There's No Place Like Home: Temporary Absences in the UCCJEA Home State

by
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In 1968, the National Conference of Commissioners on Uniform State Laws drafted the Uniform Child Custody Jurisdiction Act (UCCJA) to eliminate jurisdictional conflicts involving the custody and visitation of children.[1] The UCCJA was not effective, however, because of a number of major loopholes and ambiguities.[2] The Parental Kidnapping Prevention Act (PKPA), federal full faith and credit legislation, was designed to resolve problems with the UCCJA that encouraged child abduction by warring parents.[3] Unfortunately, it too was ineffective.[4] In 1997, the National Conference of Commissioners on Uniform State

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1 UCCJA § 1(a)(1) 9 (1A) U.L.A. 286 (Nat'l Conf. of Comm'rs on Unif. State Laws 1968), *available at* http://www.uniformlaws.org/shared/docs/child_custody_jurisdiction/uccja68.pdf.

2 *See* Wayne Young, *Parental Child-Snatching: Out of a No-Man's Land of Law*, 13 ST. MARY'S L.J. 337, 341–46, 345 n.47 (1981) (noting "the UCCJA fail[ed] to successfully eliminate all of the conditions that encourage the 'seize and run' remedy of child-snatching," finding the UCCJA's "dependence on total enactment by all of the states[ ] [was the reason behind why] the UCCJA . . . failed to totally achieve its purpose, i.e. resolution of jurisdictional disputes between states regarding child custody decrees and parental child-snatching problems"); UCCJEA at 1 9(1A) U.L.A. 657 (Nat'l Conf. of Comm'rs on Uniform State Laws 1997), *available at* http://www.uniformlaws.org/shared/docs/child_custody_jurisdiction/uccjea_final_97.pdf (noting because of the various inconsistencies among the states in the interpretation of the UCCJA, "the goals of the UCCJA were rendered unobtainable in many cases").

3 *See* 28 U.S.C. § 1738A (2014); UCCJEA, Revision of Unif. Child Custody Jurisdiction Act at 1.

4 *See* UCCJEA, at 2 ("As documented in an extensive study by the American Bar Association's Center on Children and the Law, inconsistency of interpretation of the UCCJA and the technicalities of applying the PKPA, resulted in a loss of uniformity among the States.") (citations omitted).

Laws approved—and recommended for adoption—the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).[5] That statute is now the law in all states except Massachusetts.[6]

Eighteen years later, the UCCJEA has solved most of the jurisdictional conflicts, but some questions remain unanswered and the Act could benefit from additional clarity. This article reviews problems with the definition of home state, and more specifically, temporary absences, and suggests a solution that relies predominantly on a set maximum duration together with the timing of the absence.

I. Basic Provisions of the UCCJEA

A. *Purpose of the Act*

Although the purpose of the UCCJEA was not specified in the act itself, the comment to section 1 borrows from the UCCJA and delineates the goals as follows:

> (1) Avoid jurisdictional competition and conflict with courts of other States in matters of child custody which have in the past resulted in the shifting of children from State to State with harmful effects on their well-being;
> (2) Promote cooperation with the courts of other States to the end that a custody decree is rendered in that State which can best decide the case in the interest of the child;
> (3) Discourage the use of the interstate system for continuing controversies over child custody;
> (4) Deter abductions of children;
> (5) Avoid relitigation of custody decisions of other States in this State; [and]
> (6) Facilitate the enforcement of custody decrees of other States;[7]

B. *The Basic Structure of the UCCJEA*

The mechanism for the UCCJEA to achieve its goals is to define a simple method for determining jurisdiction that results in one state that is best suited to decide a case clearly having

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5 UCCJEA (Nat'l Conf. of Comm'rs on Unif. State Laws 1997).

6 *See Legislative Fact Sheet - Child Custody Jurisdiction and Enforcement Act*, Unif. Law Comm'n, http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Child%20Custody%20Jurisdiction%20and%20Enforcement%20Act (last visited Aug. 27, 2015).

7 UCCJEA § 101 cmt.

exclusive authority to do so.[8] It includes provisions to foster cooperation between states and to ensure that states do not second-guess each other, which created the undesirable result of conflicting orders from more than one state under the UCCJA.[9]

The UCCJEA prioritizes the "home [s]tate" as the place for initial jurisdiction.[10] If there is a home state, no other state may exercise jurisdiction for an initial order.[11] To prevent uncertainty when a child moves to a new state, the home state maintains jurisdiction for six months after the child leaves, provided a parent remains in the home state during that time.[12]

The act provides an exception for emergency jurisdiction, but emergency orders are designed to have temporary effect until the state with jurisdiction can take action.[13] If there is no home state, the first state in which the action is filed that has a significant connection with the child and a parent (or someone acting as a parent) together with substantial evidence regarding the child's care, protection, training, and personal relationships, may exercise jurisdiction.[14] There are additional provisions in the unlikely situation in which no state has home state or significant connection jurisdiction.[15] If an action is commenced in more than one state, the states are required to confer to determine which state has jurisdiction.[16]

Once an order has been rendered consistent with the act, the issuing state has continuing, exclusive jurisdiction until all the parties and the child have left the state or the issuing state determines that the child and the parties no longer have a significant connection with the state and substantial evidence is no longer

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8 *See* UCCJEA, Prefatory note, pages 2–6 (noting the various changes brought about through the UCCJEA as a means of promoting uniformity among the states by simplifying the jurisdictional determination).

9 *See, e.g.*, UCCJEA § 110 (communication between courts); UCCJEA § 202 (exclusive, continuing jurisdiction); UCCJEA § 203 (jurisdiction to modify determination); UCCJEA § 206 (simultaneous proceedings); UCCJEA § 207 (inconvenient forum).

10 UCCJEA § 201(a)(1), § 201 cmt. 1.

11 *See id.* § 201.

12 *Id.* § 201(a)(1).

13 *Id.* § 204(a)–(d).

14 UCCJEA § 201 (a)(2).

15 UCCJEA § 201 (a)(3), (4).

16 UCCJEA § 206.

available there.[17] If the state that issued the initial order no longer has continuing jurisdiction, or it declines jurisdiction under forum non conveniens, jurisdiction is once again determined by home state priority.[18]

For the most part, the UCCJEA has reduced the instance of jurisdictional conflicts. However, some ambiguities remain. One issue that arises frequently is the definition of temporary absence.

II. The Continuing Conundrum of Temporary Absences

A. *Home State and Temporary Absences*

The UCCJEA defines the "home state" as

> [T]he State in which a child has 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.*[19]

There is no definition of "temporary absence" in the UCCJEA, or explanation in the comments.[20] However, the comment to UCCJEA § 2 states that "[t]he definition of 'home [s]tate' . . . ha[d] been reworded slightly[,] [and] [n]o substantive change [was] intended from the UCCJA."[21] Therefore, reference to the meaning of "temporary absence" and the rationale behind the six month rule, must be derived from the history and comments to the UCCJA.

The comment to UCCJA § 3 (jurisdiction) states in part as follows:

> A 6-month period has been selected in order to have a definite and certain test which is at the same time based on a reasonable assumption of fact. See Ratner, Child Custody in a Federal System, 62 Mich.L.Rev. 795, 818 (1964) who explains:

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17 UCCJEA § 202.
18 UCCJEA § 203.
19 *Id.* § 102(7) (emphasis added).
20 *See id.* § 102.
21 *Id.* § 102 cmt.

> "Most American children are integrated into an American community after living there six months; consequently this period of residence would seem to provide a reasonable criterion for identifying the established home."[22]

Hence, the underlying rationale for the statute was that the state with the strongest connection to the child would also have the most relevant evidence about the best interests of the child[23]—the standard for awarding custody and visitation.[24] To avoid disagreements about which state has the strongest connection, the drafters settled on the actual place of residence of the child for six months immediately preceding commencement of the action.[25] Reference to a simple factual determination – where the child resided with a parent or someone acting as a parent - rather than domicile (which would involve determination of the subjective intent of the parents) was designed to result in clear jurisdiction in one state at a time.[26] There is no explanation for the choice of the six month period other than the reference to the Ratner article,[27] which does not provide authority for the conclusion that children are integrated into their community after six months.[28]

Although there is no comment in either the UCCJA or the UCCJEA explaining the reason for the temporary absence language, it was presumably included to avoid potential problems caused by visitation in another state, vacations, and similar ab-

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22 UCCJA § 3 cmt. (citing Leonard G. Ratner, *Child Custody in a Federal System*, 62 MICH. L. REV. 795, 818 (1964)).

23 See UCCJA § 3 cmt. (explaining "[t]he interest of the child is served when the forum has optimum access to relevant evidence about the child and family. There must be maximum rather than minimum contact with the state.").

24 *See, e.g.*, Ortega v. Bhola, 869 A.2d 1261, 1262–63 (Conn. App. Ct. 2005) ("The guiding principle in determining whether visitation is proper is the best interest of the child."); *In re* Kosek, 871 A.2d 1, 4 (N.H. 2005) ("The court's overriding concern in structuring custody and visitation matters is the best interests of the child." (citing Chandler v. Bishop, 702 A.2d 813 (N.H. 1997)).

25 *See* UCCJA § 2(5); UCCJEA § 102(7).

26 *See* UCCJA § 3 cmt. (indicating that domicile is not the relevant test for home state, stating, "Short-term presence in the state is not enough even though there may be an intent to stay longer, perhaps an intent to establish a technical 'domicile' for divorce or other purposes").

27 *See* UCCJA § 3 cmt. (citing Ratner, *supra* note 22, at 818).

28 *See* Ratner, *supra* note 22, at 818.

sences, which would ordinarily occur during a six month period.[29] Normal travel would be too inhibited if the child could not leave the state for a day without endangering home state status. Unfortunately, no guidance was provided in the UCCJA on what constitutes a temporary absence and the UCCJEA failed to clarify this deficit in its predecessor.

B. *Temporary Absence Tests*

Without a statutory definition or guidance from comments, courts have been forced to determine what constitutes a temporary absence.[30] Three tests have generally been applied – duration, intent, and totality of the circumstances.[31]

1. *Duration*

Although rarely used as a sole factor, duration of the absence has been used as a determining factor in whether the absence has been temporary such that a state is the home state despite a break in the six month period preceding commencement of the action. An Illinois appellate court determined that the temporary absence provision was designed to cover "lapses caused by brief interstate visits by the child."[32] Another court opined, "common sense dictates that the plain meaning of 'temporary absence' is leaving the state for short, limited time periods."[33]

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29 *See* UCCJA § 2; UCCJEA § 102.

30 *See, e.g.*, Chick v. Chick, 596 S.E.2d 303, 308 (N.C. Ct. App. 2004) (noting the determination of whether the absence from a state amounted to a temporary absence is determined on a case-by-case basis). The North Carolina Court of Appeals in *Chick* further noted:

> Some courts in sister states have adopted certain tests for determining whether an absence from a state was a temporary absence. These tests include (1) looking at the duration of absence, (2) examining whether the parties intended the absence to be permanent or temporary, and (3) adopting a totality of the circumstances approach to determine whether the absence was merely a temporary absence.

Id.

31 *See, e.g.*, *id.*

32 *In re* Marriage of Schoeffel, 644 N.E.2d 827, 830 (1994) (decided under the UCCJA, but interpreting the same statutory language as the UCCJEA).

33 *In re* E.G., No.98652, 2013 WL 588756, at *4 (Ohio Ct. App. Feb. 14, 2013).

Courts have applied the duration test to reject prolonged periods of absence as temporary despite alleged intent for a move to be temporary. An Illinois appellate decision focused on duration and explicitly rejected a prior decision that relied on intent to allow a prolonged absence to be defined as temporary.[34] Similarly, a California court held, "It would, however, be a stretch of imagination on these facts to consider an absence, with the exception of a few days, of almost *seventeen months* to be a 'temporary' absence from New York."[35]

2. *Intent*

Some courts look to intent of the parties to determine whether an absence is temporary.[36] Several issues result from using intent to determine whether an absence is temporary. First, is there a limit on the amount of time the parties intend to be away for the absence to be considered temporary? It takes six consecutive months to create a home state.[37] If the absence lasts longer than six months, is it nonetheless temporary if the parties intend to return at some point?

The intent test has been used to significantly extend the six month time frame for home state jurisdiction. For example, in one case, the children had been living in Turkey for nearly eight months prior to commencement of an action in Florida.[38] The Florida court found that Florida had been their home state before they moved to Turkey and that, because the parents in-

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34 *In re* Marriage of Arulpragasam and Eisele, 709 N.E.2d 725, 732 (Ill. App. Ct. 1999) (citing *Schoeffel*, 644 N.E.2d at 830. For a discussion of decisions relying on duration or intent, see Warren J. Roehl, *Parent and Child-Interstate Custody: The North Dakota Supreme Court Declines to Decide Whether the Six-Month Temporary Presence of a Child in North Dakota Is Sufficient to Exercise Home State Jurisdiction*, Wintz v. Crabtr, 76 N.D. L. REV. 697, 707-08 (2000).

35 *In re* Marriage of Sareen, 153 Cal. App. 4th 371, 381, 62 Cal. Rptr. 3d 687, 695 (2007).

36 *See* Adams v. Adams, 432 S.W.3d 49, 56–57 (Ark. Ct. App. 2014); R.M. v. J.S., 20 A.3d 496, 514 (Pa. Super. Ct. 2011); *In re* Marriage of McDermott, 307 P.3d 717 (Wash. Ct. App. 2013) (child born in Costa Rica to Kansas residents – returned at six weeks); *But see* Ocegueda v. Perreira, 181 Cal. Rptr. 3d 845, 852–53 (Cal. Ct. App. 2015) (holding that intent is not relevant to where an infant "lived" since birth to establish a home state).

37 *See* UCCJEA § 102(7).

38 Sarpel v. Eflanli, 65 So. 3d 1080, 1081–82 (Fla. Dist. Ct. App. 2011).

tended the move to Turkey to be temporary, Florida remained their home state despite an absence that lasted longer than the six months required to form a new home state.[39]

An additional question is raised with regard to the point in time when intent is determined. Intent can change over time. Should the court inquire as to the intent of the parties when they first leave the state, when the action is commenced, or at some other point in time? In one case, the child lived with the mother by agreement of the parties and without a formal order.[40] The parties later agreed for the child to live with the father in Washington for the summer and school year, returning to the mother in Iowa thereafter.[41] At the end of the school year, the father filed in Washington for custody.[42] The mother filed in Iowa claiming that Iowa was the home state and that the absence was temporary because they intended for the child to return to Iowa at the end of the school year.[43] The court held that

> in determining whether an absence is a 'temporary absence,' we do not believe the significance of intent can or should be restricted to the intent existing at the time of leaving. If it were so restricted, then an absence that began with intent to return would remain a 'temporary absence' even long after a decision had been reached for the child to permanently relocate.[44]

Another issue with use of the intent test is determining whose intent is controlling. This can arise when the parties had different intentions or when one party deliberately misled the other into believing the move would be temporary when in fact he or she intended it to be permanent.[45] For example, in one case, the child lived in Mexico with the parents for more than six months when the mother took the child to Oregon with the intent to be there temporarily and to return to Mexico after she

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39 *Id.* at 1084.

40 *In re* Marriage of Pereault, 829 N.W.2d 192 *1 (Iowa Ct. App. 2013).

41 *Id.*

42 *Id.*

43 *Id.* at *2–3.

44 *In re* Marriage of Pereault, 829 N.W.2d 192 (Iowa Ct. App. 2013)

45 *See In re* Marriage of Doolan, 682 N.W.2d 83 *3 (Iowa Ct. App. 2004) (stating the father found out the mother had intended the move to be permanent within six months of commencement of action, but the court held the move was not temporary when the mother intended to make it permanent).

completed a one-year degree program.[46] They lived in Oregon for three months when the father filed a custody petition in Oregon.[47] The father claimed that he intended to make Oregon the permanent residence of the child.[48] The court held that the mother's intent to leave Mexico temporarily trumped the father's argument that his intent was for the child to stay in Oregon.[49] The court did not explain why the mother's intent, rather than the father's, was controlling.[50] One may conjecture it was because the child was born out of wedlock and the petition was sought to establish both filiation and custody rights, or it may have been because objective evidence made it clear her intent when she left Mexico was for a temporary absence.[51] However, the Texas Supreme Court has held that intent of one parent should not trump intent of the other, and, ultimately, intent should not be the test for a temporary absence.[52]

When there is an existing order, deception with regard to intent of one parent to make a permanent move can be handled through the misconduct portion of the statute.[53] In the case of deceit, one may argue jurisdiction should be declined on the grounds of misconduct.[54] However, the UCCJEA does not define "unjustifiable conduct."[55] The comment to UCCJEA section 208 states that this section should not be necessary very often because of the improved priorities in the statute.[56] The comment refers to "removing, secreting, retaining, or restraining

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46 Shepard v. Lopez-Barcenas, 116 P.3d 254, 255–56 (Or. Ct. App. 2005).

47 *Id*.

48 *Id.*

49 *Id.* Note that the parents were not married and the father filed a filiation petition requesting custody. *Id.*

50 *See id.* at 256.

51 Note that in the *Sarpel* case, 65 So. 3d 1080, the trial court found the father's intent controlling. This may have been because the mother had a pending green card application in the United States, although the appellate decision simply defers to the circuit court decision.

52 Powell v. Stover, 165 S.W.3d 322, 326 (Tex. 2005) ("[W]e believe that a test based on subjective intent—whether it examines the intent of the mother, the father, or the child—would thwart the UCCJEA's meaning and purpose.").

53 *See* UCCJEA § 208.

54 *See id.* § 208(a).

55 *See id.* § 102.

56 *Id.* § 208 cmt. "Most of the jurisdictional problems generated by abducting parents should be solved by the prioritization of home State in Section

the child."[57] If there is no prior order, both parents have an equal right to custody.[58] If one parent does not hide the fact that he or she is taking the child and provides access to the other parent, it is not clear whether a failure to notify the other parent of his or her intent to make the move permanent constitutes "unjustifiable conduct."[59] Some courts have held that such deceit does not nullify a finding of temporary absence when the move is made to avoid domestic violence.[60]

3. *Totality of Circumstances*

The "totality of the circumstances" test is commonly used to determine if an absence is temporary.[61] Courts routinely find visitation, vacations, and business trips qualify as temporary absences.[62] Factors courts consider include intent and duration,[63] as well as the nature and purpose of the child's presence outside of the state.[64] In employing this test, courts will examine facts relating to establishment of legal residence in a state, such as obtaining a new driver's license, applying for welfare benefits,[65] paying state taxes, owning a house, or signing a lease.[66] They may

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201; the exclusive, continuing jurisdiction provisions of Section 202; and the ban on modification in Section 203." *Id.*

57 *Id.*

58 *See, e.g.*, Druckman v. Ruscitti, 327 P.3d 511, 514 (Neb. 2014) ("[U]nmarried parents have equal custody rights regarding their children, absent a judicial custody order to the contrary.").

59 *See, e.g.*, Felty v. Felty, 882 N.Y.S.2d 504, 509 (N.Y. App. Div. 2009) (noting the father claimed the mother took the children out of the state under false pretenses).

60 *See infra* notes 78-79.

61 *See, e.g.*, Norris v. Norris, 345 P.3d 924, 929 (Alaska 2015); Drexler v. Bornman, 92 A.3d 628, 362–63 (Md. Ct. Spec. App. 2014).

62 *See, e.g.*, *Ex parte* Siderius, 144 So.3d 319, 325 (Ala. 2013); McDermott, 307 P.3d at 727.

63 *Chick*, 596 S.E.2d at 308.

64 *In re* A.W., 94 A.3d 1161, 1168 (Vt. 2014); *see also McDermott,* 307 P.3d at 72 (holding temporary absences "include court-ordered visitations, and *vacations* and business trips").

65 *A.W.*, 94 A.3d at 1168 (noting that the father applied for welfare benefits in Vermont while claiming a temporary absence from New York).

66 *Id.*; *see also Felty*, 882 N.Y.S.2d at 509 (the mother kept her permanent address, driver's license, veterinary license, and voter registration in New York).

consider school registration,[67] and whether the child was in the state for medical care,[68] or if the child is present for the parent's schooling or job opportunities.[69] In some cases, courts have held an absence from the mother's place of residence to give birth in a different state may qualify as a temporary absence from the mother's residence.[70] One court held that an absence was not temporary in part because the mother removed the child to return to a previous home state in violation of a restraining order.[71] Although the court could have rested its decision on unjustifiable conduct, it examined the issue from the perspective of the alleged temporary absence.[72]

In a recent case, one court examined the child's integration into the new community as the standard for determining whether an absence is temporary.[73] The court began by rejecting the du-

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67 *See, e.g.,* Baxter v. Baxter, No. 2015–CA–0085, 2015 WL 3894291, at *12 (La. Ct. App. June 24, 2015) (noting the mother's move to Canada did not constitute a temporary absence where the child was school age and was enrolled in school in Canada when the proceeding commenced).

68 *See, e.g.*, *In re* A.C., 30 Cal. Rptr. 3d 431, 436 (Cal. Ct. App. 2005).

69 *See, e.g.*, Jundoosing v. Jundoosing, 826 So. 2d 85, 88 (Miss. 2002) (noting a factor cutting against a temporary absence was the fact the mother had "found a job, a place to live, enrolled the children in school, began receiving Medicaid assistance and filed her taxes for 2001").

70 *In re* D.S., 840 N.E.2d 1216, 1223 (Ill. 2005) (finding a mother's delivery of a child and two day stay in Indiana to avoid removal of the child was a temporary absence from the home state of Illinois); *McDermott*, 307 P.3d at 727 (finding a child born in Costa Rica to Kansas residents and returned to Kansas at six weeks was a temporary absence).

71 *In re* Brilliant, 86 S.W.3d 680, 689 (Tex. App. 2002). Massachusetts was the home state when the mother brought the child to Texas and took measures indicating she intended to become a Texas resident. *Id.* at 682–83. They left after forty-five days and the mother claimed a temporary absence from Massachusetts. *Id.* at 686. The mother and child were still in Texas at the time the suit was filed. *Id.* at 689. The court held:

> The UCCJEA was designed to prevent the gamesmanship and forum shopping that has occurred here. Kristen chose to relocate to Texas and although, regrettably, she did not wish to remain, she cannot bootstrap her relocation to a 'temporary absence' from Massachusetts by skipping town with the child in direct violation of a court order.

Id. at 689-90.

72 *See id.* at 689.

73 *In re* Sampley, 347 P.3d 1281, 1286 (Mont. 2015) ("We, therefore, conclude that an absence is not temporary if the character of the absence would

ration, intent, and totality of the circumstances tests as "not particularly" persuasive.[74] However, the court also stated that Montana's legislative history provides support for the totality test "in some circumstances."[75] This leaves it unclear whether the court was announcing a new test – integration — or adding a clarification or limitation on the totality test.[76]

C. *Special Cases*

1. *"Unclean Hands"*

To meet the purpose of the statute to deter child abduction for jurisdictional purposes, the UCCJEA provides for a court to decline jurisdiction when it results from unjustifiable conduct.[77] A New York court has held that a wrongful removal creates a temporary absence.[78] However, under New York statutory law, a removal that might otherwise be considered wrongful but that is due to domestic violence, may be considered temporary.[79] The UCCJEA uses the term "unjustifiable conduct" which could eas-

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make it unreasonable to assume that a child would integrate into a community of Montana during the portions of the six-month period when the child is not absent from the state").

74 *Id.* at 1285–86 ("We are not particularly persuaded by the reasoning of these courts to adopt any of these approaches").

75 *Id.* at 1286 ("However, the legislative history of Montana's UCCJEA provides support for a totality of the circumstances approach in at least some instances").

76 *See id.*

77 UCCJEA § 208.

78 *Felty*, 882 N.Y.S.2d at 509 (noting the father claimed the mother took the children out of the state under false pretenses).

79 *See id.* (citing N.Y. DOM. REL. LAW § 76-g (4) (McKinney 2002)). The New York law reads:

> In making a determination under this section, a court shall not consider as a factor weighing against the petitioner any taking of the child, or retention of the child after a visit or other temporary relinquishment of physical custody, from the person who has legal custody, if there is evidence that the taking or retention of the child was to protect the petitioner from domestic violence or the child or sibling from mistreatment or abuse.

N.Y. DOM. REL. LAW § 76-g (4) (McKinney 2002). This provision, however, is not part of the uniform act.

ily lead to the same result without additional language directed at domestic violence.[80]

2. *Military service*

Home state under the UCCJEA is not the same as domicile or residence of a parent.[81] Although, under some state laws, a parent's domicile or residence may not be lost by absence due to military service,[82] absence of a child caused by military assignment of the parent is not necessarily temporary.[83] However, some states may have statutes that would affect determination of jurisdiction in the case of military service.[84]

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80 *See* UCCJEA § 208.

81 *See, e.g.*, Slay v. Calhoun, 772 S.E.2d 425, 429–30 (Ga. Ct. App. 2015) ("'home state' is not synonymous with the 'residence[']or [']domicile[']of the parent having legal custody") (citing Harper v. Landers, 348 S.E.2d 698 (Ga. Ct. App. 1986)).

82 *See, e.g.*, LA. REV. STAT. ANN. § 1:54 (West 2014); TEX. FAM. CODE ANN. § 6.303 (West 2015). The Servicemembers Civil Relief Act, 50 U.S.C. app. § 521 (2012), does not cover jurisdiction but protects against default judgments – including child custody. Servicemembers can request a stay or to vacate a default judgment. *Id.* § 521(g). The Uniform Deployed Parents Custody and Visitation Act has been adopted in Arkansas, Colorado, Minnesota, Nebraska, Nevada, North Carolina, North Dakota, South Carolina, South Dakota, Tennessee. *Legislative Fact Sheet - Deployed Parents Custody and Visitation Act*, UNIF. LAW COMM'N, http://www.uniformlaws.org/Legislati//veFactSheet.aspx?title=Deployed%20Parents%20Custody%20and%20Visitation%20Act (last visited Aug. 28, 2015). Section 104 of the uniform act provides the residence of a deployed parent remains if there is an order under the UCCJEA. Unif. Deployed Parents Custody and Visitation Act § 104 (Nat'l Conference of Comm'rs on Unif. State Laws 2012). This, however, does not affect the temporary absence provision of home state jurisdiction. *See id.* § 104 cmt.

83 *See* Carter v. Carter, 758 N.W.2d 1, 8-9 (Neb. 2008) (citing Consford v. Consford, 711 N.Y.S.2d 199 (N.Y. App. Div. 2000)). *But see Brilliant*, 86 S.W.3d at 688-89 (holding "logic at least supports a conclusion that military absence is a temporary absence").

84 *See, e.g.*, LA. REV. STAT. ANN. § 9:359.11 (2014 Reg. Sess.). Louisiana law provides:

> When a court of this state has issued a custody or visitation order, the absence of a child from this state during the deployment of a parent shall be a 'temporary absence' for the purposes of the Uniform Child Custody Jurisdiction and Enforcement Act and this state shall retain exclusive continuing jurisdiction in accordance with the provisions of R.S. 13:1814. The deployment of a parent may not be used as a basis to

3. *Infants*

The UCCJEA provides that the home state of an infant less than six months old is the state where the child lived since birth with a parent.[85] This definition leaves room for interpretation when the infant is born in one state and is moved to another state shortly after birth. Was the absence from the mother's home state temporary or was there no home state because the infant has not lived in one state since birth? Although one can argue that an absence from a state where an infant has not lived prior to the move to the mother's home state can not be considered temporary, some courts have held that a stay in another state to give birth is temporary in nature.[86] Other courts have simply held that there is no home state.[87] The problem, in this context, lies mainly with the definition of home state for an infant who is less than six months old.[88] The drafters seem to have assumed that young infants would not travel out of the state, but that ignores the reality of America's mobile culture and the fact that extended families often do not live in the same state.[89] It makes little sense to term the hospital stay a temporary absence if the child never lived in the state from which he or she is supposedly absent. On the other hand, the alternative is for there to be no home state for the infant which leaves the parties to argue what substantial evidence means in the context of a very young infant.[90]

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assert inconvenience of the forum in accordance with the provisions of R.S. 13:1819.

Id. Note that the Louisiana statute only affects a case in which an initial order has been issued or forum non conveniens is at issue. *See* Baxter v. Baxter, 2015 WL 3894291, at *7–8 (La. Ct. App. June 24, 2015).

85 UCCJEA § 102(7).

86 *See, e.g., D.S.,* 840 N.E.2d at 1223 (finding a mother's delivery of child and two day stay in Indiana to avoid removal of child was temporary absence from home state of Illinois); *McDermott*, 307 P.3d at 727 (finding a child born in Costa Rica to Kansas residents and returned to Kansas at six weeks was a temporary absence).

87 *See A.W.,* 94 A.3d at 1167.

88 *See* UCCJEA § 102(7).

89 *See id.*

90 *See id.* § 201(a)(2).

4. *Frequent Movement Between Two States*

Another instance in which temporary absence might be at issue is when a child is moved between two states during the six months or year prior to commencement of the custody proceeding. In such cases each parent might argue that the absence from their state was temporary. In one such case in which the child had been in Illinois for less than two months and Michigan for slightly more than five months, the court held there was no proof that the absence from either state was temporary and, consequently, there was no home state.[91] The court effectively held that there are circumstances in which there is no home state.[92] In that situation, the significant connection test can be used to establish jurisdiction in the first state in which the action is commenced and forum non conveniens can be used if that is an undesirable venue.[93]

5. *Run-away*

If a child runs away from home without permission of the parent or a person acting as a parent, will the absence be considered temporary? In at least one case, the court held that absence of a runaway is considered temporary until a court decides the child should not be returned to the parent or guardian.[94] If the runaway is not located, jurisdiction is not the most compelling issue. But what if the child is not found for quite some time? Should a child be able to establish a connection with a new state by becoming a runaway or should the original home state continue to have jurisdiction because it is the state where evidence can be found related to the cause of the child becoming a runaway?

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91 *In re* Marriage of Diaz, 845 N.E.2d 935, 942 (Ill. App. Ct. 2006).

92 *See id.*

93 *See* UCCJEA §§ 201(a)(2), 207.

94 *In re* Nelson B., 155 Cal. Rptr. 3d 746, 752-53 (Cal. Ct. App. 2013) (noting "no California case ha[d] considered whether a minor's unauthorized absence from a potential home state should be treated as a 'temporary absence,'" but finding such conduct could be analogized to the California court's treatment of unauthorized or unjustified conduct by a parent in jurisdictional determinations under the UCCJEA). The court might also have dealt with the matter by noting that the child was not living with a parent or person acting as a parent in the state to which the minor "escaped."

6. *Surrogate Motherhood*

Surrogacy can create additional issues with respect to temporary absences.[95] The term can be used to refer to a mother who agrees to be inseminated and to give up her child for adoption to another person at birth, or it can be used to describe a gestational carrier who is carrying a fetus that is not genetically related to her and who does not intend to keep the child.[96] The gestational carrier situation is similar to the mother who decides to give birth in another state, but it raises the novel question of whether the gestational carrier is a parent.[97] One can argue that the surrogate is either the mother or a person acting as a parent.[98] However, if the surrogate is not treated as a parent under state law and the intended parents remove the child immediately, one can contend that the child is not living in the state of birth with a parent and that the time for home state begins to run when the child is home with the intended parent.[99] Given that the UCCJEA explicitly excludes adoption situations[100] (which may or may not include surrogacy), and the Uniform Adoption Act has not been adopted in many states,[101] litigants need to refer to individual state laws to determine jurisdiction in these cases.

III. Analysis of the Current Tests

None of the current tests is clearly superior to the others. The duration test is simple to apply but might create negative consequences if it is widely adopted. Knowledgeable parties might refuse to cooperate with visitation because they want their state of residence to have jurisdiction. One might argue most parties would not know about jurisdictional requirements, al-

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95 *See, e.g.,* Rice v. Flynn, No. 22416, 2005 WL 2140576, at *6–8 (Ohio Ct. App. Sept. 7, 2005) (discussing jurisdictional issue involving a surrogate mother's order establishing parentage).

96 *See Surrogate Mother*, BLACK's LAW DICTIONARY (10th ed. 2015).

97 *See id.*

98 *See* UCCJEA §§ 102(7), 102(13)(B).

99 *See id.* § 201(a).

100 *Id.* § 103.

101 *See Legislative Fact Sheet - Adoption Act (1994)*, UNIF. LAW. COMM'N, http://www.uniformlaws.org/Act.aspx?title=Adoption%20Act%20(1994) (last visited Aug, 28, 2015) (noting Vermont as the only state to adopt the act).

though advice might spread quickly through the internet once the test is known. The test would predominantly affect initial orders given that home state is not the standard for continuing exclusive jurisdiction.[102] However, if all parties leave the state that rendered the initial order, home state would again become an issue.[103] In that instance, parties would more likely be familiar with the six month and temporary absence rules as a result of the original litigation and consultation with a lawyer.

The intent test raises a multitude of questions and problems. Intent is subjective and not easily identified through objective evidence or the conflicting testimony of the parties. Parties often disagree about their intent or change their intent at some point after departure from what might otherwise be the home state.[104] In addition, one party may intend a temporary absence while the other intends a permanent change of residence.[105] In some cases the differing intent might be the result of one parent deliberately hiding his or her intent to change the residence of the child.[106]

In addition, the intent test does not take into account a situation in which the parents plan to return to the former state of residence, but the child is absent from that state for an extended period of time. In such situations, a state could have home state jurisdiction when in fact, the child has been absent for more than a year. A parent's job, education, or military deployment can create this type of situation.[107] Courts have often pointed out that the UCCJEA refers to the place the child "lived" rather than "domicile" in order to avoid the uncertainty that accompanies

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102 Once a state has proper initial jurisdiction, it maintains exclusive continuing jurisdiction as long as one of the parties resides in the state and the state that issued the initial order holds that it still has a significant connection with and substantial evidence about the child. UCCJEA § 202(a)(1).

103 *Id.* §§ 202(b), 203.

104 *See, e.g.*, Ocegueda v. Perreira, 181 Cal. Rptr. 3d 845, 847–48 (Cal. Ct. App. 2015) (finding the mother never intended to return to California and the father did have such intent at the time of the filing).

105 *See Sarpel*, 65 So. 3d at 1081–82.

106 *See, e.g.*, *Felty*, 882 N.Y.S.2d at 509 (noting the father claimed the mother took the children out of the state under false pretenses).

107 *See, e.g.*, *Carter*, 758 N.W.2d at 9 (finding a child's presence in the state for ten weeks followed by a two year period of residence in Japan for military deployment was not a temporary absence for UCCJEA purposes).

the use of intent to determine home state.[108] In addition, the comment to the UCCJA states that the reason for the six month test is to provide "a definite and certain test which is at the same time based on a reasonable assumption of fact."[109] Intent is not "definite and certain," and the reasonable assumption of fact presumably refers to evidence in the state resulting from time spent in the state immediately prior to commencement of the action.

The totality of the circumstances test provides for a thorough analysis of a number of factors, but it does not provide any certainty. Commenting on the benefits of adopting this test, one court opined, "it provides greater flexibility to the court making the determination by allowing for consideration of additional circumstances that may be presented in the multiplicity of factual settings in which child custody jurisdictional issues may arise."[110] Flexibility and discretion do not create a definite and certain jurisdiction. One court might find an absence to be temporary on facts similar to those on which another court might find the absence to be of a more permanent nature. Given the purpose of the UCCJEA to deter child abduction, uncertainty is not a desirable result.[111]

The suggestion of a test for integration into the new community is tempting, given the comment to the six month rule in the original act.[112] It hints of "habitual residence," a term used in the Hague Convention on the Civil Aspects of International Child Abduction[113] and the International Child Abduction Remedies Act, ICARA,[114] the federal act implementing the treaty. The terminology is better understood in Europe where it has been in use for a long time, and it does not provide any more

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108 *See, e.g.*, Slay v. Calhoun, 772 S.E.2d 425, 429–30 (Ga. Ct. App. 2015) ("'home state' is not synonymous with the 'residence[']or [']domicile[']of the parent having legal custody.") (citing Harper v. Landers, 348 S.E.2d 698 (Ga. Ct. App. 1986)).

109 UCCJA § 3 cmt. (citing Ratner, *supra* note 22, at 818).

110 *Chick*, 596 S.E.2d at 308.

111 *See supra* note 2 and accompanying text.

112 *See* UCCJA § 3 cmt. (citing Ratner, *supra* note 22, at 818).

113 *See* Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, 1343 U.N.T.S. 22514, *available at* http://www.hcch.net/upload/conventions/txt28en.pdf.

114 42 U.S.C. §§ 11601–11611 (2006).

certainty than the totality test currently in use. It might also confuse the inquiry given that the treaty is not jurisdictional in nature, but rather a remedy for improper retention or abduction of children.[115]

One can argue that no test needs to be clearly determinative given the requirement that courts confer when jurisdiction is contested,[116] together with the forum non conveniens provisions[117] of the act. However, the provision for a conference with the judge of another state is triggered by simultaneous proceedings, which necessitates commencement of an action in a second state.[118] A second action increases time and expense in situations in which the ultimate decision might be that the first court had jurisdiction because of a temporary absence.

IV. A Proposed Alternative Test

As stated previously, the purpose of the UCCJEA is to avoid jurisdictional disputes, provide a simple test for jurisdiction, deter child snatching for jurisdictional purposes, and render a decision by the state that "can best decide the case."[119] How then can courts establish a reliable test that is simple but also results in jurisdiction in the state best suited to determine the merits of the case?

The standard for determining child custody is the "best interests of the child."[120] It makes sense that the place where the child lives for a prolonged period of time with a parent would have a great deal, if not most, of the evidence necessary to make a custody determination. The six month rule delineates the amount of time necessary to create a sufficient nexus with a state to make such a determination. If there is no such state, the stat-

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115 *See* Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, 1343 U.N.T.S. 22514, *available at* http://www.hcch.net/upload/conventions/txt28en.pdf.

116 UCCJEA § 206(b). UCCJEA § 110 and § 112 provide for cooperation between courts, but it is not mandatory ("a court *may* request") and its provisions refer to holding hearings, taking testimony and other activities that do not involve discussion of the appropriate forum.

117 *Id.* § 207.

118 *See id.* § 206(b).

119 *See supra* text accompanying note 2.

120 *See supra* note 24.

ute allows a state with a significant connection to the child and substantial evidence about the child to make that determination, as long as the suit was filed in that state first.[121] The fact that significant connection jurisdiction does not require the *most* significant connection, but, instead, *a* significant connection in the state where the action was first filed, demonstrates the importance the drafters placed on a simple and definite test.[122] Had the statute required the state to have the most significant connection, disputes would more likely arise between states over which had a greater connection. In addition, if there is a more convenient forum, a state may decline jurisdiction in favor of another state.[123] Thus, the jurisdictional standard in the absence of a home state remains fairly certain while simultaneously maintaining the requirement of a significant nexus with the state that asserts jurisdiction.

To satisfy the UCCJEA goals of preventing child snatching and forum shopping, the test for temporary absence needs to be clear and simple. The use of intent in any test raises too many problems to be reliable. One may argue that intent alone will not fulfill any purpose of the statute or provide a sufficient nexus to the state. A parent might intend an absence to be temporary, but the extended nature of the absence and the need for the child to seek medical attention, schooling, and child care might create a greater nexus to the temporary location. As noted above, intent by itself is particularly problematic in that it provides little certainty, and it is not guaranteed to provide jurisdiction in a state with substantial evidence about the best interests of the child.[124]

The totality test appears to be fair and allows the court discretion to determine what is appropriate in a particular case. However, with inclusion of the intent factor, and without some limitation such as a set durational component, the test can potentially create uncertainty, lack of consistency, and prolonged hearings.

Although temporary absence cannot be defined quite as simply as home state by examining duration alone, the test can be made less variable by adding a few parameters. First, duration

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121 *See* UCCJEA § 201(2).

122 *Id.*

123 *See* UCCJEA § 208.

124 *See supra* text accompanying notes 37-60.

should control. It is fairly simple to apply, and consistent with the six month rule. It also ensures that the state with jurisdiction bears a "reasonable" relation to the substantive test of best interests of the child.

Although the purpose comment to the UCCJA does not refer to a nexus with the child, the comment to UCCJA § 3 (jurisdiction), explained that the use of the six month period provides a "reasonable basis" for jurisdiction in that most children would be integrated into their community after six months.[125] Although there is no support cited for the choice of six months, a prolonged absence would defeat the rationale behind that standard regardless of the reason for the absence. If it takes six months to integrate the child into the community, any prolonged absence would presumably interfere with that integration and with the amount of evidence concerning the best interests of the child. Prolonged removal of the child for a parent's education, medical treatment, military service, or any other reason that might indicate an eventual return, although in some sense temporary, is nonetheless anathema to the idea that the home state is where the child actually lived for the six consecutive months immediately preceding commencement of the action. If a specified maximum duration for the absence can be provided through amendment of the statute or through court decisions, the duration test could provide a simple, definitive test that also ensures jurisdiction in a state where the relevant evidence can be found.

It is difficult to say how lengthy a period of absence is too long to be considered temporary, given that the original choice of six months appears arbitrary. At some point an absence weakens the evidence available in what would otherwise be the home state. Certainly an absence of more than three months, half the time necessary to form a home state, would be excessive and negate the idea that the child would be sufficiently integrated into the state. If the child was absent visiting family for a week each month, a limit of six weeks might be reasonable for a temporary absence. The limit could be set somewhat longer to two months to accommodate situations in which visitation is quite liberal or the child goes on vacation in addition to visiting often out of state. Once a limit is set by the courts or by amendment of the

125 *See* UCCJA § 3 cmt. (citing Ratner, *supra* note 22, at 818).

statute, it should be simpler to determine which absences may be considered temporary.

Mere delineation of the maximum length of time constituting a temporary absence is not sufficient however. The timing of the absence should also be considered. If the absence occurs at the beginning of the six month period preceding commencement of the action, it should not be considered as part of the time required to create a home state. A child cannot be temporarily absent from a state in which he or she was not yet present. An argument could be made that, when a child is less than six months old, the amount of time a woman spends out of the state of her usual residence to give birth should be considered a temporary absence from the mother's state of residence. That would necessarily result in no home state for a child less than six months old because the child would not have lived continuously in one state. However, the fact that there is no home state does not leave jurisdiction indeterminate. In this type of case, the child would have a significant connection with the mother's state of residence and there would be no substantial evidence in the state in which the mother was present for a short time solely to give birth. The forum non conveniens[126] and the catch-all[127] sections of the act can cover a situation in which the child is so young he or she has not been in either state very long.

A more difficult case might be presented if the child is born prematurely outside of the mother's state of residence and the child stays in the state of birth for a prolonged period of time because of birth complications. If a custody or visitation situation arises after the child returns to the mother's home, and within the six month period after the infant's birth, there would be no home state because the absence from the state where the hospital is located would not be considered temporary. If the action is brought in the state where the hospital is located before the child leaves, that state would have jurisdiction. One might argue that the mother's residence should be the home state. However, substantial evidence concerning the health of the child and the interaction of the parents with the child could be found in the state where the hospital is located, not in the mother's

126 UCCJEA § 207.

127 UCCJEA § 201(a)(4).

usual state of residence, because the child has been in the hospital since birth. The result would then comport with the goals of the statute.

The second timing possibility involves a series of absences that occur during the six months immediately preceding commencement of the action. This is apparently the situation the temporary absence language was devised to address. Short absences during the six month period are not likely to result in loss of connections with the home state nor to create significant connections with other states. It should not matter whether one or both parents intended a prolonged absence but decided to return after a short period of time, or if they intended a short absence which became a prolonged one. If the aggregate of the out of state visits becomes too long, certainly exceeding three months, it may weaken the connection with what would otherwise be the home state. If the maximum time for absences is three months, intuitively, there should be no greater nexus to either state, and, hence, no home state. In that case, application of a duration test should yield a reasonable result.

The most difficult issue could arise if the absence occurs immediately before the petition is filed so that the child is not present in what otherwise would have been the home state. For example, if duration is the sole test and the child has been gone for a week or a month immediately before commencement of the action, the absence would qualify as temporary even if a parent has packed up all of the child's possessions and made a permanent move. This reasoning would result in an altered definition of home state to six months minus the maximum allowable period for temporary absences, instead of a full six months. Conversely, immediately preceding commencement of the action, the child might be out of state for a week to visit relatives or to go on vacation and return a week later to what should be the home state. In these cases, the court should apply a purpose test.

Purpose is related to intent, but it is not as subjective or dependent on the mental state of either parent. As noted above, intent is difficult to determine and each parent may have different intentions. Although purpose may not always be easy to ascertain, objective criteria could be used to determine whether, at the time the action was commenced, the child was absent for a visit, vacation, or for a short period for some other purpose that

would indicate the absence is temporary. The court may inquire about what the child is doing in the new state. If the child's possessions were removed in what appears to be a permanent abandonment of the erstwhile home state, the absence would not be deemed temporary. In other words, does the absence appear to be short or does it appear that the child will not return before the maximum time for a temporary absence has expired? These are objective fact questions that courts are accustomed to deciding. Eliminating investigation into the mental state of the parents should simplify the inquiry.

Members of the military who are deployed for prolonged periods of time would not be able to claim their previous residence as home state if the move with the child extends through the deployment. Although servicemembers should not be placed at a disadvantage as a result of deployment, jurisdiction to determine child custody should not be negatively affected as long as they have the opportunity to present their case. If they are not in the same state as the child, that can be done through the mechanisms provided in the statute for communication between courts to take testimony in other states[128] and through the possibility of forum non conveniens in appropriate circumstances.[129] If the child is with the servicemember, disallowing jurisdiction in the state from which they are absent should not be a problem.

A wrongful removal under the current test would not automatically be considered temporary. Despite the cases cited above,[130] the unjustifiable conduct section of the UCCJEA[131] only refers to declining jurisdiction in a state that *obtained* it through unjustifiable conduct. Nonetheless, the state to which the child was improperly transported would have to decline jurisdiction (subject to some exceptions), and the state that would have been the home state but for the removal might claim jurisdiction on one of the remaining grounds in section 201.[132]

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128 UCCJEA § 111.

129 UCCJEA § 207.

130 *See supra* text accompanying notes 78-79.

131 UCCJEA § 208.

132 Depending on the particular circumstances of the case, jurisdiction might be claimed on significant connection, or catch-all grounds. *See* UCCJEA §§ 201(a)(2), (3), (4).

Although one could argue that the proposed test is merely a slightly altered version of the totality test, addition of a set duration, use of duration in all cases except those in which the absence occurs at the end of the six month period, and elimination of any inquiry into the subjective intent of the parents could provide greater certainty than the current tests.

A potential flaw in the duration test is that it might deter cooperation between parents with respect to visitation. Duration alone may discourage visitation for beneficial activities such as visiting family. As noted above, it is unlikely most parents would know about the rule before they consult an attorney to obtain an initial order. However, word could spread through the internet, and the parents might be familiar with the rule if a modification is requested after all parties have exited the initial state. It should be noted that this possibility exists in the very definition of home state through duration. Extending that policy to the temporary absence exception to home state should not exacerbate the problem.

V. Conclusion

Although no test can define temporary absence without producing some uncertainty, a set maximum duration, with a secondary examination into the purpose of the absence if it occurs immediately preceding commencement of the action, would assist courts and litigants to determine home state status more readily, and could potentially decrease jurisdictional conflicts in child custody cases.

Although state rules relating to custody and visitation vary somewhat, it is ultimately not beneficial to children for their parents to wrangle about jurisdiction in these cases. The parents' time, energy, and finances are better spent on the child, and the substantive questions of custody and visitation, rather than on the place that will render that decision. As courts work together to determine the most appropriate forum and to take testimony remotely using modern technology,[133] these problems should abate. In the meantime, greater clarity in the definition of temporary absences could improve the system.

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133 *See* UCCJEA § 111.