What, No Home State? Hague/UCCJEA, Military Families, Athletes, Snow Birds and Others

by: Jacqueline M. Valdespino and Mark E. Sullivan[1]

"Home is where the heart is."
- Pliny the Elder

"Where we love is home - home that our feet may leave, but not our hearts."
- Oliver Wendell Holmes

"A house is not a home."
- Benjamin Franklin

"Home is the place where, when you have to go there, they have to take you in."
- Robert Frost

"Where thou art, that is home."
- Emily Dickinson

While all these sentiments are true, for family law practitioners, *home* means something quite specific, depending on the issue one is facing. Its meaning is changeable, and it is a term of art. To quote Charles Dickens, "Home is a name, a word, it is a strong one; stronger than magician ever spoke, or spirit ever answered to, in the strongest conjuration." The family lawyer needs to know several aspects of "home" to practice competently.

I. "Domicile" for Divorce

Most states (except Alaska, South Dakota, and Washington) have a durational residency requirement for the plaintiff in a divorce. (The defendant need not be a

resident in the forum in order for the court to divorce the parties under the divisible divorce doctrine.) The court's personal jurisdiction over the defendant is necessary only if the court enters personal orders regarding the defendant. *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 418 (1957) ("[A] court cannot adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant.".)

The durational domicile or residency requirement goes to the heart of the court's ability to divorce the parties. In *Williams v. North Carolina* ("Williams I"), 317 U.S. 287, 63 S.Ct. 207, 87 L.Ed. 279 (1942), and *Williams v. North Carolina* ("Williams II"), 325 U.S. 226, 65 S.Ct. 1092, 89 L.Ed. 1577 (1945), the Supreme Court held that domicile of one party to a divorce creates an adequate relationship with the state to justify its exercise of power over the marital relation, 317 U.S. at 298, 63 S.Ct. at 213; 325 U.S. at 235, 65 S.Ct. at 1097. Williams II left a sister state free to determine whether there was domicile of one party in an 'ex parte' proceeding so as to give the court jurisdiction to enter a decree. 325 U.S. at 230, note 6, 237.

The following charts lists the domicile/residency requirements:

Alabama	6 Months or 180 Days
Alaska	No statutory provision
Arizona	90 Days
Arkansas	60 Days
California	6 Months or 180 Days

[1] Ms. Valdespino practices in Miami, Florida, and Mr. Sullivan practices in Raleigh, North Carolina. Parts of this manuscript are adapted from Mr. Sullivan's book, **THE MILITARY DIVORCE HANDBOOK** (ABA 2nd

Colorado	90 Days
Connecticut	12 Months or 1 Year
Delaware	6 Months or 180 Days
Dist. of Columbia	6 Months or 180 Days
Florida	6 Months or 180 Days
Georgia	6 Months or 180 Days
Hawaii	6 Months or 180 Days
Idaho	6 Weeks
Illinois	90 Days
Indiana	6 Months or 180 Days
Iowa	12 Months or 1 Year
Kansas	60 Days
Kentucky	6 Months or 180 Days
Louisiana	6 Months or 180 Days
Maine	6 Months or 180 Days
Maryland	12 Months or 1 Year
Massachusetts	12 Months or 1 Year
Michigan	6 Months or 180 Days
Minnesota	6 Months or 180 Days
Mississippi	6 Months or 180 Days
Missouri	90 Days

Ed., 2011).

Montana	90 Days
Nebraska	12 Months or 1 Year
Nevada	6 Weeks
New Hampshire	12 Months or 1 Year
New Jersey	12 Months or 1 Year
New Mexico	6 Months or 180 Days
New York	12 Months or 1 Year
North Carolina	6 Months or 180 Days
North Dakota	6 Months or 180 Days
Ohio	6 Months or 180 Days
Oklahoma	6 Months or 180 Days
Oregon	6 Months or 180 Days
Pennsylvania	6 Months or 180 Days
Rhode Island	12 Months or 1 Year
South Carolina	12 Months or 1 Year
South Dakota	No Statutory Provision
Tennessee	6 Months or 180 Days
Texas	6 Months or 180 Days
Utah	90 Days
Vermont	6 Months or 180 Days
Virginia	6 Months or 180 Days

Washington	No Statutory Provision
West Virginia	12 Months or 1 Year
Wisconsin	6 months or 180 Days
Wyoming	60 Days

When a state's divorce law stipulates that a spouse must be “domiciled” in that state, it means that the spouse must have a fixed, permanent home in that state, with the intention of staying. To further muddy the waters, most states (e.g., Alabama, Georgia, New York, South Carolina) have construed the term “resident” in the divorce statute to be synonymous with domicile, and some states have held that a petitioning party must be both domiciled and a resident (e.g., Rhode Island). *See* Annotation, *Length or Duration of Domicil as Distinguished from Fact of Domicil, as a Jurisdictional Matter in Divorce Action*, 2 A.L.R.2d 291 (1948 & Supps); *see also* Rhonda Wasserman, *Divorce and Domicile: Time to Sever the Knot*, 39 Wm & Mary L Rev 1, 7-24 (1997) (discussing the history of domicile and divorce).

A person can have several residences, but only one domicile:

> To constitute domicil, the residence at the place chosen for the domicil must be actual, and to the fact of residence there must be added the intention of remaining permanently; and that place is the domicil of the person in which he has voluntarily fixed his habitation, not for a mere temporary or special purpose, but with the present intention of making it his home. This intention must be to make a home in fact, and not an intention to acquire a domicil. Where it becomes highly advantageous to the claimant temporarily to feign an intention to become a resident for only a brief time, in order to accomplish other ends, his claim of intention will be scrutinized and weighed like any other evidence in the light of his conduct and all the circumstances surrounding it. Moreover, a person may have only one domicil at any one

> time. A former domicil persists until a new one is acquired. Therefore proof of the acquisition of a new domicil of choice is not complete without evidence of an abandonment of the old.

Juma v. Aomo, 143 Conn. App. 51, 57-58, 68 A.3d 148, 152 (2013) (internal quotations and internal citations omitted).

To obtain a valid divorce, a party must file in a jurisdiction that is the domicile of at least one of the parties to the divorce. Family law practitioners should need to have a working understanding of the concept of "domicile." Here are the basics for "Domicile 101."

A. In *Old Republic National Title Insurance Co. v. Koregay*, 292 P.3d 1111, 1115 (Colo. Ct. App. 2012), the court made the following observation: Colorado cases have distinguished "residence" from "citizenship," "domicile," or "legal residence." In *Carlson v. District Court,* 116 Colo. 330, 338–39, 180 P.2d 525, 529–30 (1947), the supreme court held that a pastor temporarily serving a church in Leadville was a resident of Colorado for purposes of service of process on him. The court reasoned that there was a difference between residence—which requires only "personal presence at some place of abode with no present intention of definite and early removal therefrom and with a purpose and intent to remain for an undetermined period"—and domicile, which refers to "the legal home of a person, or that place where the law presumes that he has the intention of permanently residing although he may be absent from it." *Id.* at 338, 180 P.2d at 529–30; *see also Gordon v. Blackburn,* 618 P.2d 668, 671

(Colo.1980) (distinguishing "residence" from "legal residence" or "domicile" in election context).

B. A person may have more than one "residence" but only one "domicile. *Old Republic National Title Insurance Co. v. Koregay*, 292 P.3d 1111, 1116 (Colo. Ct. App. 2012), citing *Black's Law Dictionary* 1423 (9th ed. 2009) (contrasting the term "residence" with "domicile" and stating "A person thus may have more than one residence at a time but only one domicile.").

C. Thus, a person cannot establish a new domicile unless there has been an "actual abandonment" of the prior domicile. *Koscove v. Koscove*, 113 Colo. 317, 156 P.2d 696 (1945). Thus, while a plan to leave upon the happening of a future event does not preclude one from acquiring a new domicile, a temporary move to a new residence with the intent to return to one's former home does not establish a new domicile, since there has been no "abandonment" of the previous domicile. *People v. Chrysler*, 83 Colo. 355, 265 P. 92 (1928).

D. Once a domicile has been established, it is presumed to continue until a new domicile is established. *Id*.

E. To effect a change of domicile there must be (1) an actual abandonment of the first domicile, accompanied by the intention not to return to it, and (2) the acquisition of a new domicile by actual residence at another place, coupled with the intention of making the last acquired residence a permanent home. *Id.*

F. Domicile is a factual issue that can be proved by direct evidence and circumstantial evidence. Expressions of intent are competent evidence of

domicile but not conclusive proof; courts will examine all relevant evidence, including objective indicia, when making domicile determinations. A person asserting a change in domicile bears the burden of proving that the old domicile was abandoned and a new one established. *Old Republic National Title Insurance Co. v. Koregay*, 292 P.3d 1111, 1115 (Colo. Ct. App. 2012).

The jurisdictional basis of divorce is domicile of one or both of the parties. One annotation describes domicile in detail as follows:

> In legal parlance a person's "domicile" is that place where he has a settled connection for legal purposes, either because his home is there or because that place is assigned to him by the law. In a broader sense, it is that place to which a person, whenever absent, has the intention of returning, and from which he has no present intention of moving; it is the place of his true, fixed, permanent home and principal establishment.
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> Such a domicile may be any one of three different kinds, depending upon the manner by which it is acquired. Thus, the domicile acquired by every child at birth is a domicile of origin; the place which a person elects and chooses for himself to displace his previous domicile is called a domicile of choice; and, where a person having no capacity to acquire a domicile of choice has a domicile assigned to him, independent of his own intention or action of residence, he acquires a domicile by operation of law. For the purposes of the present discussion we are concerned only with a domicile of choice, that is, the place which a person has voluntarily chosen as his sole or chief residence, with an intention of continuing to reside there for an unlimited time.
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> In order to acquire a domicile by choice there are two essentials which must concur: first, an actual residence in a new locality at which place the person is physically present, and second, an intention to remain in or at that place for an indefinite period of time. In addition, there must be an intention to abandon the old domicile. Moreover, the acts of the person must correspond with such intention. The change of residence must be voluntary; the residence at the place chosen must be actual; and to the fact of residence there must be added the *animus manendi*. The mere fact of removal without the intention avails nothing, as does not an intention to acquire a new domicile without the fact of an actual removal and an actual residence in the new locality.
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> Once a domicile is established it continues until it is superseded by a new one. Consequently, the old domicile is never lost until a new one is acquired.

> This follows from the proposition that everyone must at all times have a domicile somewhere. And a domicile once existing cannot be lost by mere abandonment even when coupled with the intent to acquire a new one, but continues until a new one is in fact gained. To effect the abandonment of one's domicile, there must be the choice of a new domicile, actual residence in the place chosen, and the intent that it be the principal and permanent residence.
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> Inasmuch as the element of intention plays so large a part in the determination of one's domicile, a bit more should perhaps be said with regard to the nature of the intention required. An intention of acquiring a new domicile, in itself, where not accompanied by the intention of residing there for a more or less definite time and of making it a home is insufficient to bring about any change in a person's domiciliary status. Thus, a change of domicile is not effected by the desire to derive the benefits of a domicile if there is no wish to change one's home to that place.
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> It is also necessary that, for one to acquire a domicile of choice, he must have a present intention of permanent or indefinite living in a given place, not for mere temporary or special purposes, or until such time as it is to his advantage to take up his place of residence elsewhere. Ordinarily, however, it is not necessary that a person intend to remain at a place for all time if he has the intention of remaining there for an indefinite period of time.[2]

Once established, a domicile continues until the individual acquires a new one. To establish a new domicile, one must actually move to another place with the present intent of remaining there as his or her new place of domicile. If there is physical relocation without the present intent to remain in the new location, the prior state continues as the individual's domicile.

To see how the application of facts works in the world of "domicile determination," let's take a look at Joe Garcia, our next client. Joe is a professional athlete and travels all over the country during the year. He has a house in Indiana, and this is owned jointly with his wife. This is where his family lives. Joe's bills are sent there, he banks there

[2] George H. Fischer, Annotation, *Residence or Domicile, for Purposes of Divorce Action, of One in Armed Forces*, 21 A.L.R. 2d 1183. *See also* Captain Dean W. Korsak*, The Hunt for Home: Every Military Family's Battle with State Domicile Law*, 69 AIR FORCE L. REV. 251, 255 (2013).

and most of his personal effects and all of his household goods are located there. Joe also has an apartment in Florida (this is for training camp), where he spends roughly three months of every year. He also has an apartment in Hawaii (for off-season visits), and an apartment in Vermont (for skiing). Joe can be found at the Hawaii or Vermont homes regularly for month-long, sometimes longer, intervals. Joe doesn't vote, and his children are not old enough for in-state tuition at college. He and his wife do their banking in Indiana and that's the home listed on their state (Indiana) and federal tax returns.

Despite his travels, it is safe to say that Joe has one domicile: Indiana. This is the place he calls home, and it is where he is currently living for an indefinite period of time. If he's away, Indiana is the place to which he intends to return. All of these phrases are another way of saying that "Indiana is home" for Joe, and it's his domicile. If he wants to file for divorce, Indiana is where the filing must take place.

Now let's take a look at a different situation. Jim Sailor is a commander in the U.S. Navy.

- Jim grew up in Virginia. He entered the Navy there.
- He is now assigned to Naval Air Station Atsugi in Japan. All his personal effects are there. He does his banking on-line with the Navy Federal Credit Union in Tennessee.
- Jim's previous duty station was San Diego; he and his wife and their two children were there for three years. They bought a car there for each parent, and the

vehicles were registered in California. They rented an apartment there, and had most of their household goods in San Diego, as well as their personal effects. The rest of these were in household storage in Tennessee.

- Before the San Diego posting, Jim was at the Naval Personnel Center in Millington, Tennessee for four years. He has voted there for state and federal elections; he has done the same by absentee ballot since he left Tennessee. He has been filing income tax returns through Tennessee, since the state has no income tax on salaries or wages. He has continued this ever since his assignment there. He and his wife had one car in Tennessee, which they sold upon the transfer to San Diego.
- Jim owns no real estate, and his last will and testament, prepared by the Navy just after he entered active duty, shows Virginia as his legal residence.
- His "Home of Record" is shown on Navy records as Virginia.

Can you imagine the difficulty that a judge would have in determining where the "legal residence" of Jim Sailor is? How would a judge go about deciding whether State A or State B is his domicile?

Members of the armed forces, due to their mobility, have special protections accorded to them in regard to domicile, taxes and voting.[3] The moves which a servicemember (SM) makes are, by and large, involuntary in nature. They are due to military orders. Federal law provides military members with unique protections because

[3] See Captain Dean W. Korsak, *The Hunt for Home: Every Military Family's Battle with State Domicile Law*, 69 Air Force L. Rev. 251, 255 (2013); George H. Fisher, Annotation, *Residence or Domicile, for Purposes of Divorce Action, of One in Armed Forces*, 21 A.L.R.2d 1183 (2222).

otherwise they might be considered domiciliaries of each state in which they are assigned. While the Servicemembers Civil Relief Act (SCRA) does not have a provision that directly affects divorce jurisdiction, it does have provisions regarding both taxing and voting, providing that presence in a state as a consequence of military orders does not deprive the servicemember of a domicile previously established. As voting and paying taxes are two important indicia of domicile, allowing the servicemember to keep a previously gained domicile goes a long way toward allowing a servicemember to retain a domicile for divorce purposes as well. Specifically, the SCRA allows SMs to retain their domiciles for tax purposes:

> (a) Residence or domicile
>
> A servicemember shall neither lose nor acquire a residence or domicile for purposes of taxation with respect to the person, personal property, or income of the servicemember by reason of being absent or present in any tax jurisdiction of the United States solely in compliance with military orders.[4]

It also allows this protection for voting purposes:

> For the purposes of voting for any Federal office (as defined in section 301 of the Federal Election Campaign Act of 1971 (2 U.S.C. 431)) or a State or local office, a person who is absent from a State in compliance with military or naval orders shall not, solely by -reason of that absence —
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> (1) be deemed to have lost a residence or domicile in that State, without regard to whether or not the person intends to return to that State;
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> (2) be deemed to have acquired a residence or domicile in any other State; or
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> (3) be deemed to have become a resident in or a resident of any other State.[5]

While the establishment of domicile is based on the totality of the circumstances, not

[4] 50 U.S.C. App. § 571.
[5] 50 U.S.C. App. § 595.

one or two isolated pieces of evidence, voting and state income taxation are strong indicia of domicile. Coupled with the necessary evidence of intent, they might be sufficient to carry the day.

The domicile determination, as stated earlier, is fact-specific. Counsel should focus on gathering information about state income taxes (if applicable), in-state tuition, location of the client's residence, where bank accounts are found, and so on. This information can be converted into a convenient checklist (shown below) for clients to complete and for attorneys to use in deciding whether Florida or some other state has jurisdiction, based on a client's domicile, to grant a divorce. A five-year look-back period is shown on the checklist, although five isn't a magic number; two, three or four could be just as useful.

DOMICILE CHECKLIST

✓	**Question or Issue**	**State(s), Years**	**Comments**
	For each item below, answer with information covering the last five years (or other period)		
	1. Physical location		
	Describe the dates, places, and circumstances of your residing here in State A in the past __ years on a separate sheet of paper.		
	2. Taxation		
	Where have you paid state income taxes?		
	(If applicable) Where have you paid local income taxes?		
	Where have you paid personal property taxes?		
	Where have you paid real property taxes?		

	Where have you paid any other state-related taxes (e.g., intangibles tax)?		
	Which state have you shown for your address on your Form 1040 (federal income tax return)?		
	3. Real estate		
	In what state(s) do you own residential real estate?		
	In what state(s) do you own other real estate?		
	4. Motor vehicles		
	For each motor vehicle you own (or partly own), give the state(s) of your driver's license(s).		
	Where is each motor vehicle registered?		
	Give the state of your driver's license.		
	5. Banking		
	In what state(s) do you have a checking account?		
	A savings account?		
	A safe deposit box?		
	Other investment accounts?		
	6. Voting		
	In which state(s) are you registered to vote in state, county, or local elections?		
	In federal elections?		
	7. Schooling		
	In which state(s) have your children attended school?		
	In which state(s) have you obtained resident tuition for yourself or a family member?		
	Nonresident tuition?		
	8. Other		

The importance of analyzing these facts and actions to determine an individual's

intent to establish or retain domicile cannot be overstated. Many servicemembers claim Florida or Texas, for example, as their domiciles because these states do not have an income tax. A close analysis of most of these claims, however, reveals that none of the above factors to support them, and also that the servicemember has never really resided in that state in the first place.

To analyze and possibly challenge a servicemember's assertion of domicile, it is necessary to determine what documents support a domicile claim. There are several methods that should prove productive. The first is to obtain a copy of his military payment statement, called a Leave and Earnings Statement (LES). This pay statement, issued twice a month for members of the military, contains an entry for "State Taxes" that will show what state CDR Jim Sailor has listed for state tax withholding. In addition, it is useful to get the member's DD Form 2058, "State of Legal Residence Certificate," which is completed at the same time as the SM's W-4 Statement for tax withholding purposes.

Thus, a challenge to the servicemember's claim regarding domicile requires good record-keeping on the part of the nonmilitary spouse. This includes records of taxes (state income taxes, personal, and real property taxes), voting registration, bank statements, home ownership, copies of pay statements, driver's licenses, and motor vehicle title and registration documents.

Some people confuse the military phrase "home of record" with *domicile*. In reality, they are two different things. "Home of Record" is a military administrative term that refers to the place to which the Defense Department will transport the servicemember

and his household goods upon separation from the service. Based on the place where the servicemember entered military service, “Home of Record” is a term that is not intended to carry legal implications over and above the financial considerations of such transportation.

Domicile doesn’t just support a claim for divorce in the case of a servicemember. It is important for the practitioner to understand that the jurisdictional tests for military pension division also include a domicile option. The jurisdictional basis for dividing a members pension is not found in state long-arm statutes; rather, it is set forth specifically in the Uniformed Services Former Spouses’ Protection Act, or USFSPA.[6] The Act provides that a state may only exercise jurisdiction over a member’s pension rights if 1) that state is his or her domicile; 2) the servicemember consents to the exercise of jurisdiction; or 3) the servicemember resides there for reasons other than military assignment in that state or territory. These statutory provisions are in addition to jurisdiction based on the more traditional long-arm statutes, which allow the court to exercise of jurisdiction consistent with due process if there are sufficient minimum contacts with a state. One court stated:

> the trial court erred in relying on long-arm jurisdiction or traditional notions of minimal contacts to acquire jurisdiction to divide [the member’s] military pension. . . . The question whether a trial court acquires jurisdiction over a military member’s pension is governed not by state rules of *in personam* jurisdiction or procedure, but rather by the specific terms of the USFSPA. By virtue of the Supremacy Clause of the United States Constitution, those terms, in effect, preempt state rules with respect to a court’s jurisdiction to consider the military

[6] 10 U.S.C. § 1408(c)(4).

pension as a marital asset.[7]

Domicile is the first stated basis for jurisdiction under 10 U.S.C. 1408(c)(4). A court may exercise jurisdiction over a SM's pension "by reason of . . . (B) his domicile in the territorial jurisdiction of the court." This is the safest and most effective way of obtaining the court's jurisdiction over military retired pay.

II. Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA): "Home State"

If the parents are living in different states within the United States, the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), adopted in forty-nine of the fifty states (the exception being Massachusetts), determines where these cases are heard. The UCCJEA is very specific about jurisdiction, and much clearer than its predecessor, the Uniform Child Custody Jurisdiction Act (UCCJA).

The UCCJEA's jurisdictional model gives a state exclusive, continuing jurisdiction once it makes an initial child custody determination. There are two important sets of rules: First, the UCCJEA establishes how a state initially gains exclusive jurisdiction. Second the UCCJEA sets a clearly defined line that must be met in order for the first court to lose jurisdiction.

There are four ways the original state can gain jurisdiction to make an initial custody determination and thus acquire exclusive, continuing jurisdiction. The most

[7] *In re* Marriage of Akins, 932 P.2d 863, 867 (Colo. Ct. App. 1997). *See also In re* Hattis, 292 Cal. Rptr. 410, 196 Cal. App. 3d 1162 (1987) (court held there was no federal jurisdiction under 10 U.S.C. § 1408(c)(4) to partition the military retired pay of a former domiciliary despite adequate "minimum

common, *and the priority*, is where the state is the child's "home state." A home state is the place where "a child lived with a parent . . . for at least six consecutive months immediately before the commencement of a child-custody proceeding." The UCCJEA prioritizes home state jurisdiction, so a court must first consider whether the child has a home state. If there is no home state, or if the home state declines jurisdiction, a court can acquire jurisdiction under a "significant connection" test or two fallback provisions.

Once established, exclusive jurisdiction can only be lost in one of two ways: (1) if no party (nor the child/children) continues to have any "significant connection" with the original state, and there is no substantial evidence available to the court in that state, or (2) if no party (nor the child/children) "presently resides" in the original state.

In *Kalman v. Fuste*, 207 Md. App. 389, 52 A.3d 1010 (2012), the mother relocated to Florida after the entry of a divorce and custody order in Maryland. The parties continued to litigate in Maryland over various custody issues. When the mother challenged the trial court's continuing jurisdiction, the trial judge brushed off the objection, but the appellate court took it seriously, pointing out that the only real contact with Maryland was the child's spending one week in the state on her fifth birthday. The child was raised by the mother in Florida, and the father visited the child there 3-4 times a year until 2011, when he began monthly visits. In light of this, the appellate found that Florida – not Maryland – had jurisdiction, due to the "significant connection/substantial evidence" test.

A similar result occurred in *Billhime v. Billhime*, 952 A.2d 1174 (Pa. Super. 2008).

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contacts.").

The children were born in Florida. The parties later relocated to Pennsylvania, where a custody order was subsequently entered. In 2005 the mother and children moved back to Florida, where they continued to reside at the time of the custody decision in 2007 (declining to allow the mother's request to relinquish jurisdiction) and the appellate court decision. The appellate decision stated that the trial judge focused only on the father's significant connection with Pennsylvania, such as his ownership of a farm there, his driver's license, the visitation he enjoyed there with the children, and the pending property division case. There was no detailed focus, however, on whether the children continue to maintain a significant connection with Pennsylvania, outside of their visits there. Since essentially all of the evidence showed that the information relating to the welfare of the children was located in Florida – medical and dental care providers, school and education records, extracurricular activities, church attendance, friends and relatives – the trial judge was found to have erred in refusing to allow the mother's motion as to relinquishment of jurisdiction.

Note that only the original decree state may make the "significant connection/substantial evidence" determination. In contrast, any state may determine that no party presently resides in the original state.

The issue of the secondary test for custody jurisdiction, "Significant Connection, Substantial Evidence," which is found in Section 201 (a)(2) of the UCCJEA, arises quite often when a client has no fixed home and moves around often enough to make it difficult to pin down a place where the child has been for the last six months. If there is no "home state" for the children (or child), or if the home state declines to exercise

custody jurisdiction, then the courts of another state may properly exercise custody jurisdiction if the children and at least one contestant (parent or one acting as a parent) have sufficient ties to that state. This is known as a "significant connection." The significant connection must be more than mere physical presence. In addition, there must be available in that state substantial evidence concerning the child's care, protection, training and personal relationships.

Clearly, more than one state can attempt to exercise jurisdiction on this basis. However, only one state may exercise jurisdiction. If two actions are filed, the statute resolves the conflict in favor of the one which was filed first. The courts in both states must communicate with each other, and in the appropriate case the judge in the state where the first lawsuit was filed may defer to the judge in State #2 for custody jurisdiction, as a result of the judicial communication.

This could be the situation in Joe Garcia's case, set out above under divorce and domicile. If Joe decided to abandon his Indiana domicile, and he took the parties' children with him from Indiana to Florida for five months (with a school tutor to keep on top of their schoolwork), and then to Hawaii for three months after "school was out of session" and the tutor released, there would be no "home state" for the children. Thus the court – in whatever state a custody case was filed, Indiana or Hawaii, would need to look at the second test under the UCCJEA for rules in determining the proper jurisdictional forum for a custody dispute. Arguably both Indiana and Hawaii would have significant connection jurisdiction. But under the UCCJEA, only one state can exercise

authority over the children's custody.

Difficulties with the "home state situation" also arise in military cases. One such example is the "Jim Sailor case," outlined above in the analysis of divorce and domicile. The issue of custody jurisdiction arose when co-author Mark Sullivan handled his case in North Carolina in 2010-11. As stated, Jim was stationed in Japan at a U.S. Navy base when the case arose. His wife had just left to "join the Navy and see the world," so to speak, and she was completing the Officer Basic Course at Naval Station Newport, Rhode Island. The two children stayed behind with Jim, and this is when he decided to file for custody.

The only connection with North Carolina, where Mr. Sullivan practices, was the fact that Jim's parents live in Chapel Hill, where they retired, and that every summer Jim and his wife would drop off the children for a month with their grandparents while the parents took a vacation. Thus there was a small factual basis for choosing North Carolina as the state in which to file for custody. Japan was out of the running, since that nation will not allow the filing of a custody action in its courts when neither parent is a Japanese national, as was the case with Commander and Mrs. Sailor.

The initial challenge was to make sure that there was a significant connection with the forum state, North Carolina, and that meant more than the mere physical presence of Jim Sailor at the time the lawsuit was filed. It was, in short, necessary for Jim to "create a home" and back up his intentions with concrete actions. He had always, he said, wanted to return to North Carolina when he finished his Navy career, if only to be near his parents as they grew older. But Jim had been careless about his

"home connection," so that – when he arrived for the initial interview to discuss his case - it became quickly apparent that he had several homes or, just as likely, no home at all.

There was some difficulty in getting Jim's car and driver's license established in North Carolina, since he was merely in the state on leave from Japan. Enrollment with the state Department of Revenue was much easier; North Carolina is always happy to recognize and accept new taxpayers! It was unpleasant for Jim, however, since he'd been coasting along with Tennessee as the "tax home" on his Leave-and-Earnings Statement, and that state has no income tax for wages. Jim quickly re-did his last will and testament so as to show North Carolina as his domicile; a brief appointment at the JAG office in Japan took care of that. With these items squared away, Jim then applied for registration as a North Carolina voter, and he was accepted.

The upshot of all of this was to plot out and complete a campaign of establishing proof of a "significant connection" for himself with North Carolina. Jim knew that he could show the children's connection – their time every summer with the grandparents – but he realized that (in golfing terms) he needed to "improve the lie of the ball" in regard to his own connections with the state, which were nonexistent when he first broached the subject of separation and divorce. While not every client needs to "create a domicile" in order to take advantage of the "Significant Connection, Substantial Evidence" test, it makes a lot of sense to examine the issue of "where home is" and to take steps to either establish a domicile or at least to "shore up the evidence" if it is not clear where one has his legal residence.

The “home state” test is straightforward. “Home state” means 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. (Note: an unborn child does not have a “home state.” *See Gray v. Gray*, ___ So.3d ___, 2013 WL 3967672 (Ala. Civ. App., Aug. 2, 2013), and cases cited therein.

The UCCJEA's use of the term “lived” in the definition of “home state” focuses on the child's physical presence rather than intent of the parents. (Compare the Hague Convention’s “settled purpose” doctrine, below.)

As the Supreme Court of Texas observed:

> [T]he Legislature used the word “lived” “precisely to avoid complicating the determination of a child's home state with inquiries into the states of mind of the child or the child's adult caretakers.” . . . The UCCJEA was thus intended to give prominence to objective factors. We believe that the UCCJEA should be construed in such a way as to strengthen rather than undermine the certainty that prioritizing home-state jurisdiction was intended to promote, and thus decline to apply a test to determine where a child “lived” based on the parties' subjective intent.

Powell v. Stover, 165 S.W.3d 322, 326 (Tex. 2005) (quoting *Escobar v. Reisinger*, 2003-NMCA-047, ¶ 16, 133 N.M. 487, 64 P.3d 514). *See* David Carl Minneman, Annotation, *Construction and Application of Uniform Child Custody Jurisdiction and Enforcement Act's Home State Jurisdiction Provision*, 100 A.L.R.5th 1 (2002).

While the definition of “home state” is straightforward, there is much litigation about “home state” when individuals in two jurisdictions make conflicting claims of

jurisdiction, such as when the parents have resided with the child in both jurisdictions, and one argues that the residence in the other jurisdiction was "temporary." In fact, the most frequent claim in both UCCJEA and Hague Convention (see below) cases is that the children involved in the case have been in one of the jurisdictions only on a "temporary" basis. That issue is fact-driven.

A recent case discussed this issue well:

> The UCCJEA explicitly includes "[a] period of temporary absence of a child, parent, or person acting as a parent" in the six-month time period necessary to establish a child's "home state." RCW 26.27.021(7). In evaluating whether an absence was intended to be temporary or permanent, courts of this and other states consider the parents' intent. A.R.K.-K., 142 Wash.App. at 303–04, 174 P.3d 160 (citing In Re Marriage of Payne, 79 Wash.App. 43, 52, 899 P.2d 1318 (1995)); In re Parentage of Frost, 289 Ill.App.3d 95, 224 Ill.Dec. 409, 681 N.E.2d 1030 (1997). Courts weigh a number of factors in order to determine whether an absence was temporary, including "the parent's purpose in removing the child from the state, rather than the length of the absence," "whether the parent remaining in the claimed home state believed the absence to be merely temporary," "whether the absence was of indefinite duration," and "the totality of the circumstances surrounding the child's absence." Sajjad v. Cheema, 428 N.J.Super. 160, 173, 51 A.3d 146 (2012) (citing Arnold v. Harari, 772 N.Y.S.2d 727, 729–30, 4 A.D.3d 644 (2004); Consford v. Consford, 711 N.Y.S.2d 199, 205, 271 A.D.2d 106 (2000); Chick v. Chick, 164 N.C.App. 444, 449, 596 S.E.2d 303 (2004); Sullivan v. Sullivan, 2004 UT App. 485, ¶ 12, 105 P.3d 963, 966. Courts have found that "temporary absences include court-ordered visitations, and vacations and business trips." Sajjad, 428 N.J.Super. at 173 (citing Alley v. Parker, 1998 ME 33, ¶ 5, 707 A.2d 77, 78; In re Lewin, 149 S.W.3d 727, 739 (Tex.App.2004)).

In re Marriage of McDermott, 173 Wash. App. 467, 307 P.3d 717 (2013).

A troublesome example of the definition of "home state" (and the loss of jurisdiction when no one lives there any more) in the military context is found in a recent case involving Colorado and Maryland involving a custodial parent who was "called to

the colors." The mother, who had a Maryland custody order, was mobilized and sent to Texas on active duty and then deployed overseas. After a battle between state court trial judges, the Colorado Supreme Court issued a show cause order to suspend a trial judge's decision to take over custody jurisdiction. The case was *In re Marriage of Brandt*, 268 P.3d 406 (Colo. 2012).

Briefly, the military mother and the daughter had lived in Maryland after the parties' divorce. The Maryland court had entered an order granting custody to the mother, who later entered the Army Nurse Corps while living in Maryland. She and the daughter moved to Ft. Hood, Texas for a year, pursuant to the mother's military orders, and then she was deployed to Iraq for six months. Upon her return to Texas, she was ordered back to Maryland for a non-deployable assignment.

In accord with the Army's rules and her own Family Care Plan, the mother turned over custody to her ex-husband in Colorado when her overseas deployment occurred. When she returned to the states, the parties agreed that the child would stay in Colorado for the next seven months to finish the school year, ending in May 2011. It was in May 2011 that the father filed in Colorado for the court to assume custody jurisdiction, since neither mother nor child "currently resided" in Colorado. The father also filed a motion to change custody. The trial judge agreed with the father and issued an order assuming jurisdiction.

Pursuant to the UCCJEA (Uniform Child Custody Jurisdiction and Enforcement Act), the judges from Maryland and Colorado conferred about custody jurisdiction by

telephone. But they could not agree. Each one maintained that *his state* was properly exercising jurisdiction.

The mother filed for an extraordinary writ in the Colorado Supreme Court. She asked that Court to grant an order for show cause – which it did – arguing that the district court erred in finding that she no longer resided in Maryland for custody jurisdiction purposes.

The Colorado Supreme Court disagreed with the trial judge's custody jurisdiction ruling, stating that the phrase "presently reside" in the UCCJEA is not the same as "currently reside" or "physical presence," and that the judge must make an inquiry into the totality of the circumstances, examining what makes up a person's permanent home, her *domicile*. Factors in the "totality of circumstances" inquiry should include a) the length of time for the absence of the parents and child; b) the reasons therefor; c) their intent in departing from the issuing state and in returning to it; d) the nature of a parent's military duties and assignments, whether active-duty or Guard/Reserve in nature; e) the usual indicia of "legal residence" or domicile, such as where the departing parent maintains her home, car, driver's license, job, professional licenses (if any), voting registration and state income taxes; f) the issuing state's determination of residency based on the facts and the issuing state's law; and g) other circumstances raised by the evidence. The Court further held that the parent who claims that the initial state has lost "exclusive, continuing jurisdiction" has the burden of proof in showing this before the trial judge.

Accordingly, the Court reversed and vacated the district's judge's order assuming jurisdiction. The case was remanded for further proceedings. In its final remarks, the Supreme Court of Colorado stated:

> …[The trial court's] order assuming jurisdiction to modify Maryland's custody decree cannot stand because that order appears to be based solely on Christine Brandt being out of Maryland on military assignment. The UCCJEA provision allowing Colorado to divest Maryland of jurisdiction based on where the parties "presently reside" should not be interpreted to allow one parent to re-litigate the issue of custody simply by winning the race to the courthouse when the other parent is absent from the issuing state.

268 P.3d at 416.

It is also noteworthy that the second way of losing jurisdiction, that no party "presently resides" in the original state, has given rise to differing interpretations. For the original state to lose exclusive jurisdiction, the provision requires a determination that the child, the child's parents, and any person acting as a parent do not presently reside in [the original] State. Either the original state or the new state may make the determination about where the parties presently reside--thus heightening the need for uniformity across jurisdictions for this particular provision of the UCCJEA--but the new state must have a basis for taking jurisdiction. This means that only states that would qualify to take original jurisdiction under § 201 may make a "presently resides" determination. "Resides" leads us to questions of residency, not "home state," a question of home and hearth. *See* Kevin Wessel, *Home Is Where the Court Is: Determining Residence for Child Custody Matters under the UCCJEA*, 79 U. Chi. L. Rev. 1141 (2012).

III. Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670 ("Hague Convention")/International Child Abduction Remedies Act ("ICARA"): "Habitual Residence"

Professor Robert Spector pointed out in 2011 that the UCCJEA's definition of "home state" is *not* the same as the Convention's term "habitual residence," because the Convention does not define the term. Robert G. Spector, *Accommodating the UCCJEA and the 1996 Hague Convention*, 63 Okla. L. Rev. 615 (2011). This lack of definition was purposeful.

The High Court of Justice in the United Kingdom has explained the lack of a definition this way:

> The notion [of habitual residence is] free from technical rules, which can produce rigidity and inconsistencies as between legal systems.... The facts and circumstances of each case should continue to be assessed without resort to presumptions or presuppositions.... All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled.

In re Bates, No. CA 122.89 at 9-10, High Court of Justice, Fam.Div'n Ct.Royal Court of Justice, United Kingdom (1989) (citation omitted).

Professor Spector explained that there are currently three different approaches to habitual residence that are used, depending on the particular circuit. (Much of the discussion that follows is from his article. *See also* Jeff Atkinson, *The Meaning of "Habitual Residence" under the Hague Convention on the Civil Aspects of International Child Abduction and the Hague Convention on the Protection of Children*, 63 Okla. L. Rev. 647 (2011).

The “settled purpose” test, used in the Third and Sixth Circuits, was first set out in *Feder v. Evans-Feder*, 63 F.3d 217 (3d Cir. 1995). It is explained by the Third Circuit as follows:

> [A] child's habitual residence is the place where he or she 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.

Feder, 63 F.3d at 224; *see also Armiliato v. Zaric-Armilato*, 169 F. Supp. 2d 230 (S.D. N.Y. 2001) (using the “settled purpose” doctrine and deciding that although the child traveled extensively with her parents, she was born in Italy, spoke Italian, and always returned to Italy after their travels, and therefore Italy was the child's habitual residence); *People ex rel. Ron v. Levi*, 719 N.Y.S.2d 365 (N.Y. App. Div. 2001).

The Sixth Circuit reexamined the issue of habitual residence and affirmed the “settled purpose” approach. It held that habitual residence is the place where the child has been physically present for an amount of time sufficient to be acclimatized so that the child has a degree of settled purpose from the child's point of view. *Robert v. Tesson*, 507 F.3d 981 (6th Cir. 2007); *Lockhart v. Smith*, 2006 WL 3091295 (D. Me. 2006) (finding two children who relocated with their mother to Canada while their father spent eighteen months in prison to be habitual residents of Canada, regardless of the father's intent).

The Ninth Circuit interpreted the concept of settled purpose to mean that both parents must have a settled intent that their children remain in the new country in order

for habitual residence to shift. *Mozes v. Mozes*, 239 F.3d 1067 (9th Cir. 2001). The court appeared to be concerned that it would be impossible to apply the settled purpose language of *Feder* to cases involving young children.

This conflict was recognized in by the Second Circuit in *Gitter v. Gitter*, 396 F.3d 124 (2d Cir. 2005). The court in that case fashioned an amalgam of the two tests. The court held that normally the child's habitual residence ought to be determined by the shared intent of the parents. However, since in some cases the child will have resided for a considerable period of time in one country without the parents coming to an agreement on where the child should reside, the court should also determine whether the child has become acclimatized to the new country regardless of the parent's intentions.

These three approaches continue to divide the Circuit Courts of Appeal. In *Ruiz v. Tenario*, 392 F.3d 1247 (11th Cir. 2004), the court determined that a three-year stay in Mexico was insufficient to change the habitual residence of the children to Mexico from the United States because the court could not find a settled intent on the part of the parents to abandon their habitual residence in the United States. The mother had made comments to the effect that she was only moving to Mexico if their marriage worked out, and therefore even three years was not sufficient to establish an intent to abandon their old habitual residence. It seems clear that if the court applied the “settled purpose” test that habitual residence would have shifted to Mexico.

IV. Uniform Interstate Family Support Act: "Home State"

The Uniform Interstate Family Support Act (UIFSA) contains a definition of "home state" in Section 102(2):

> "Home State" means the State in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately preceding the time of filing of a petition or comparable pleading for support and, if a child is less than six months old, the State in which the child lived from birth with any of them. A period of temporary absence of any of them is counted as part of the six-month or other period.

The definition is *only* relevant when Sections 204 or 207 come in to play: when there are simultaneous proceedings or when there are multiple conflicting orders. As noted in the Commentary to Section 102,

> For the limited purpose of resolving certain conflicts in the exercise of jurisdiction, Subsection (4) borrows the concept of "home state of a child" from the UCCJA and its successor, the UCCJEA[.]

Section 204 provides:

> (a) A tribunal of this State may exercise jurisdiction to establish a support order if the [petition] or comparable pleading is filed after a pleading is filed in another state only if:
>
> (1) the [petition] or comparable pleading in this State is filed before the expiration of the time allowed in the other state for filing a responsive pleading challenging the exercise of jurisdiction by the other state;
>
> (2) the contesting party timely challenges the exercise of jurisdiction in the other state; and
>
> (3) if relevant, this State is the home state of the child.
>
> (b) A tribunal of this State may not exercise jurisdiction to establish a support order if the [petition] or comparable pleading is filed before a [petition] or comparable pleading is filed in another state if:
>
> (1) the [petition] or comparable pleading in the other state is filed before the expiration of the time allowed in this State for filing a responsive pleading challenging the exercise of jurisdiction by this State;

(2) the contesting party timely challenges the exercise of jurisdiction in this State; and
(3) if relevant, the other state is the home state of the child.

The Commentary to Section 204 explains:

> This section is similar to Section 6 of the Uniform Child Custody Jurisdiction Act. Under the one-order system established by UIFSA, it is necessary to provide a new procedure to eliminate the multiple orders so common under RURESA and URESA. This requires cooperation between, and deference by, sister-state tribunals in order to avoid issuance of competing support orders. To this end, tribunals are expected to take an active role in seeking out information about support proceedings in other states concerning the same child. Depending on the circumstances, one or the other of two tribunals considering the same support obligation should decide to defer to the other. In this regard, UIFSA makes a significant departure from the approach adopted by the UCCJA, which chooses "first filing" as the method for resolving competing jurisdictional disputes. In the analogous situation, the federal Parental Kidnapping Prevention Act chooses the home state of the child to establish priority. Given the preemptive nature of the PKPA, and the possibility that custody and support are both involved in the case, UIFSA opts for the federal method of resolving disputes between competing jurisdictional assertions by establishing a priority for the tribunal in the child's home state. If the child has no home state, "first filing" controls.

Section 207 concerns determination of the controlling child support order when there are multiple orders from multiple states. This section provides, in pertinent part:

> If two or more tribunals have issued child support orders for the same obligor and child, and more than one of the tribunals would have continuing, exclusive jurisdiction under this [Act], an order issued by a tribunal in the current home state of the child must be recognized, but if an order has not been issued in the current home state of the child, the order most recently issued must be recognized.

The Commentary explains:

> Subsection (b) establishes the priority scheme for recognition and prospective enforcement of a single order among existing multiple orders

> regarding the same obligor, obligee, and child. A tribunal requested to sort out the multiple orders and determine which one will be prospectively controlling of future payments must have personal jurisdiction over the litigants in order to ensure that its decision is binding on all concerned. For UIFSA to function, one order must be denominated as the controlling order, and its issuing tribunal must be recognized as having continuing, exclusive jurisdiction. In choosing among existing multiple orders, none of which can be distinguished as being in conflict with the principles of UIFSA, subsection (b)(1) gives first priority to an order issued by the only tribunal that is entitled to continuing, exclusive jurisdiction under the terms of UIFSA, i.e., an individual party or the child continues to reside in that state and no other state meets this criterion. If two or more tribunals would have continuing, exclusive jurisdiction under the act, Subsection (b)(2) first looks to the tribunal of the child's current home state. If that tribunal has not issued a support order, subsection (b)(2) looks next to the order most recently issued. Finally, subsection (b)(3) provides that if none of the existing multiple orders are entitled to be denominated as the controlling order because none of the preceding priorities apply, the forum tribunal is directed to issue a new order, given that it has personal jurisdiction over the obligor and obligee. The new order becomes the controlling order, establishes the continuing, exclusive jurisdiction of the tribunal, and fixes the support obligation and its nonmodifiable aspects, primarily duration of support, see Sections 604 and 611(c), infra.

This section is relevant only if two or more tribunals would have continuing exclusive jurisdiction, an impossibility under UIFSA; it is possible only when there are lingering orders under URESA. This section will lose its relevance when all children have aged out of URESA, i.e., 21 years after the change-over from URESA to UIFSA.

V. Conclusion

Home state issues are a continuing concern for domestic practitioners. Whether the case involves domicile and divorce, home state and custody, or some other related issue, it is important to pay attention to the facts, since all cases are fact-specific, and to perform sufficient research into the law in order to handle the case competently and ethically.