is any of these reasons, then—with sufficient evidence—courts should presume that the presence was temporary.

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

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

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

If a move is for an indefinite amount of time, then the general temporal standard should apply. Certain evidentiary standards of indefinite presence (e.g., return travel arrangements, property in previous residence, enrolling in school) could add a measure of certainty.

Procedures surrounding these time-limited moves could further protect parent and child rights. The Central Authorities could collaborate on form agreements that parents could use and
register with the Central Authorities when the children go abroad. Parents could simply access these forms online and rest easy knowing that courts will respect these agreements.

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

C. Conclusion

This tour of two continents has outlined jurisdiction in cross-border custody cases and the body of law that has developed increasingly over the past several decades. Jurisdictional determinations have room for progress under U.S., E.U., and international law.

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

In Europe, parties face a very different situation. Unlike the rigid rules in U.S. jurisdiction, the CJ has endorsed an all-the-facts-in-the-case standard, which leaves parties with little certainty in front of foreign judges. Despite the recent ruling in A, parties and attorneys must rely on guesswork and extended litigation in close jurisdictional cases. Thus, a refined temporal standard would better solve the lack of uniformity and uncertainty in E.U. family law.

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

Considering the impressive work of the National Conference, the E.U., and the Hague Conference towards modernizing and streamlining jurisdiction, they should combine their efforts to fashion a concrete definition of habitual residence. Until these actors work together, courts can act to inject uniformity and certainty in determining jurisdiction. This will save parents’ and courts’ resources, which in turn, will ultimately promote the best interests of children.