CAN GRANNY HAVE A NEW HOME? RESOLVING THE DILEMMA OF DEMENTIA AND DOMICILE IN FEDERAL DIVERSITY JURISDICTION CASES

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Americans are living longer and, unfortunately, suffering from Alzheimer's dementia in greater numbers. As the population has aged, new legal issues have emerged requiring innovative resolutions. One particularly important issue facing incompetent adults is equitable access to the federal courts under diversity jurisdiction. For individuals, citizenship is equated with the individual's domicile—the place where the individual resides and to which he intends to return. Determination of incompetent adults' domicile, because such adults lack the capacity to form intention, has presented federal courts with a unique challenge when the incompetent is relocated by his or her guardian post-incapacitation. The circuit courts are split regarding whether and under what circumstances an incompetent adult can change his domicile post-incapacitation, resulting in approaches that are either unworkable or result in disparate treatment of claims. As the population ages, it is critical to resolve how to determine an incompetent adult's citizenship for purposes of diversity jurisdiction. This Article tackles the important issue of whether and under what circumstances an incompetent adult can change his citizenship post-incapacitation.

INTRODUCTION

Louis Acridge was a successful member of the law enforcement community.[1] For nearly twenty years he served as

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sheriff in a community in New Mexico where he lived with his wife and children.[2] Unfortunately, in 1996 he was struck with Alzheimer's dementia and his mental acumen rapidly deteriorated.[3] Louis's wife, Mary, placed him in a retirement center in New Mexico.[4] Mary decided to move him to a long-term care facility in Texas after becoming dissatisfied with his care.[5] While in the Texas facility, Louis was placed in a room with a troubled resident who attacked and killed him.[6] Mary brought suit on behalf of herself and Louis in a federal district court in Texas against the Texas treatment facility for failing to protect Louis and failing to warn Louis's family of the known risks presented by his roommate.[7] Mary alleged diversity subject matter jurisdiction over the claims asserted by Louis's estate—the defendant treatment facility was a citizen of Texas and Louis was a citizen of New Mexico, as this was the last place Louis resided while competent.[8] Shortly after Mary filed suit, the treatment facility moved to dismiss the case for lack of diversity jurisdiction, arguing that Louis became a citizen of Texas when he was relocated to the Texas facility.[9]

In *Acridge v. Evangelical Lutheran Good Samaritan Society*, the federal district court tackled the difficult issue of determining Louis's citizenship for diversity jurisdiction. In the federal judicial system, an individual's citizenship for diversity jurisdiction purposes is in the state in which the individual resides *and* intends to remain.[10] As incompetent adults are unable to formulate intention, determining their citizenship is complicated by their relocation to a new state post-incapacitation. The federal circuit courts of appeals have wrestled with how to resolve this dilemma, adopting inconsistent

1. Acridge v. Evangelical Lutheran Good Samaritan Soc'y, 334 F.3d 444, 446 (5th Cir. 2003).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.* By the time of his relocation, Louis was "completely unable to take care of himself, was disoriented as to time and place, and had little memory, and was virtually unaware of his surroundings." *Id.* at 447.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS 161–62 (5th ed. 1994).

approaches when faced with a suit by or against an incompetent adult.[11]

Louis's situation is not unique and is likely to become a more common occurrence in federal courts. The average age of the population has been increasing—the members of the baby boom generation are becoming senior citizens, and the average life span is increasing due to advances in medicine and health care.[12] The Centers for Disease Control and Prevention estimates that by 2030 the population of Americans aged 65 and older will double, accounting for 20% of the U.S. population.[13] Unfortunately, the percentage of older Americans suffering from Alzheimer's dementia is also increasing, rendering many of these elderly individuals unable to manage their own care.[14]

As the elderly population has increased, there have been aggressive state tort reform movements that limit the ability of plaintiffs to succeed in tort claims arising out of medical treatment and residential care.[15] As more incompetent individuals

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11. *See generally Acridge*, 334 F.3d at 450–53; Dakuras v. Edwards, 312 F.3d 256 (7th Cir. 2002); Long v. Sasser, 91 F.3d 645 (4th Cir. 1996); Rishell v. Jane Phillips Episcopal Mem'l Med. Ctr., 12 F.3d 171 (10th Cir. 1993).

12. CENTERS FOR DISEASE CONTROL AND PREVENTION & THE MERCK COMPANY FOUNDATION, THE STATE OF AGING AND HEALTH IN AMERICA 2007 EXECUTIVE SUMMARY 3 (2007) [hereinafter THE STATE OF AGING], *available at* http://www.cdc.gov/aging/pdf/saha_exec_summary_2007.pdf.

13. *Id.*

14. Emily Senay, *Americans Living Longer Than Ever*, CBS NEWS, Mar. 2, 2005, http://www.cbsnews.com/stories/2005/03/02/earlyshow/contributors/emilysenay/main677485.shtml; *see* Centers for Disease Control and Prevention, Health Information for Older Adults, http://www.cdc.gov/aging/info.htm (last visited Nov. 15, 2007) (noting that "[a]mong Americans 65 years and older, approximately 6–10% have dementia, and two-thirds of people with dementia have Alzheimer's disease.").

15. *See* F. Patrick Hubbard, *The Nature and Impact of the "Tort Reform" Movement*, 35 HOFSTRA L. REV. 437, 517–18 (2006). Hubbard explains that medical malpractice tort reform in the late 1990s took many forms, including the following:

> First . . . twenty-two states have adopted various schemes for limiting noneconomic damages. Second, some states have modified the collateral source rule for medical malpractice claims. Third, several states have adopted contingency fee restrictions for medical malpractice actions. A fourth type of reform concerns expert witnesses. Doctors have long complained that the rules about medical experts qualified to testify about the standard of care and the cause of the injury are too lax. As a result, statutory definitions of "expert" have been adopted, and at least twenty states require the plaintiff to file an affidavit from a statutorily qualified expert that a claim exists. These requirements vary in terms of such things as: (1) whether the affidavit must be filed with the complaint or

are receiving long-term health care, individuals injured by the allegedly tortious conduct of health care facilities have attempted to optimize their chances for successful litigation by searching for the most favorable judicial forum for their state tort claims.

Defendants have argued that the federal courts are preferable for litigating medical tort claims.[16] This is, in part, attributable to the more exacting standards utilized by the federal courts for certifying expert witnesses.[17] As a result, defendants to medical tort claims often attempt to remove such claims from state court to federal court on diversity of citizenship grounds.

Aggressive state tort reform movements, however, may soon result in plaintiffs opting to pursue their claims in federal court.[18] While federal courts hearing a case based on diversity subject matter jurisdiction must apply state substantive law to resolve the dispute,[19] federal judges enjoy life-time tenure and are free to operate against the current political pressure associated with state tort reform movements.[20] Additionally, fed-

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within some specified time after filing, (2) whether the requirement applies to all professional negligence or only to medical negligence, and (3) the procedures and sanctions for failure to comply.

Id. at 520–21.

16. *See* David Marcus, Erie, *the Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 WM. & MARY L. REV. 1247, 1250–51 (2007). The author explains,

> In any particular case, federal procedural rules might favor one side or the other, and practitioners know that procedure can decide cases. Personalities of particular judges obviously factor into the choice as well. In addition, many lawyers share beliefs about the federal judiciary that go beyond the procedural posture of particular cases or the reputations of individual judges. Recently, for example, class action lawyers who represent plaintiffs have demonstrated a preference for state courts, whereas their adversaries think that federal judges share attitudes that better serve their clients' interests in complex mass [tort] litigation.

Id.; *see also* Robin K. Craig, *When Daubert Gets Erie: Medical Certainty and Medical Expert Testimony in Federal Court*, 77 DENV. U. L. REV. 69, 69–71 (1999) (exploring one difference between trying cases in state versus federal court—in this case, the standard for medical expert testimony).

17. Edward K. Cheng & Albert H. Yoon, *Does Frye or Daubert Matter? A Study of Scientific Admissibility Standards*, 91 VA. L. REV. 471, 472–73 (2005).

18. *Id.* at 510.

19. Erie R.R. v. Tompkins, 304 U.S. 64, 73 (1938).

20. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 1.1 (3d ed. 1999). *But see* Kristen Loiacono, *Tort "Reformer" Turn to Federal Court*, TRIAL, Mar. 2000, at 12, 12 (arguing the fact that "defendant constituencies may be looking to

eral courts typically draw upon a wider cross-section of the public to comprise the jury pool.[21] These potential advantages may make the federal courts more desirable forums for plaintiffs to litigate state tort claims than in the past.

As the effects of recent tort reform movements are yet unknown, it remains to be seen whether more plaintiffs or more defendants will utilize the federal courts to litigate medical tort claims. What is predictable, however, is that more medical tort claims are likely to find their way to the federal courts. The dramatic increase in the elder population living in long-term treatment centers makes such claims more likely.[22] As a result, it is also likely that more suits will be brought by and against incompetent individuals under diversity jurisdiction in the federal courts. With a possible increase of litigation on the horizon, it is critical to resolve the federal circuit courts' split regarding the determination of an incompetent adult's citizenship for purposes of diversity jurisdiction.

This Article tackles the issue of whether an incompetent adult can change his citizenship post-incapacitation, thereby creating or destroying diversity subject matter jurisdiction. In Part I, this Article examines the legal standard for asserting federal diversity jurisdiction in claims made by and against competent and incompetent individuals. After examining and critiquing the current circuit court split in Part II, this Article ultimately recommends in Part III that federal courts should hold that an incompetent adult has changed his citizenship when he takes up a new residence in a different state and objective indicia of permanency exist in that state.

I. ESTABLISHING DIVERSITY OF CITIZENSHIP IN SUITS INVOLVING AN INDIVIDUAL CITIZEN

To fully understand the circuit court split over whether and under what circumstances incompetent adults may change their domicile for purposes of diversity jurisdiction, one must appreciate how domicile is established for competent adults. Moreover, the distinctions between cases filed by or against

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the federal system is a perception that federal judges are now more conservative and less plaintiff-friendly").

21. Robert L. Jones, *Finishing a Friendly Argument: The Jury and the Historical Origins of Diversity Jurisdiction*, 82 N.Y.U. L. REV. 997, 1086 n.422 (2006).

22. *See* THE STATE OF AGING, *supra* note 12, at 3.

competent adults under diversity jurisdiction and those cases filed by or against incompetent adults must be clarified. This Part undertakes that examination.

A. Determining Citizenship under 28 U.S.C. § 1332

Article III of the United States Constitution provides for the judicial power of the federal government to extend to controversies "between Citizens of different States."[23] Congress granted this subject matter jurisdiction to the newly created federal courts through the Judiciary Act of 1789 to protect out-of-state litigants from actual or perceived bias in state courts.[24] Codified at 28 U.S.C. § 1332, this statutory grant of federal subject matter jurisdiction has been revised several times by Congress since passage of the Judiciary Act of 1789.[25] Commonly referred to as "diversity jurisdiction," the current statute provides, "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between . . . citizens of different States."[26] This provision encompasses two requirements: (1) the opposing litigants must be citizens of different states, and (2) the controversy must exceed $75,000 in damages or equivalent injunctive relief.

While § 1332 provides a basis for original federal subject matter jurisdiction on which plaintiffs may rely, Congress has also authorized a mechanism through which defendants can invoke diversity jurisdiction. Under 28 U.S.C. § 1441, if the action satisfies the requirements of § 1332, a defendant may remove the case from state court to the appropriate federal district court.[27] Removal, however, is not permitted in a diversity action when any defendants properly joined in the suit are citizens of the state in which the suit was filed.[28] Both § 1332 and § 1441 provide a substantial opportunity for litigants to pursue their state claims in federal court.

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23. U.S. CONST. art. III, § 2.

24. Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 484–93 (1928); *see* CHEMERINSKY, *supra* note 20, § 5.3.2 (discussing whether the underlying justification for diversity jurisdiction is still a compelling reason for maintaining diversity jurisdiction in the federal courts).

25. 28 U.S.C. § 1332(a)(1) (2000 & Supp. V 2005).

26. *Id.*

27. 28 U.S.C. § 1441(a) (2000).

28. 28 U.S.C. § 1441(b) (2000).

The citizenship requirement in Article III and § 1332 restricts federal subject matter jurisdiction when any party is a citizen of the same state as any opposing party.[29] Federal law determines what constitutes state citizenship for purposes of diversity jurisdiction.[30] The federal courts have interpreted the phrase "citizen of a state" to require an individual litigant to be a citizen of the United States and a citizen of a state.[31] Individuals are considered capable of maintaining citizenship in only one state, and thus have only one place of citizenship for purposes of diversity jurisdiction.[32] To determine an individual's state citizenship, the federal courts look to the individual's domicile.[33]

B. Domicile of Competent Individuals

An individual's domicile is established in the place where he has a "true, fixed home and principal establishment, and to which, whenever he is absent, he has the intention of returning."[34] While residency in the state is an essential component of domicile, domicile is not synonymous with residency. For example, while an individual may have residences in multiple states, he may only be a domiciliary of the state in which he has an intention of remaining.[35] Intention can only be established in *one* state.

While the determination of the location of an individual's domicile is a legal conclusion, the determination of the litigant's intention to return to or remain in the state of residency oftentimes necessitates a highly intensive and difficult factual

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29. Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267 (1806).

30. Grubbs v. Gen. Elec. Credit Corp., 405 U.S. 699, 705 (1972).

31. Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 828 (1989); *see also* Gilbert v. David, 235 U.S. 561 (1915) (each litigant's state citizenry must be clearly identified); Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

32. Williamson v. Osenton, 232 U.S. 619, 625 (1914).

33. *See Gilbert*, 235 U.S. at 569–70.

34. 13B CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3612 (2d ed. 1984). The determination of an individual's domicile is made at the initiation of the lawsuit and is not subject to change during the litigation despite subsequent relocation of a party. Freeport-McMoRan, Inc. v. K. N. Energy, Inc., 498 U.S. 426, 428 (1991). For removal actions, the determination of domicile is made at the time the suit was filed and at the time the defendants remove the case to federal court. Stevens v. Nichols, 130 U.S. 230, 231–32 (1889). Diversity of citizenship must exist at both points in time. *Id.*

35. *See Williamson*, 232 U.S. at 625.

inquiry.[36] The party asserting federal subject matter jurisdiction bears the burden of showing that diversity of citizenship exists, including the establishment of the parties' domiciles.[37] The inquiry into domicile has become increasingly complicated in the twentieth and twenty-first centuries as more individuals maintain multiple dwellings in various states.

To determine where an individual's domicile is located, federal courts do not limit their inquiry to the individual's statements regarding his intention.[38] Statements of subjective intent are considered by federal district courts in determining an individual's domicile. Such statements, however, will not automatically establish domicile given the ease with which one could artificially manipulate diversity jurisdiction simply by making a self-serving statement.[39] Rather, courts consider various *objective* factors to determine the individual's intention, including: place of employment; location of any purchases or sales of real property, especially those that can be used as a dwelling; voter registration; payment of state taxes; qualifying for and receiving state benefits which are predicated on permanent state residency; automobile registration and driver's license; location of bank accounts; and membership in churches or other organizations.[40]

Once an individual's domicile is established it is "presumed to continue" until such time as a new domicile is acquired by that individual.[41] While it is presumed that a change in residence does not effect a change in domicile, an individual can change his domicile during his lifetime.[42] To change one's domicile, the individual must physically take up a new residence in another state *and* have the intent to return to that state whenever away from the state.[43] The same factors considered in determining domicile are considered by federal dis-

36. JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 2.6 (4th ed. 2005).

37. *See* Cameron v. Hodges, 127 U.S. 322 (1888).

38. WRIGHT, *supra* note 34, § 3612, at 530–33 (discussing the various factors which comprise the determination of "intention" in establishing one's domicile).

39. District of Columbia v. Murphy, 314 U.S. 441, 456 (1941) ("One's testimony with regard to his intention [to make a particular place his domicile] is of course to be given full and fair consideration, but is subject to the infirmity of any self-serving declaration, and may frequently lack persuasiveness or even be contradicted or negatived by other declarations and inconsistent acts.").

40. FRIEDENTHAL, *supra* note 36, § 2.6, at 32.

41. Mitchell v. United States, 88 U.S. (21 Wall.) 350, 353 (1875).

42. *See* WRIGHT, *supra* note 34, § 3613, at 544.

43. *See id.*

trict courts in determining whether an individual has changed his or her domicile.[44] This change, however, must occur by the time the suit is initiated.[45]

Because there may be a substantial lapse of time between the events that give rise to the cause of action and the filing of the lawsuit, a party could conceivably relocate and establish a new domicile with the purpose of creating or destroying diversity jurisdiction. Federal courts, however, are unconcerned with this possibility. Motivation for establishing one's domicile has been universally and consistently rejected as irrelevant in determining whether diversity jurisdiction exists.[46] Therefore, even after the event that gives rise to the cause of action, it is possible to change one's domicile for the sole purpose of creating or destroying federal diversity jurisdiction over that action.[47] If an individual, however, continues to maintain contacts with the former state in which he was domiciled, district courts may question the intention of the party to create a new domicile and may reject the assertion that the individual changed his domicile.[48]

While an individual's motive is not an obstacle to establishing or destroying diversity jurisdiction, Congress has created other limitations on artificially manufacturing diversity jurisdiction. For example, 28 U.S.C. § 1359 strips federal district courts of subject matter jurisdiction in any civil action "in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court."[49] This provision primarily limits the addition of a nominal party who has no real or substantive interest in the dispute and was joined simply for the purpose of creating or destroying diversity jurisdiction among the parties.[50] Section 1359 became especially important in the 1960s when federal

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44. *See id.*

45. Grupo Dataflux v. Atlas Global Group, L.P., 541 U.S. 567, 582 (2004).

46. *E.g.*, Dakuras v. Edwards, 312 F.3d 256, 259 (7th Cir. 2002); Peterson v. Allcity Ins. Co., 472 F.2d 71, 74 (2d Cir. 1972); Janzen v. Goos, 302 F.2d 421, 425 (8th Cir. 1962).

47. *See, e.g.*, *Dakuras*, 312 F.3d at 259; *Peterson*, 472 F.2d at 74; *Janzen*, 302 F.2d at 425.

48. *See* Galva Foundry Co. v. Heiden, 924 F.2d 729, 730 (7th Cir. 1991) (finding defendant's continued contact with state of original domicile defeated the argument that his domicile had changed).

49. 28 U.S.C. § 1359 (2000).

50. *See* CHEMERINSKY, *supra* note 20, § 5.3.3., at 298–99.

courts responded to difficult challenges presented by cases involving incompetent individuals.[51]

C. *Historical Treatment of a Party's Incompetency in Diversity Cases*

Because citizenship has been equated with domicile for purposes of diversity jurisdiction, determining the location of an incompetent individual's citizenship presents a quandary for the federal courts. The incompetence itself generates the primary difficulty—the individual does not possess the capability of forming intention to remain in or return to the state of residency.[52] Because domicile requires an intention to return to or remain in the state, federal courts have traditionally sought out alternative tests to determine an incompetent individual's citizenship.

Historically, the federal courts deemed an incompetent to be a domiciliary of the state in which the incompetent's representative[53] was domiciled.[54] This rule led to what most perceived to be significant abuse of federal diversity subject matter jurisdiction. In the 1960s, scholars and judicial advocates noted that there was a significant trend of forum shopping via

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51. *See infra* notes 58–61 and accompanying text (discussing McSparran v. Weist, 402 F.2d 867, 871–72 (3d Cir. 1968), and the use of a single representative filing in sixty-one separate pending actions in the same district court).

52. The level of intention necessary for domicile requires a very low level of comprehension. Acridge v. Evangelical Lutheran Good Samaritan Soc'y, 334 F.3d 444, 448 (5th Cir. 2003). As a result, individuals who have been adjudicated incompetent in another context may retain the level of capacity necessary to formulate intention to alter their domicile. *Id.* In this Article, the term "incompetent individual" will be used to refer to those individuals who do not possess the capacity necessary to establish or alter their domicile.

53. For purposes of diversity jurisdiction, the representative need not be legally appointed. *See Acridge*, 334 F.3d at 449–50 n.3.

54. *See* Mexican Cent. Railway Co. v. Eckman 187 U.S. 429, 434 (1903). In addition to the difficulty presented by the issue of intention, the adoption of the Federal Rules of Civil Procedure created debate among the federal courts as to how to handle cases brought by or against an incompetent individual. Namely, the federal courts split over whether a representative of an incompetent individual should be treated as the real party in interest under Rule 17(a) or whether the representative should be treated as merely having the capacity to sue under Rules 17(b) and (c). For a discussion of this circuit split, see McSparran v. Weist, 402 F.2d 867, 869–70 (3d Cir. 1968).

the strategic selection of a representative.[55] For example, it was possible for an incompetent's guardian to anticipate litigation from a group of plaintiffs that had potential legal claims because of actions taken by the individual prior to his incompetence. To avoid federal jurisdiction, the guardian would select a representative for purposes of receiving service of process and bringing suit who was domiciled in the same state as the plaintiffs, thereby destroying diversity.[56]

Similarly, a guardian could create diversity jurisdiction through the selection of a representative with citizenship in a different state than that of the defendants.[57] Assume, hypothetically, that an incompetent was injured by a tortious act while under the medical care of the defendant. Assume further that the incompetent's guardian asserts a claim against the defendant, who is domiciled in the same state where the incompetent individual is domiciled. If such a suit were brought by a competent individual it would be treated as a local dispute in which no federal diversity jurisdiction existed. Under the historical rule, however, the guardian could designate an out-of-state representative to artificially create diversity jurisdiction because the representative's domicile would be substituted for the incompetent individual's domicile.

The United States Court of Appeals for the Third Circuit was one of the first courts to question the legitimacy of this trend in *McSparran v. Weist*.[58] The *McSparran* court stated that in claims brought by incompetent individuals, there was a vast trend of guardians creating diversity jurisdiction through selection of an out-of-state representative.[59] The court noted one individual who was serving as a representative of incompetent individuals in sixty-one pending diversity cases in the Eastern District of Pennsylvania.[60] Further, the *McSparran* court observed that "of the diversity cases filed in the Eastern District of Pennsylvania during 1958 and 1959 . . . 20.5 per cent of them were brought by out-of-state personal representa-

55. *See* AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1301(b)(4), cmt. at 117–19 (1968) [hereinafter DIVISION OF JURISDICTION].

56. *See id.* at 119.

57. *See McSparran*, 402 F.2d at 871–72.

58. *Id.* at 867.

59. *See id.* at 871–72.

60. *Id.* at 871.

tives of Pennsylvania citizens against Pennsylvania defendants."[61]

Concerned about this trend, the *McSparran* court labeled these cases—diversity actions filed by a "straw" out-of-state representative on behalf of an in-state incompetent against an in-state defendant—as "manufactured diversity" cases.[62] It concluded that in "manufactured diversity" cases, the traditional rule for determining the citizenship of an incompetent individual should be rejected.[63] Citing 28 U.S.C. § 1359, the *McSparran* court held that "manufactured diversity" cases constituted impermissible collusion.[64] As a result, these cases deprived the court of diversity jurisdiction.[65]

In reaching its conclusion, the *McSparran* court examined the historical origin of § 1359.[66] The current version of § 1359 is a combination of an anti-assignment provision codified previously at 28 U.S.C. § 41(1) and 28 U.S.C. § 80.[67] Section 80 codified section 37 of the Judicial Code of 1911, which mandated that district courts dismiss a suit "at any time . . . [if] such suit [did] not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, or the parties to said suit have been improperly joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable."[68] The *McSparran* court relied on the preliminary words of the Judicial Code to conclude that § 1359 deprived the district court of jurisdiction when a nominal party, with no real interest in the dispute, was designated solely for the purpose of creating diversity of citizenship.[69] In the case of an action brought on behalf of an incompetent individual, the *McSparran* court concluded that § 1359 prohibited the appointment of a nonresident guardian for an incompetent

61. *Id.* (citing AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN THE STATE AND FEDERAL COURTS, pt. I, at 170–77 (Official Draft, 1965)).
62. *McSparran*, 402 F.2d at 871.
63. *Id.* at 873–76.
64. *See id.*
65. *See id.*
66. *Id.* at 872–73.
67. *Id.*
68. *Id.* (quoting 28 U.S.C. § 80 (1940)).
69. *Id.* at 873.

individual when such appointment was solely for the purpose of creating diversity jurisdiction.[70]

The Third Circuit revisited *McSparran* in *Groh v. Brooks*.[71] In *Groh*, the court made clear that the motivation for appointment of the representative was the proper focus for determining citizenship in cases involving a deceased or incompetent individual represented by a third party.[72] The *Groh* court explained that in determining whether an out-of-state representative was appointed solely to create diversity of citizenship, district courts should consider: the representative's identity and whether he had a relationship with the incompetent, the scope of the representative's powers and duties, the experience of the representative or any special capacity of the representative that may have generated the selection of the representative in this suit, the existence of a non-diverse party who would normally be expected to represent the interests at stake in the litigated matter, the expressed rationale for the selection of the representative, and the local nature of the dispute.[73] Following the *McSparran* and *Groh* decisions, several other federal circuit courts adopted a similar motive-based test for determining whether diversity existed in a case in which an out-of-state representative was appointed to represent a resident plaintiff against a resident defendant.[74]

While the motive-based test was appealing—it targeted the most troublesome cases in which federal diversity jurisdiction was created through a purposeful façade—its difficulty to apply garnered much criticism.[75] The criticism of the motive-based test was that it created a difficult subjective standard.[76] Because this test focused on the underlying motives of guardians in selecting representatives, it required extensive fact-finding

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70. *Id.* at 876.

71. 421 F.2d 589 (3d Cir. 1970).

72. *Id.* at 595.

73. *Id.*

74. Gross v. Hougland, 712 F.2d 1034, 1038 (6th Cir. 1983) (dealing with dissolved corporations); Bass v. Texas Power & Light Co., 432 F.2d 763, 765–67 (5th Cir. 1970) (wrongful death); O'Brien v. Avco Corp., 425 F.2d 1030, 1036 (2d Cir. 1969) (wrongful death); Lester v. McFaddon, 415 F.2d 1101, 1104 (4th Cir. 1969) (wrongful death). The Fourth Circuit later rejected the motive-based test. *See* Bishop v. Hendricks, 495 F.2d 289, 295 (4th Cir. 1974) (wrongful death).

75. *See* Linda S. Mullenix, *Creative Manipulation of Federal Jurisdiction: Is there Diversity After Death?*, 70 CORNELL L. REV. 1011, 1033 (1985).

76. *Id.*

on issues not central to the litigation itself.[77] In 1971 hearings before the Senate Subcommittee on Improvements in Judicial Machinery, then Chief Judge Haynsworth of the Fourth Circuit stated that the subjective factual inquiries of the motive-based test created "a dreadful waste of time."[78] An additional criticism of the motive-based test was that it did not comport with the purpose of diversity jurisdiction—the avoidance of state bias against an out-of-state citizen.[79] Motive supported diversity jurisdiction when it could be shown the reason for selection of the representative was "more than an expression of sentiment or personal preference or mere kinship with either the beneficiaries or the decedent."[80] It was not "established by some self-serving profession of good faith in the appointment."[81] This type of motive inquiry, however, overlooks the important issue of whether "the fiduciary has more than a nominal relationship to the litigation."[82]

An alternative test known as the "substantial stake" test emerged in response to criticism of the motive test. Adopted by the Fourth, Seventh, Eighth, and Tenth Circuits,[83] the substantial stake test focused courts' inquiry on whether the representative himself possessed a substantial stake[84] in the litigation that was "more than a nominal relationship to the litigation."[85] The substantial stake test also operated as a subjective test. Similar to the motive test, the substantial stake test required federal courts to consider the purpose for appointment of a representative. In most cases, the tests operated in a similar manner, preventing the creation of diversity

77. *Id.*

78. Pallazola v. Rucker, 797 F.2d 1116, 1123 n.17 (1st Cir. 1986) (citations omitted).

79. *See* Mullenix, *supra* note 75, at 1033.

80. *Id.* at 1033–34 (quoting Bishop v. Hendricks, 495 F.2d 289, 293 (4th Cir. 1974)).

81. *Id.* at 1034 (quoting *Bishop*, 495 F.2d at 293).

82. *Id.* (citing *Bishop*, 495 F.2d at 295).

83. *See* Bettin v. Nelson, 744 F.2d 53, 56 (8th Cir. 1984) (wrongful death case); Messer v. Am. Gems, Inc., 612 F.2d 1367, 1373–74 (4th Cir. 1980) (wrongful death case); Hackney v. Newman Mem'l Hosp., 621 F.2d 1069, 1071 (10th Cir. 1980) (wrongful death case); Betar v. De Havilland Aircraft of Can., Ltd., 603 F.2d 30, 35–36 (7th Cir. 1979) (wrongful death case).

84. *Hackney*, 621 F.2d at 1071.

85. *Bishop*, 495 F.2d at 294.

jurisdiction unless the representative had a stake in the outcome of the litigation.[86]

Commentators criticized the substantial stake test, like the motive test, for its difficult application and inefficacy.[87] Moreover, the substantial stake test was condemned as an overreaching of judicial power and as being inconsistent with the purposes of § 1359.[88] For most critics, the substantial stake test was simultaneously too broad and too narrow. The substantial stake test added the additional hurdle of establishing a stake in the litigation. This was an overly limiting condition because it extinguished jurisdiction in cases where the representative did not have a stake in the outcome but was otherwise chosen with a proper purpose.[89] This approach was under-inclusive, however, in that it would sustain diversity jurisdiction in cases in which the representative had a simultaneous interest in the litigation *even though* the representative was appointed with the purpose of creating diversity jurisdiction.[90]

Various scholars and agencies presented alternative tests in response to the circuit split. The American Law Institute (ALI) presented one test of note in its recommendations published in the 1969 Study of the Division of Jurisdiction Between the State and Federal Courts.[91] The ALI proposal cited the high potential for manipulation created under the historical approach of utilizing the representative's citizenship, as it was relatively easy for a guardian to select a "straw" representative in another state to initiate the suit.[92] Therefore, to solve this problem, the ALI proposed that the citizenship of an incompetent individual be used as the basis for establishing diversity jurisdiction.[93]

In 1988 Congress addressed the circuit split by amending § 1332. Rejecting both subjective intent tests—the motive test and the substantial stake test—Congress adopted the per se rule recommended by the ALI.[94] Therefore, in all diversity ac-

86. *See, e.g.*, *id.* at 293–95.
87. Mullenix, *supra* note 75, at 1034–37.
88. *Id.*
89. *Id.*
90. *Id.*
91. DIVISION OF JURISDICTION, *supra* note 55, § 1301(b)(4), cmt. at 117–19.
92. *Id.*
93. *Id.*
94. 28 U.S.C. § 1332 (1988) (amended 1996, 2005).

tions, the citizenship of an incompetent individual is used to determine whether diversity jurisdiction exists.[95] In operation, the per se rule means that if an adult becomes incompetent during adulthood, the domicile of the adult prior to the incompetence is used to establish citizenship. An individual who never gains capacity after childhood and remains incompetent throughout adulthood is considered to continue to have the domicile of his parents.[96]

II. THE IMPACT OF INCOMPETENCE ON THE ABILITY TO ESTABLISH A NEW DOMICILE

While the 1988 Amendments to § 1332 provided the federal courts with more direction, cases involving represented incompetent individuals continue to pose unique challenges. By predicating state citizenship on the domicile of an incompetent rather than the legal representative, Congress clarified the law and curtailed the abusive trend of creating or destroying diversity by simply appointing an out-of-state representative. The 1988 Amendments, however, did not address whether an incompetent's state citizenship could ever be changed by the representative.

With competent individuals, a change in domicile is effected when the individual takes up a new residence in another state and intends to return to that state when away from it.[97] Because a change in domicile requires intention to return to a particular state, the federal courts were left to grapple with the issue of whether an incompetent individual's citizenship could change despite his inability to form intention. To remedy this problem, federal circuit courts interpreted the level of intention required to change one's domicile to be a low threshold of understanding.[98] In fact, several federal circuit courts noted that

95. 28 U.S.C. § 1332(c)(2) (2000 & Supp. V. 2005).

96. *See* RICHARD D. FREER, INTRODUCTION TO CIVIL PROCEDURE § 4.5.4 (2006) ("You retain the domicile ascribed at birth until you affirmatively change it."); *see also* Del., L. & W. R. Co. v. Petrowsky, 250 F. 554 (2d Cir. 1918) (explaining that person claiming parental responsibility for child is person to whom the court looks in determining domicile).

97. *See* 15 MOORE'S FEDERAL PRACTICE § 102.34[2]–[10] (Matthew Bender 3d ed. 2007).

98. Acridge v. Evangelical Lutheran Good Samaritan Soc'y, 334 F.3d 444, 448 (5th Cir. 2003); Juvelis v. Snider, 68 F.3d 648, 655 (3d Cir. 1995) (concluding that

a person could be adjudicated mentally incompetent and still have enough understanding of his circumstances to express an intention necessary to change his domicile.[99] The lowering of the standard of intention, however, did not address the vast majority of cases in which an individual's incompetence renders him incapable of achieving even this low threshold of understanding.

A. Current Approaches

The issue of whether a representative can change the domicile of an incompetent individual prior to suit—and thereby create or destroy diversity jurisdiction—has split the federal circuit courts. The tests currently used range from the most inflexible per se rejection of any change in an incompetent's domicile to a more flexible motive test. On the other end of the spectrum, courts could adopt a rule permitting any change in residency to constitute a change in domicile. While no circuit has treated a change in residency of an incompetent as a per se change in domicile, this Article undertakes an examination of this possible approach to fully analyze the spectrum of options available to address the issue. Each approach is examined in turn in this section of the Article.

1. Per Se Rejection of Domicile Changes

In *Long v. Sasser*, the Fourth Circuit took a severe approach in resolving the issue of whether an incompetent's domicile can be changed post-incompetence to establish diversity jurisdiction.[100] Gilbert Long was an incompetent adult who had previously been a resident and citizen of South Carolina.[101] While a South Carolina resident and prior to his incapacity, Gilbert had undergone medical treatment at a South Carolina hospital.[102] During treatment, Gilbert suffered a stroke and became incapacitated.[103] Gilbert's representative

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an incompetent adult may change his domicile as long as "he understands the nature and effect of his act").

99. *Acridge*, 334 F.3d at 448; *Juvelis*, 68 F.3d at 655.

100. 91 F.3d 645 (4th Cir. 1996).

101. *Id.* at 646.

102. *Id.*

103. *Id.*

and family member, Freddy Long, moved Gilbert to a nursing home in Virginia and filed a medical malpractice action against Gilbert's South Carolina physicians on his behalf in the South Carolina federal district court.[104] The complaint asserted that the court's jurisdiction was predicated on diversity of citizenship.[105] To support the assertion of diversity jurisdiction, the plaintiffs alleged that the two defendant physicians were domiciled in South Carolina and that Gilbert was domiciled in Virginia.[106] The defendant physicians filed a motion to dismiss for lack of subject matter jurisdiction, alleging that all parties were citizens of South Carolina because Gilbert's move to Virginia did not constitute a change of domicile.[107] The district court held that Gilbert's domicile remained in South Carolina and dismissed the action for lack of diversity jurisdiction.[108]

On appeal, Freddy argued that district courts should recognize a guardian's decision to change the domicile of an incompetent ward where the guardian acts in the incompetent's best interests.[109] Freddy alleged that his attempt to change Gilbert's domicile was in Gilbert's best interests and should, therefore, be given legal effect.[110] The Fourth Circuit rejected Freddy's argument and held that a guardian was not empowered to change the domicile of an incompetent ward.[111]

In rejecting a best interests approach to determining whether an incompetent's domicile has changed for purposes of diversity jurisdiction, the Fourth Circuit noted the need for clear jurisdictional rules.[112] The court reasoned that jurisdictional principles must provide predictability to litigants so that an appropriate forum may be selected with a "minimum of fuss."[113] The Fourth Circuit warned of the speculative nature of a best interests rationale in the context of subject matter ju-

104. *Id.*
105. *Id.* (alleging that Long was domiciled in Virginia and the two defendant doctors were both domiciled in South Carolina).
106. *Id.*
107. *Id.*
108. *Id.* at 646–47.
109. *Id.* at 647.
110. *Id.*
111. *Id.* at 647–48.
112. *Id.* (explaining that "[j]urisdictional rules should above all be clear").
113. *Id.*

risdiction.[114] First, an incompetent may regain his capacity and there may be discord between the domicile chosen by the guardian and the ward's intention. Second, the determination of whether the guardian's choice was in the incompetent's best interests invited unnecessary additional litigation. Therefore, the Fourth Circuit concluded that a bright-line approach rejecting a guardian's proxy attempt to alter jurisdiction was necessary to preserve predictability.[115]

In addition to its concerns regarding the predictability of jurisdictional rules, the Fourth Circuit noted that there was no need to permit a guardian to alter the ward's domicile because there was the "absence of traditional diversity concerns in this sort of case."[116] While the court viewed the need for diversity jurisdiction in any case involving an incompetent individual with some skepticism, it noted that the *present* dispute was "essentially a local dispute."[117] The court noted that the primary purpose of diversity jurisdiction was to alleviate the fear of local bias against litigants from out of state. No such bias existed against Gilbert, the court concluded, because he was a resident of South Carolina for many years prior to his stroke.[118]

2. Best Interests Test

The Tenth, Seventh and Fifth Circuits have also weighed in on the issue of whether an incompetent's domicile can be changed by the incompetent's guardian. In *Rishell v. Jane Phillips Episcopal Memorial Medical Center*, the plaintiff, Kathleen Lacey, was an incapacitated adult.[119] Prior to her incapacitation, Kathleen was hospitalized in the defendant institution in Oklahoma, where she unsuccessfully attempted sui-

114. *Id.* at 647–48 (explaining that "[i]nquiring [into] whether the 'best interests' of the ward are served by a guardian's attempt to effect a change in domicile to secure a federal forum strikes us as singularly unproductive").

115. *Id.* The Fourth Circuit's approach has been advocated by other scholars. *See* LARRY L. TEPLY & RALPH U. WHITTEN, CIVIL PROCEDURE 637–38 (2d ed. 2000); Larry L. Teply, *The Elderly and Civil Procedure: Service and Default, Capacity Issues, Preserving and Giving Testimony, and Compulsory Physical or Mental Examinations*, 30 STETSON L. REV. 1273, 1278–80 (2001) [hereinafter Teply, *The Elderly*].

116. Long v. Sasser, 91 F.3d 645, 647 (4th Cir. 1996).

117. *Id.*

118. *Id.* at 648.

119. 12 F.3d 171, 172 (10th Cir. 1993).

cide, causing her severe brain damage and leaving her in a permanent vegetative state.[120] Kathleen's brother-in-law, as curator, and her husband moved her to an institution in Louisiana that was able to provide her long-term care.[121] After her relocation to Louisiana, Kathleen, through her brother-in-law, filed a negligence action against the Oklahoma medical institution in a federal district court.[122] The defendant moved to dismiss the complaint for lack of subject matter jurisdiction, arguing that Kathleen remained a domiciliary of Oklahoma despite her relocation to Louisiana, thus destroying diversity.[123] The district court dismissed the case, reasoning that because Kathleen was incapable of forming the intention to change her domicile to Louisiana, she remained a domiciliary of Oklahoma, thus destroying diversity.[124]

On appeal, the Tenth Circuit confronted the issue of whether the guardian's intention to change an incompetent's domicile could be used as substituted intent to effect a legal change in the incompetent's domicile. In exploring this issue, the Tenth Circuit noted that state courts have permitted guardians to alter the domicile of a ward in other contexts.[125] Namely, state courts have permitted guardians to change an incompetent's domicile when the change would alter the distribution of the ward's estate or taxation of the estate.[126] These changes are typically permitted only when they are in the best interests of an incompetent.[127]

The Tenth Circuit analogized changes in domicile for estate purposes to changes in domicile for diversity purposes and held that a guardian could change an incompetent's domicile under § 1332 so long as the change was in the "best interests" of an incompetent.[128] The *Rishell* court criticized the Fourth Circuit's per se rejection of a guardian's authority to change an

120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.* at 173.
126. *Id.* (citing Hayward v. Hayward, 115 N.E. 966, 973 (Ind. Ct. App. 1917) (estate distribution case); *In re* Gray's Estate, 250 P. 422, 423 (Okla. 1926) (relocation of ward out of state); Estate of Freeman v. Dept. of Revenue, 11 Or. Tax 219, 233 (Or. T.C. 1989)).
127. *See Rishell*, 12 F.3d at 173–74.
128. *Id.*

incompetent's domicile, stating that "to prohibit [the guardian from changing an incompetent's domicile] is to leave the incompetent in a never-ending limbo where the presumption against changing domicile becomes more important than the interests of the person the presumption was designed to protect."[129] The *Rishell* court ultimately remanded the case for determination of whether Kathleen's relocation to the Louisiana facility was in her long-term best interests.[130]

The Fifth Circuit followed a similar approach in *Acridge v. Evangelical Lutheran Good Samaritan Society*,[131] referenced in the introduction to this Article.[132] The issue on appeal before the *Acridge* court was whether Louis Acridge's domicile was changed by his representative when she moved him to a nursing home in Texas after he became mentally incompetent.[133] In determining whether Louis's domicile was changed to Texas, the *Acridge* court examined the difficulties inherent in a case involving an incompetent party. The court noted that generally a change in domicile required a physical change in residence and a change in the intent of the party.[134] Louis had clearly changed his physical residence to Texas by residing at the nursing home there. However, Louis was "virtually unaware of his surroundings," rendering him unable to form the requisite intent to change his domicile.[135]

While the *Acridge* court recognized the presumption against finding a change in domicile when a person has not clearly demonstrated an intention to change domicile after a physical relocation, it noted that this presumption should not work against the interests of an incompetent individual.[136]

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129. *Id.* at 174.
130. *Id.* at 174–75.
131. 334 F.3d 444 (5th Cir. 2003).
132. *See supra* Introduction for discussion of facts.
133. *Acridge*, 334 F.3d at 448.
134. *Id.* (citing Coury v. Prot., 85 F.3d 244, 250 (5th Cir. 1996)).
135. *Id.* at 447.
136. *Id.* at 450. The court explained:

> To hold that the person charged with making decisions on behalf of an incompetent lacks the authority to change the incompetent's state of domicile in his best interests leaves the incompetent "in a never-ending limbo where the presumption against changing domicile becomes more important than the interests of the person the presumption was designed to protect."

Id. (quoting Rishell v. Jane Phillips Episcopal Mem'l Med. Ctr., 12 F.3d 171, 174 (10th Cir. 1993)).

Following the reasoning of the Tenth Circuit, the *Acridge* court expressed concern that overzealous enforcement of the presumption would act to undermine the interests of an incompetent.[137] To rectify this harsh result, the *Acridge* court held that Louis's domicile could be changed by his representative if the representative acted in his best interests in relocating him to Texas.[138]

In adopting the best interests test, the *Acridge* court explained that "[a]n incompetent sits in an unenviable position in society, unable to fend for himself and completely dependent upon those closest to him."[139] The best interests test, according to the *Acridge* court, serves to better protect an incompetent's interests by authorizing the representative to fully carry out an incompetent's affairs.[140]

The *Acridge* court also refuted the Fourth Circuit's criticism that the best interests test introduced "unwanted uncertainty" into the determination of jurisdictional matters.[141] The *Acridge* court noted that the determination of a competent adult's domicile is equally uncertain as it requires district courts to "weigh the multitude of relevant factors."[142] Additionally, the court explained that a more reasoned determination of federal district courts' jurisdiction is possible when courts are permitted to analyze all of the facts and circumstances surrounding an individual's citizenship.[143]

3. Motive-Based Test

The Seventh Circuit adopted a slightly different motive-based test in *Dakuras v. Edwards*.[144] In *Dakuras*, James Dakuras and Ella Calder were living together in "a simulacrum of marriage" in Illinois when Ella suffered a disabling stroke.[145]

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137. *Id.*

138. *Id.* at 452–53. Ironically, Acridge's representative had not wanted his relocation to Texas to result in a change of his domicile. *See id.* at 447.

139. *Id.* at 450.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* (explaining that "analysis of the facts and circumstances of the case [with respect to the domicile determination] presents the court with the best opportunity to reach the appropriate conclusion").

144. 312 F.3d 256 (7th Cir. 2002).

145. *Id.* at 257.

The complaint alleged that Ella's relatives in Ohio deceived her into moving to Ohio after she suffered the stroke.[146] Upon her arrival, Ella's relatives had her declared mentally incompetent and placed her in an assisted-living facility.[147] James filed a fraud action in federal district court against Ella and her relatives, alleging that Ella's relatives had unlawfully prevented James from contacting Ella and that Ella took some of his valuable property with her to Ohio and failed to return it.[148] The alleged basis for federal jurisdiction was diversity jurisdiction.[149]

The district court initially dismissed James's complaint for lack of subject matter jurisdiction on the grounds that James pleaded that Ella's relocation was precipitated through the deceptive acts of her relatives.[150] The district court explained that a change of domicile required the individual to intend to remain in the new state and that an involuntary change in one's physical residence could not create a change in domicile.[151]

While the Seventh Circuit in *Dakuras* expressed approval of the district court's interpretation of the law, it disagreed with the application of such a principle to the present case.[152] The *Dakuras* court noted that the defendants had conceded that Ella was incompetent at the time of her relocation and that if any change in domicile had occurred, it would only be through their actions and decisions as her guardians.[153]

The *Dakuras* court then addressed the issue of whether Ella's guardians had the authority to change Ella's domicile by moving her from Illinois to Ohio after she was incompetent.[154] In reaching its determination, the *Dakuras* court noted the unique situation presented to the court when the domicile of an incompetent is at issue. An incompetent individual, unlike a competent adult, is not able to decide where to live. Rather, an incompetent is dependent upon her guardian to make all significant life choices. The *Dakuras* court explained, "[t]he re-

146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.* at 257–58.
151. *Id.* at 258.
152. *Id.* at 258–59.
153. *Id.* at 258.
154. *Id.*

sponsibility for making the essential life choices of children and wards is vested not in them but in their parents or guardians, and we cannot see why the choice of domicile should not be treated as one of those life choices."[155]

While the *Dakuras* court recognized the authority of a representative or guardian to alter the domicile of an incompetent ward, it expressed concern over providing the guardian with unchecked authority. Specifically, the *Dakuras* court noted that the guardian is not authorized to change an incompetent's domicile when such a change is made with an improper purpose.[156] Because James asserted that Ella's guardians had fraudulently moved Ella to Ohio and then attempted to defeat federal jurisdiction, the court estopped the guardians from denying that Ella's move to Ohio constituted a change in domicile.[157] The *Dakuras* court explained, "[a]lthough the defendants are not trying to confer federal jurisdiction, but to defeat it, they should not be allowed to gain a litigating advantage from having changed their ward's domicile for an improper reason."[158]

The *Dakuras* decision, while not endorsing a best interests test, recognized the authority of a guardian to change an incompetent's domicile in some instances. This is similar to the limited recognition of authority by the Tenth and Fifth Circuits. The Seventh Circuit approach differs from the best interests test employed by the Tenth and Fifth Circuits in that the only limitation on the guardian's authority is the motive for the change in domicile. In *Dakuras*, the only motive examined by the court was the motive to destroy federal jurisdiction.[159] The best interests test appears to involve a broader inquiry by federal district courts into the overall motivation of the guardian in relocating the ward and an evaluation of whether the relocation served the incompetent's best interests. Arguably, the *Dakuras* motive test is not concerned with whether the relocation serves an incompetent's best interests.

155. *Id.*
156. *Id.* at 259.
157. *Id.*
158. *Id.*
159. *Id.*

4. Per Se Domicile Change with Residency Change

While no federal court has permitted a guardian unfettered discretion to change the domicile of an incompetent, such a rule is a possible option. Incompetence presents a challenge for federal courts in determining domicile following the 1988 amendments to § 1332. Because incompetent individuals lack the ability to form intention, they are not able to intend to remain in a place indefinitely. Therefore, under the current definition of domicile, an incompetent cannot change his or her domicile because he or she cannot take up a new residence with the *intention* of remaining there indefinitely.

To resolve this dilemma, courts could opt to omit the intent requirement altogether. This would permit a guardian to change the domicile of a ward simply by changing the ward's physical residence. While such a rule would be a significant departure from the current approaches taken by the Fourth, Fifth, Seventh and Tenth Circuits, it is within the scope of permissible tests the federal courts could adopt.[160]

B. Critiquing Current Approaches Involving Domicile of Incompetent Parties

The current approaches used by courts in determining an incompetent's domicile are reactionary and do not adequately preserve the interests of incompetent individuals nor protect the integrity of the federal courts' subject matter jurisdiction. This section of the Article critiques the current approaches to resolving an incompetent's domicile after a change in residency.

1. Inflexibility Inherent in the Per Se Rejection of Domicile Changes

In adopting a per se rejection of any change in an incompetent's domicile, the Fourth Circuit in *Long* reasoned that the federal courts' subject matter jurisdiction needs to be predictable and any subject matter jurisdiction test needs to be unam-

160. FREER, *supra* note 96, § 4.5 (explaining that because Congress has not generally defined the citizenship of natural persons, it has left that question to the courts for resolution).

biguous and yield predictable results.[161] The Fourth Circuit expressed a concern over the workability of the best interests test and the uncertainty it would inject into the jurisdictional determination.[162] While the Fourth Circuit's per se rejection of any change in domicile by an incompetent adult creates a clear bright line for the determination of federal subject matter jurisdiction, it is overly restrictive and deprives incompetent adults who may be prejudiced by local bias from utilizing the protection of diversity jurisdiction in federal court.

First, this approach is inflexible and is more restrictive than its counterpart for competent adults. While the Tenth, Fifth and Seventh Circuits' best interests and motive tests would require federal district courts to consider a wide range of factors in a highly fact-intensive assessment of domicile, courts already engage in some degree of fact-finding when determining a *competent* individual's domicile.[163] To evaluate a competent individual's intention to remain in the new state of residency, federal district courts look to evidence such as employment in the state, state licenses, and payment of state income taxes.[164] Oftentimes, a federal district court is faced with a situation where an individual participates in such activity in multiple states. In such cases, the court must determine which of the multiple forums has the most qualitatively significant contacts to establish domicile. Given that the district courts are capable of considering and evaluating facts in the context of determining a competent adult's domicile, the inflexible per se rejection rule adopted by *Long* is unwarranted.

Second, the per se rejection of domicile change is supported by an inaccurate premise, namely that the protection provided by federal diversity jurisdiction is inapplicable when one party is an incompetent adult who has relocated to a new state post-incapacitation. In adopting a per se rejection of any change in domicile by an incompetent adult, the Fourth Circuit in *Long* stated that "traditional diversity concerns" were absent in these types of cases.[165] Because the *Long* court failed to pro-

161. Long v. Sasser, 91 F.3d 645, 647 (4th Cir. 1996) (reasoning that "[j]urisdictional rules should above all be clear").

162. *Id.* at 647–48 (criticizing the Tenth Circuit's approach in Rishell v. Jane Phillips Episcopal Mem'l Med. Ctr., 12 F.3d 171 (10th Cir. 1993)).

163. *See* FRIEDENTHAL, *supra* note 36, § 2.6.

164. *Id.*

165. *Long*, 91 F.3d at 647.

vide the reasoning behind this conclusion, we are left to determine why the protections of diversity jurisdiction are not implicated in cases filed by or against incompetent adults who are relocated post-incapacitation. The court's conclusion could have been premised on the notion that local bias does not exist against incompetent individuals who become residents of a different state post-incapacitation. There is no empirical evidence to suggest that this is true. Moreover, there does not appear to be support for such a conclusion because local bias against the incompetent would presumably attach once permanent residency was established in another state. A non-resident incompetent individual may be subject to the effect of local bias when suing resident physicians or caretakers. Bias may be exacerbated by evasive litigation tactics used by large nursing homes defending tort claims.[166]

Moreover, while several modern procedural scholars suggest that local bias may no longer exist in the same way or to the same degree as it existed when the Judiciary Act first authorized diversity jurisdiction, Congress has continued to authorize diversity jurisdiction in federal courts.[167] Regardless of whether local bias still remains a supportable basis of diversity jurisdiction, the *Long* court failed to proffer any reason why incompetent adults should be treated differently from competent adults.

Alternatively, the *Long* court's conclusion could have been premised on the notion that diversity jurisdiction is designed to protect against the perception of bias. Protection of diversity jurisdiction would thus not be warranted because an incompetent adult is unable to perceive bias. This premise is equally flawed. Diversity jurisdiction provides a safe-haven forum for any nonresident defendant. To establish diversity jurisdiction, the party asserting jurisdiction does not have to show the existence of actual bias. The party need not even allege that he or she perceives or fears local bias.[168] Therefore, the fact that an

166. Nursing homes are often owned and operated by means of complex corporate structures. The organizational structure is consciously designed to make it as difficult as possible both to name and identify defendants in tort actions and to collect a substantial judgment from any defendant. *See, e.g.*, Charles Duhigg, *At Many Homes, More Profits and Less Nursing*, N.Y. TIMES, Sept. 23, 2007, at A1.

167. *See* CHEMERINSKY, *supra* note 20, § 5.3.2 (discussing whether actual bias is required and whether the need for diversity jurisdiction still remains).

168. *See* FED. R. CIV. P. 84; FED. R. CIV. P. FORM 2.

incompetent adult may not be aware of any local bias should have no impact on whether he or she is entitled to the protection of diversity jurisdiction. Actual bias can exist even when it is not perceived. Diversity jurisdiction surely protects litigants from actual, though not perceived, bias.

2. Best Interests and Motive-Based Tests

a. A Vague Standard Yields Unpredictable Jurisdictional Determinations

The best interests and motive-based tests both lack clarity—they are vague in scope of review and in factors to be considered. Under the best interests test used by the Tenth and Fifth Circuits, an incompetent's domicile can be changed after incompetence by a change in physical residence if a guardian's relocation of an incompetent is in his or her best interests. The proper scope for this determination, however, is unclear. For example, some courts examine the mental, physical, and social needs of an incompetent, focusing on whether the incompetent's needs are better met in the new jurisdiction. The Fifth Circuit in *Acridge* examined whether the treatment facility located in the new forum was better able to meet the incompetent's medical needs.[169] By contrast, the Tenth Circuit in *Rishell* did not clarify whether federal district courts should focus on such interests in reviewing the guardian's decision.[170]

Because the best interests test does not define the scope of review, a district court could conceivably focus on the litigation decisions made by the guardian, a consideration thought irrelevant when evaluating the validity of a competent individual's change in domicile. For example, district courts could examine whether the decision to change domicile for purposes of federal subject matter jurisdiction was in the best interests of the incompetent, or whether the guardian had an improper or self-interested motivation. The best interests standard itself

169. Acridge v. Evangelical Lutheran Good Samaritan Soc'y, 334 F.3d 444, 453 (5th Cir. 2003).

170. Rishell v. Jane Phillips Episcopal Mem'l Med. Ctr., 12 F.3d 171, 174–75, 174 n.4 (10th Cir. 1993) (noting the need to "sort out the factors" to be considered in determining whether the incompetent's best interests were served by a change in domicile and whether any such change occurred, but failing to define those factors).

does not exclude such a focus. Moreover, the appellate courts have provided little clarification regarding the scope of this inquiry.[171]

The best interests test also fails to provide clear factors to be reviewed by federal district courts. The lack of factors can be explained in part because the standard itself suggests a highly individualized consideration. Assuming the appropriate scope of review is to determine whether the new forum better serves an incompetent's mental, physical and social needs, district courts must consider the specific limitations and needs of the individual incompetent and the comparative quality and availability of resources in each forum. Even if circuit courts were to clarify the scope of the test or the factors to be considered, the individualized nature of this approach makes it difficult to apply with any regularity.

The highly individualized and fact-based determination mandated by the best interests test creates unpredictability in its application. Under the best interests test, a district court's determination of domicile is based on the district court's perception of an incompetent individual's needs and the resources available to the incompetent in the new forum. For prospective plaintiffs choosing to file suit against an incompetent defendant, it will be very difficult to predict a district court's determination of domicile. These plaintiffs likely will not have access to facts concerning the incompetent's medical, social, and emotional needs nor the quality and availability of resources for the incompetent in the new forum. Even if a plaintiff could gain access to such information, the substantial discretion afforded district courts when determining domicile makes outcomes difficult to predict. This introduces a new level of unpredictability in the assertion of federal subject matter jurisdiction not present in the domicile determination for competent adults.[172]

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171. The Seventh Circuit's motive-based test provides a more limited scope of review by focusing on whether the relocation of the incompetent was made solely for jurisdictional advantage. Dakuras v. Edwards, 312 F.3d 256, 259 (7th Cir. 2002). This test, while more clear than the best interests test, is still flawed. *See infra* notes 184 & 192 and accompanying text (discussing the limitations of the motive-based test).

172. While courts consider the competent individual's domicile on a case-by-case basis, they use established objective factors. *See* FRIEDENTHAL, *supra* note 36, § 2.6.

An important aim of jurisdictional principles is to provide litigants with guidance regarding where to file a claim.[173] Another goal of jurisdictional rules is to create consistency among the federal district courts.[174] Federal subject matter jurisdiction is limited by Article III of the United States Constitution. Because the Constitution requires Congress to authorize federal subject matter jurisdiction, federal courts should be vigilant in narrowly interpreting the scope of their subject matter jurisdiction so as to prevent judicial overreaching. The best interests test, however, provides wide latitude to district court judges in determining whether subject matter jurisdiction is established in an individual case. Such broad discretion increases the likelihood that different district court judges will reach contrary decisions on the same facts. Circuit courts that endorse the best interests test thus undermine the policies underlying federal subject matter jurisdiction by advocating a test that injects unpredictability into the jurisdictional analysis.

Those who support the best interests test argue that it does not introduce any more uncertainty into the determination of federal subject matter jurisdiction than the domicile test used for competent individuals.[175] To determine competent individuals' domicile, district courts are required to examine various factors, including place of employment; location of any purchases or sales of real property, especially property that can be used as a dwelling; voter registration; payment of state taxes; qualifying for and receiving state benefits that are predicated on permanent state residency; automobile registration and driver's license; location of bank accounts; and membership in churches or other organizations.[176] Advocates of the best interests test argue that because these factors yield some uncertainty in the domicile determination, the uncertainty created by the best interests test is no more problematic.[177] While the

173. *See* Long v. Sasser, 91 F.3d 645, 647 (4th Cir. 1996); *see also* Teply, *The Elderly*, *supra* note 115, at 1278–80 n.33.

174. *See* DIVISION OF JURISDICTION, *supra* note 55, § 1301(b)(4); David D. Siegel, *Commentary on 1988 Revision*, *in* 28 U.S.C.A. § 1332 at 10, 18–19 (West Supp. 2005) [hereinafter Siegel, *Commentary*] (discussing the split among the circuits prior to the 1988 amendments to § 1332 and Congress' desire to resolve that split).

175. Acridge v. Evangelical Lutheran Good Samaritan Soc'y, 334 F.3d 444, 450 (5th Cir. 2003).

176. FRIEDENTHAL, *supra* note 36, § 2.6; WRIGHT, *supra* note 34, at 530–33.

177. *Acridge*, 334 F.3d at 450.

determination of domicile for competent individuals permits district courts some discretion to consider whether a combination of factors supports a finding that the individual intends to remain in the jurisdiction, district courts' discretion is limited. The factors to be considered by district courts in making a determination of domicile for a competent adult are a set of objective criteria which lead to predictable results.

b. Arbitrariness in Fact-Finding

In addition to introducing an undesirable amount of unpredictability into a jurisdictional determination, the best interests test exposes litigants to potentially arbitrary and biased decisions by district courts. This is most evident in the wide latitude of discretion given to a district court judge in determining whether an incompetent individual has made a prima facie showing of diversity jurisdiction—something not granted to a district judge under the general domicile test utilized for competent adults.

First, the best interests test requires district courts to make value judgments about an incompetent's circumstances when considering an incompetent's needs and the quality and quantity of resources available to an incompetent in the various forums.[178] As a result, the determination of whether diversity has been established may turn on the inherent biases of individual district court judges. The underlying facts in *Acridge* serve as an example of how these inherent biases may creep into the decision-making process of the best interests test. Louis Acridge had been a domiciliary of New Mexico for almost thirty years prior to the onset of debilitating Alzheimer's dementia.[179] His wife, Mary, moved him from a treatment facility in New Mexico to one in Texas.[180] At the time of the suit, Mary was a domiciliary of Colorado and their son was a domiciliary of New Mexico.[181]

A district court presented with these facts would be required to determine whether Mary's relocation of Louis from a treatment center in New Mexico to a treatment center in Texas

178. *See id.* at 452–53.
179. *Id.* at 446.
180. *Id.*
181. *Id.* at 448 n.2.

was in Louis's best interests, thereby changing his citizenship to Texas. If the judge believed that living close to one's relatives is a very important interest of an incompetent adult, the judge may consider that Louis's relocation to Texas away from his family members was not in his best interests. Such a determination would result in a conclusion that Louis's domicile had not changed from New Mexico despite his relocation to Texas.

By contrast, the district court judge might give little weight to the proximity of an incompetent adult's family members. Instead, the district court might assign more weight to the types of treatment and respective reputations of each treatment facility. A comparison of the facilities in New Mexico and Texas might lead to a conclusion that the treatment facility in Texas is superior, requiring a determination that Louis's best interests were served by his move to Texas. This determination would result in a conclusion that Louis's domicile changed to Texas when he was relocated to a Texas nursing home.

The different possible outcomes in the above scenario highlight the shortcomings of the best interests test. With broad discretion and no clear factors to consider, district courts considering the same facts may come to vastly different conclusions as to whether the relocation of an incompetent adult was in his best interests. This renders determinations of federal subject matter jurisdiction unpredictable and arbitrary. Moreover, such determinations are subject to the internal bias of district court judges and their perception of what constitutes the best interests of any given incompetent adult.

Best interests tests have been used by courts in other contexts. The best interests of the child test is the standard used in most states to resolve child custody disputes.[182] This test has been criticized as being difficult to apply and as permitting the judge's personal notions of good parenting practices to intrude on the decision-making process.[183] The best interests test used by the Fifth and Tenth Circuits is subject to the same criticisms.

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182. *See* 22 AM. JUR. TRIALS 347 § 3 (2007).

183. *See* Deirdre Larkin Runnette, Comment, *Judicial Discretion and the Homosexual Parent: How Montana Courts Are and Should Be Considering a Parent's Sexual Orientation in Contested Custody Cases*, 57 MONT. L. REV. 177 (1996).

The motive test used by the Seventh Circuit, which focuses on the motive of the guardian in attempting to change an incompetent's domicile, is similarly flawed. The motive test is narrower in focus than the general best interests test used by the Fifth and Tenth Circuits. Under this test, an incompetent's domicile is altered with a change in residency so long as the guardian does not change the incompetent's residency solely for the purpose of creating or destroying diversity jurisdiction.[184] This approach also injects impermissible bias and arbitrariness into the determination of whether district courts have subject matter jurisdiction over cases. In examining the motives of the guardian, district courts will necessarily consider whether the relocation of an incompetent serves his interests in any way other than for litigation purposes. Such a determination will inevitably focus on comparison of the relative benefits of an incompetent's prior domicile and the new residence. Presumably, if an incompetent's needs are better met in the new forum, then his relocation could not have been predicated solely on litigation strategy. Because district courts are offered no guidance in how to evaluate and compare the two forums with respect to an incompetent's interests, this test also results in unpredictable and inherently biased decisions.

c. Overly Intrusive Determination

In addition to generating arbitrary and biased determinations, the best interests test may deter claims filed on behalf of incompetent adults. Unlike the domicile test used for competent adults, the best interests test permits district courts to engage in factfinding on highly personal issues. For example, to support a determination that an incompetent adult's change in residency should amount to a change in domicile, an incompetent adult must present evidence to support the finding that his relocation was in his best interests.[185] This would presumably require disclosure of the circumstances of his incapacitating condition, the nature of treatment options, a comparison of treatment facilities, possible support that can be offered by family members, and the likelihood of successful rehabilitation. This evidence must be presented even if it is not

184. Dakuras v. Edwards, 312 F.3d 256, 259 (7th Cir. 2002).
185. *See Acridge*, 334 F.3d at 453.

relevant to the underlying dispute, as this forms the basis of federal district courts' subject matter jurisdiction. By comparison, to establish evidence of their domicile, competent adults need only offer general evidence such as acquisition of state licensure, property acquisition in the state, employment in the state, or payment of state income taxes.[186]

Requiring incompetent adults or their representatives to put on such evidence constitutes a considerable burden on access to the federal courts and permits district courts to engage in an overly invasive exploration of that party's circumstances. An incompetent's guardian may have difficulty finding evidence to support his assertion of diversity jurisdiction, as there may not be clear evidence regarding the nature and treatment of his condition. Moreover, an incompetent's family may not wish to expose intimate details of an incompetent's condition or care to review by federal courts. As a result, incompetents or their guardians may be discouraged from seeking access to federal courts.

d. Overstepping of Judicial Authority

The best interests and motive tests are especially problematic because they provide for an arguably unconstitutional expansion of judicial authority into the subject matter jurisdiction of the federal district courts. The Constitution grants Congress the authority to extend federal jurisdiction to the limits of Article III. Congress has never elected to grant the federal courts the full extent of federal jurisdiction permitted under Article III. Moreover, the federal courts cannot unilaterally create or eliminate bases of federal subject matter jurisdiction that have been constitutionally invoked by Congress.[187] Because Congress has explicitly rejected the motivation for appointment of the guardian as a test for establishing the domicile of an incompetent, the judiciary is not authorized to condition access to the federal district courts on motive-based analysis. Tests such as the best interests and motive tests, which ultimately focus on motivation for appointment of the

186. FRIEDENTHAL, *supra* note 36, § 2.6; WRIGHT, *supra* note 34, at 530–33.

187. U.S. CONST. art. III, § 2, cl. 1; 28 U.S.C. § 1332 (2000 & Supp. V 2005); Kontrick v. Ryan, 540 U.S. 443, 452 (2004) ("Only Congress may determine a lower federal court's subject-matter jurisdiction.").

guardian, arguably permit judges to contravene the express directives of Congress.

In 1988 Congress undertook an examination of the use of diversity jurisdiction in cases in which one party was an incompetent individual.[188] In considering how to address these cases, Congress considered using a motive-based test to resolve the issue of whether the appointment of a diverse guardian would operate to establish diversity jurisdiction.[189] Namely, Congress considered a test that would prohibit the utilization of diversity jurisdiction when diversity of citizenship was artificially created by the appointment of a diverse representative to an incompetent adult.[190] Ultimately, Congress explicitly rejected this test, choosing to adopt an approach that focused on the citizenship of individual incompetents.[191]

The federal district courts must adopt a standard consistent with Congress's grant of jurisdiction. The best interests and motive tests run afoul of Congress's grant of jurisdiction because they interject consideration of the guardian's motive in relocating an incompetent to a new state of residence. The Seventh Circuit's narrow motive test most clearly conflicts with Congress's approach, as it suggests the primary focus of district courts should be on whether the guardian relocated an incompetent adult solely for the purpose of creating or destroying diversity jurisdiction.[192] However, the more general best interests test used by the Fifth and Tenth Circuits also conflicts with the congressional grant of jurisdiction. While this test incorporates consideration of other facts in addition to the motive of the guardian, its primary focus is to uncover whether the relocation was triggered primarily by a desire to create or destroy diversity jurisdiction. Because Congress explicitly rejected consideration of the guardian's motive as a basis for determining whether the district courts had subject matter jurisdiction over an incompetent adult's diversity case,[193] these tests constitute impermissible judicial overreaching.

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188. *See* Siegel, *Commentary*, *supra* note 174, at 10, 18–19.

189. *Id.* (noting use of the motive and substantial stake tests by the circuit courts and explicitly rejecting such an approach).

190. *Id.*

191. *Id.* at 19 (noting that "[t]he measure of citizenship to look to on the estate's side, therefore, is the state of which the decedent was a domiciliary at the time of death").

192. Dakuras v. Edwards, 312 F.3d 256, 259 (7th Cir. 2002).

193. *See* Siegel, *Commentary*, *supra* note 174, at 10, 18–19.

3. Per Se Domicile Change with Residency Change

While no circuit court has permitted an incompetent's domicile to automatically change upon his relocation, such an approach is an option. Should a "residence only" approach be adopted, it would create potentially unworkable results.

Federal circuit courts have consistently rejected a "residence only" approach to determining citizenship of competent individuals.[194] The primary reason for not looking solely to one's residency to establish citizenship is that an individual may maintain multiple residences. Individuals, however, only have one state of citizenship for purposes of diversity jurisdiction.[195] Therefore, to permit incompetent adults to establish citizenship in any state in which they reside would permit them to maintain more than one state of citizenship. While entities such as corporations have dual citizenship for purposes of diversity jurisdiction,[196] there is no justifiable reason that incompetent adults should be allowed, unlike competent adults,[197] to maintain more than one state of citizenship.

It could be argued that incompetent adults are not as likely to maintain multiple residences in different states because they are generally less mobile than competent adults and would have more difficulty in establishing and maintaining such dwellings. While incompetent adults may not be as likely as competent adults to have residences in multiple states, those who live near state borders may, in fact, possess such residences. For example, an incompetent adult may maintain a residence at a treatment facility in one state but spend a significant portion of his time living with family members in a neighboring state. In such a scenario an incompetent adult would have two residences. If circuit courts adopted a "residence only" approach to determine the domicile of an incompetent adult, district courts could be faced with an individual with two domiciles and, consequently, two citizenships for purposes of diversity jurisdiction.

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194. FREER, *supra* note 96, § 4.5.

195. *See* Williamson v. Osenton, 232 U.S. 619, 625 (1914).

196. *See* 28 U.S.C. § 1332(c)(1) (2000 & Supp. V 2005).

197. *See* CHEMERINSKY, *supra* note 20, § 5.3.3 ("[A]n individual is considered to be a citizen of only one state for purposes of determining diversity jurisdiction.").

III. A NEW PROPOSAL: RESIDENCY AND OBJECTIVE INDICIA OF PERMANENCY

The differing approaches currently used by the federal courts to determine whether an incompetent adult has changed his domicile after becoming mentally incapacitated present significant challenges in application and create unnecessary obstacles to an incompetent's access to federal court. Moreover, the divergent treatment has split the federal circuit courts of appeals, generating conflicting standards and providing disparate treatment of similarly situated incompetent adult litigants. Given this conflict and the shortcomings of the current approaches, the federal courts should adopt a new approach to resolve whether and how an incompetent adult can change his domicile for purposes of diversity jurisdiction.

Federal courts should find that an incompetent adult has changed domicile when the adult himself or through his guardian establishes a residence in a new state and establishes indicia of permanency there. Similar to the approach used for competent adults, an incompetent adult must actually reside in the new state prior to being considered a domiciliary of the new state. As residency is not linked to intention, there is no need to alter this aspect of the test traditionally used in determining the domicile of competent adults. Because an incompetent adult is unable to establish an intention to remain in the new residency, however, federal courts will need to adjust this aspect of the traditional test used in cases of competent adults. In general, the primary consideration for district courts in determining whether an incompetent has changed his domicile should be whether the new residence is the incompetent's primary, permanent dwelling place.

When faced with determining whether an incompetent adult has become a domiciliary of the new state, district courts should look to an objective set of criteria to determine if there are indicia of permanency in the new state. Permanency can be established by evidence such as acceptance of benefits from the new state on the basis of permanent residency, termination of the provision of long-term care services in the state of prior residency, establishment of the provision of long-term care services in the new state of residency, payment of taxes in the new state, and ownership of property in the new state. District courts should weigh the strength of these factors and any other

like evidence which facilitates the determination of whether the new residence is the primary, permanent dwelling of the incompetent adult.

The proposed approach closely mirrors the test used in determining whether a competent adult has changed his domicile by requiring district courts to consider activities which are commonly performed by guardians in establishing a permanent home for an incompetent adult. Under the traditional approach for competent adults, intention is judged by an objective standard.[198] The competent adult cannot establish his intention to remain in the new state by simply testifying to his intent.[199] Rather, district courts look for the existence of actions by the adult that are objectively considered to be evidence of activity commonly done when a person is establishing a new fixed and permanent home.[200] The proposed approach for incompetent adults is similarly objective. Moreover, the proposed criteria, while modified to reflect the actions taken on behalf of an individual who is mentally incapacitated, mimic the traditional test.

The facts in *Acridge* provide a context in which to understand application of the proposed approach. Louis Acridge clearly established a residence in a new state when he was relocated from his New Mexico nursing home to the defendant treatment facility in Texas. After establishing a change in residence, a court confronted with the *Acridge* facts under the proposed approach would consider whether there were indicia of permanency in Texas by weighing the proposed objective criteria. After relocating to Texas, Louis's wife applied for state welfare benefits on Louis's behalf.[201] To receive these benefits, Louis had to establish his permanent residency in Texas.[202] The fact that Louis was awarded these benefits should favor a determination that Louis can establish indicia of his permanency in Texas. Moreover, Louis's move to Texas was preceded by the termination of his treatment at the New Mexico nursing home.[203] When he relocated to Texas, Louis's wife arranged for

198. FRIEDENTHAL, *supra* note 36, § 2.6.
199. Dist. of Columbia v. Murphy, 314 U.S. 441, 456 (1941).
200. *See supra* text accompanying note 40.
201. Acridge v. Evangelical Lutheran Good Samaritan Soc'y, 334 F.3d 444, 451 (5th Cir. 2003).
202. *Id.* at 450–51.
203. *See id.* at 446, 453.

his long-term care to be provided by the defendant treatment facility in Texas.[204] The adjustment in his long-term care also establishes indicia of his permanency in Texas. As a result, Louis would be a domiciliary of Texas under the proposed approach.

The proposed approach has significant advantages over the current approaches used by the federal circuit courts of appeals. Unlike the per se rejection approach used by the Fourth Circuit, the proposed approach conditions access to the federal courts on the establishment of a new domicile by an incompetent adult. The proposed test might prohibit access to the federal courts by an incompetent adult who under the per se test would not be permitted to change domicile post-incapacitation. For example, an incompetent adult who, like Louis, has permanently relocated to a new state would retain his prior domicile under the Fourth Circuit test. He could then use diversity jurisdiction to sue a resident of the state in which he has permanently relocated. Under the proposed test, this individual would be deemed a domiciliary of his new state of permanent residency. As a result, he would not be permitted to use diversity jurisdiction to pursue his claim against another resident of the state in which he has become a permanent resident. While the proposed test limits such suits, an incompetent adult should be permitted access to the federal courts in a manner similar to a competent adult. The proposed approach prevents disparate treatment of incompetent adults in federal court by mirroring the traditional test for competent adults.

Because the proposed approach so closely mirrors the traditional test used in cases involving competent adults, it also has the advantage of being easier to apply than the best interests and motive-based tests. Under the proposed approach, district courts need only consider the actions of the guardian in setting up a permanent arrangement for an incompetent adult in the new state of residence. District courts can avoid consideration of slippery questions of whether the new forum adequately serves the incompetent adult's interests. Moreover, there is no need to evaluate whether the decision to relocate an incompetent adult to a new state was based on the selfish interests of the guardian.

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204. *See id.*

The proposed approach also avoids the dilemma created by an approach that would permit change of domicile based on only a change in residency. Abandonment of any intent requirement could create a situation in which an incompetent with two residences would have two domiciles. The proposed approach mandates district courts to select a single domicile by considering whether there are indicia of permanency in the new state. When indicia of permanency are found, district courts will treat the new state as the domicile and the former state of residency will no longer be considered a domicile. As district courts have never recognized two domiciles for competent adults,[205] the proposed approach tracks the traditional test.

Finally, the proposed approach avoids disparate treatment of incompetent adults by mirroring the traditional test used to determine whether a competent adult has changed his domicile. The Fourth Circuit's per se rejection of domicile change by an incompetent adult is unnecessarily inflexible and places incompetent adults in a different position from similarly situated competent adults. Additionally, the motive and best interests tests require district courts to examine the motivation for an incompetent's relocation and the guardian's decision to file in federal court. In cases involving competent adults, district courts consider the competent adult's motivation in relocation irrelevant in determining whether the relocation effectuates a change in domicile.[206] Under these tests, however, motivation becomes the central focus for district courts in considering whether an incompetent adult has changed his domicile. As there is no justification for such disparate treatment of incompetent adults, the proposed test is more advantageous than the current tests employed by the federal circuit courts.

CONCLUSION

The determination of whether an incompetent adult's domicile can change post-incapacitation has presented the federal courts with a unique challenge. While a competent adult's

205. CHEMERINSKY, *supra* note 20, § 5.3.3.

206. Dakuras v. Edwards, 312 F.3d 256, 259 (7th Cir. 2002); Peterson v. Allcity Ins. Co., 472 F.2d 71, 74 (2d Cir. 1972); Janzen v. Goos, 302 F.2d 421, 425 (8th Cir. 1962).

domicile can change when he physically relocates his residence to a new state and he intends to return to that state when away, an incompetent adult does not possess the capacity to form intention. Whether and under what circumstances an incompetent adult can change his domicile post-incapacitation has split the federal circuit courts of appeals.

This circuit split has resulted in inconsistent approaches which are either unworkable or result in disparate treatment of claims by and against incompetent adults. Unfortunately, the split will only be exacerbated in the next few decades as the elderly population doubles.[207] It is critical to resolve the recent split among the federal circuit courts of appeals as to how to resolve the determination of an incompetent adult's citizenship for purposes of diversity jurisdiction. To facilitate a resolution of this split and provide a fair, workable test, this Article advocates that an incompetent adult should be deemed to have changed his citizenship when he takes up a new residence in a different state and objective indicia of the incompetent's permanency exist in that state.

207. THE STATE OF AGING, *supra* note 12, at 3.