

Jurisdiction in parental responsibility matters

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1) Basic situations I

- international situation – international factor concerning a child and parental responsibilites
- the question: **which MS has jurisdiction?**
- aim is to provide
 - clear answer
 - clear guidelines
 - transparent method
 - in the child's best interests
- key point is the requirement of proximity

1) Basic situations II

- **habitual residence** in the foreground
- the child's nationality does not matter too much
- requires a different attitude
- the rules on jurisdiction are mandatory
- a lot of different situations -
 - parents have different nationalities and they live as a family in one MS
 - parents have same nationality but they live as family in third country
 - the child lives with one parent
 - the state will intervene

1) Basic situations III

habitual residence in the foreground

parents can be spouses, cohabitants or in no partnership at all

legal dispute can be between parents or parents and state (or even other relatives)

2) Brussels Ila covers ‘civil matters’

Preamble (7) and Art 1(1)

civil matters

close connection to parental responsibilities

civil and public matters impact

broad interpretation is needed

confirmed by the CJEU

‘C’ C-435/06 [2007]

‘A’ C-523/07 [2009]

decision ordering a child to be taken into care

3) Structure of jurisdictional rules

If a court is seised – it examines its jurisdiction

(Art 17)

- 1) Is there any jurisdiction acc. to Art 8? (general jurisdiction)
- 2) If not, is there any jurisdiction acc. to Arts 9, 10 12, 13?
(special grounds)
- 3) Transfer to the court better placed (Art 15)
- 4) If not and other MS' court has jurisdiction
 declares the lack of jurisdiction
- 5) Art 14 residual jurisdiction

4) Art 8 – child's habitual residence

- *The courts of the MS shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that MS at the time the court is seised.*
- Basis – the most appropriate forum due to its **proximity** to the child
- No definition – uniform and autonomous interpretation is needed
- Original idea is that one HR exists which is not hard to determine

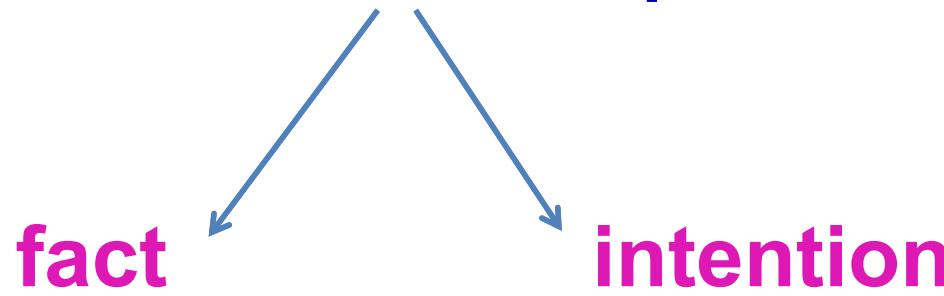
4) Art 8 – child's habitual residence

- The existing definitions in national rules/other international documents **cannot** be used
- CJEU decisions provide some guidelines but it means a **case-by-case** basis
- MS should use the **same** standards
- **Difference** in the cases

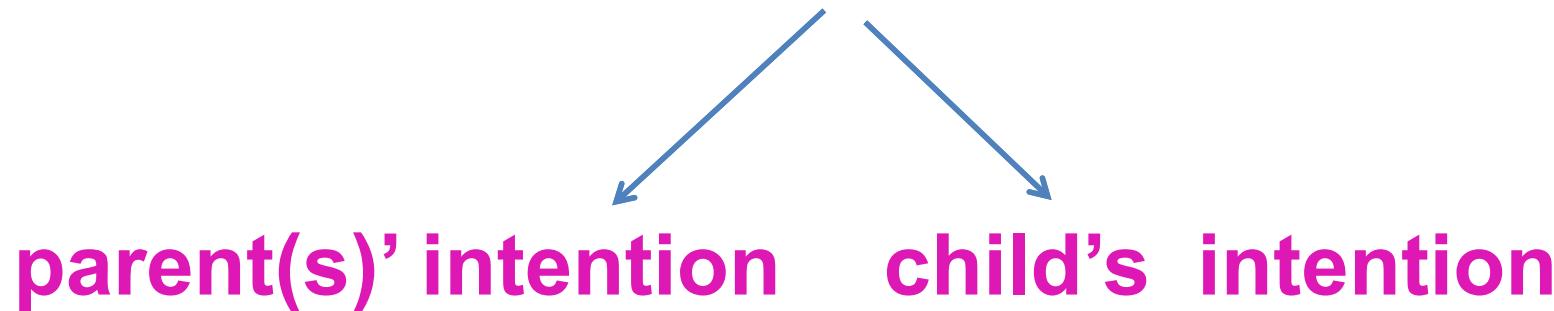
4) Art 8 – child's habitual residence

Which factors are important?

Which is more important?



Whose intention is more important?



4) Art 8 – child's habitual residence contra Art 13 (child's presence)

The **physical presence alone** of the child in a Member State, as a jurisdictional rule alternative to that laid down in Article 8 of the Regulation, is not sufficient to establish the habitual residence of the child.

(CJEU, 2.04.2009, C-523/07, A)

5) Cases – Art 8

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

5) Cases – Art 8

The child's age may be taken into consideration both in the context of examining the loss of a habitual residence and in that of the acquisition of a new habitual residence. As a very young child is particularly dependent on his or her mother, who constitutes his or her 'life horizon', it is clear that the mother's wish lawfully to leave one Member State to settle or resettle in another Member State is a crucial factor in assessing the loss of that child's habitual residence. The child's extreme youth implies, moreover, that the conditions for her integration into her new family and social environment are likely to be satisfied very quickly.

That primary consideration of the wish of the person with sole parental authority does not in any way imply that there is no need to take other factors into account.

(CJEU, 22.12.2010, C-497/10 PPU, Mercredi)

5) Cases – Art 8

HR as a fact in case of a child who was born ‘abroad’

*If a child **has been born and has lived continuously with her mother for several months**, in accordance with the **joint wishes** of her parents, **in a Member State other than that where those parents were habitually resident before her birth**, the **initial intention** of the parents with respect to the return of the mother, together with the child, to the latter Member State cannot allow the conclusion that that **child was ‘habitually resident’ there**, within the meaning of that regulation.*

(CJEU, 8.06.2017, C-111/17 PPU, OL v PQ)

5) Cases – Art 8

HR as a fact in case of infant - I

Decisive factors are:

- the fact that, from its birth until its parents' separation, the child **generally lived** with those parents in a specific place;
- the fact that the parent who, in practice, has had custody of the child since the couple's separation **continues to stay in that place** with the child **on a daily basis and is employed there** under an employment contract of indefinite duration; and
- the fact that the **child has regular contact** there with its other parent, who is still resident in that place.

(CJEU, 28.06.2018, C-512/17, HR)

5) Cases – Art 8

HR as a fact in case of infant – II

NOT decisive factors are:

- the stays which the parent who, in practice, has custody of the child has spent in the past with that child in the territory of that parent's Member State of origin in the context of **leave periods or holidays**;
- **the origins of the parent in question, the cultural ties** which the child has with that Member State as a result, and the parent's relationships with family residing in that Member State; and
- **any intention the parent** has of settling in that Member State with the child in the future.

5) Cases – Art 8

HR as a fact

A child must have been physically present in a Member State in order to be regarded as habitually resident in that Member State, for the purposes of that provision. Circumstances such as those in the main proceedings, assuming that they are proven, that is to say, first, the fact that the father's coercion of the mother had the effect of her giving birth to their child in a third country where she has resided with that child ever since, and, secondly, the breach of the mother's or the child's rights, do not have any bearing in that regard.

(CJEU, 17.10.2018, C-393/18 PPU, UD v XB)

5) Cases – Art 8

some issues also upon national cases - I

- I. Moving abroad with family – **intention of final settlement?**
- II. Having a registered address – **has it any meaning?**
- III. Leaving property behind in the country of origin – **has it any meaning?**
- IV. Possibility of having **two HRs?**

5) Cases – Art 8

some issues also upon national cases - II

- I. **Child's dependence** upon the parent's (primary caregiver's) intention?
- II. Importance of the **child's age**
- III. **Infants** – serious dependence
- IV. **Children in school-age** – independent integration
- V. **Child's opinion** – hearing of the child
- VI. **Child's HR** – children's HR (?)

6) Art 9 – continuing jurisdiction

- I Child's lawful move from one MS to another one
- II acquires a new HR
- III holder of access rights has his/her HR in that former state
- IV former HR's MS retain jurisdiction
- V three-month period long
- VI with the aim of modifying a judgment on access rights issued in that Member State before the child moved

6) Art 9 – continuing jurisdiction

Lawful move – HR

- Art 8-9
- Art 10-11 wrongful removal or retention of child
- Joint parental responsibilities as a tendency
Consequence – both parents have PR
Lawful removal requires the parents' agreement

7) Art 12 – prorogation of jurisdiction

- alternative forum for parental responsibility proceedings
- two different jurisdictional ground
- common point is the acceptance of the jurisdiction of the court
- one is – **divorce court**
 - some concentration of legal questions
 - procedural economy
- other is – **other court**
 - interest of the child
 - some respect of party-autonomy

7) Art 12 – prorogation of jurisdiction

Art 12 (1) – divorce court - I

The courts of a MS exercising jurisdiction by virtue of Article 3 on an application for divorce, legal separation or marriage annulment shall have jurisdiction in any matter relating to parental responsibility connected with that application where:

1 at least one of the spouses has parental responsibility in relation to the child

and

2 the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by the spouses and by the holders of parental responsibility, at the time the court is seized and is in the superior interests of the child

7) Art 12 – prorogation of jurisdiction

Art 12 (1) – divorce court - II

- Strong link between the PR case and the divorce court
 - 1 At least one spouse has parental responsibility (tendency – both of them have)
 - 2 Acceptance
 - 3 Superior interests of the child
 - judicial discretion
 - commentaries – if 1 and 2 is fulfilled it is difficult to imagine that the exercise of jurisdiction would not be in the child's interest

7) Art 12 – prorogation of jurisdiction

Art 12 (3) – other court - I

- The courts of a MS shall also have jurisdiction in relation to parental responsibility in proceedings other than those referred to in paragraph 1 where:
 - 1 the **child has a substantial connection** with that Member State, in particular by virtue of the fact that one of the holders of parental responsibility is habitually resident in that Member State or that the child is a national of that Member State;
 - and
 - 2 the jurisdiction of the courts **has been accepted expressly or otherwise in an unequivocal manner** by all the parties to the proceedings at the time the court is seised and is in the **best interests of the child**

7) Art 12 – prorogation of jurisdiction

Art 12 (3) – other court - II

- General exception
 - Extension of party autonomy
 - 1 Substantial connection with some examples
 - 2 Acceptance
 - 3 Child's best interests
 - judicial discretion
 - difficult to see when it is not in the child's best interest
- (meaning of best interests)**

8) Cases – Art 12

Art 12 (3) – other court - III

No acceptance

where the defendant in those first proceedings subsequently brings a second set of proceedings before the same court and, on taking the first step required of him in the first proceedings, **pleads the lack of jurisdiction** of that court

(CJEU, 12.11.2014, C-656/13, *L v M*)

8) Cases – Art 12

Art 12 (3) – other court - IV

No acceptance

solely because the legal representative of the defendant, appointed by those courts of their own motion in view of the impossibility of serving the document instituting proceedings on the defendant, has not pleaded the lack of jurisdiction of those courts

(CJEU, 21.10.2015, C-215/15, Gogova)

8) Cases – Art 12

Art 12 (3) – other court - V

the joint lodging of proceedings by the parents of the child before the courts of their choice is an unequivocal acceptance by them of that court;

the fact that the residence of the deceased at the time of his death, his assets, which are the subject matter of the succession, and the liabilities of the succession were situated in the Member State of the chosen courts leads, in the absence of matters that might demonstrate that the prorogation of jurisdiction was liable to have a prejudicial impact on the child's position, to the conclusion that that prorogation of jurisdiction is in the best interests of the child.

(CJEU, 19.04.2018, C-565/16, Saponaro)

Acceptance

- The acceptance is a crucial issue
- What is **deemed to be an unequivocal acceptance** ?
 - not contesting jurisdiction
 - not contesting it while having a lawyer
 - not contesting while being there personally

Real acceptance  ‘presumption’ is enough?

Child best interests

- It is rarely scrutinized although important
- Real investigation
 - national examples
 - CJEU judiciary (?)
- Right to be heard?

9) Art 13 – child's presence

- No HR can be determined
- Art 12 cannot be applied
- The court of the MS where the child is present

CJEU, 22.12.2010, C-497/10 PPU, Mercredi

10) Art 15 – transfer to a court better placed

- It was a new form of judicial cooperation
- Transfer of the case
 - 1 child has particular connection to that MS
 - 2 would be better placed to hear the case
 - 3 it is in the best interests of the child
- Examples

10) Art 15 – transfer to a court better placed

In order to determine that a court of another Member State with which the child has a **particular connection** is better placed, the court having jurisdiction in a Member State must be satisfied that the transfer of the case to that other court is such as **to provide genuine and specific added value to the examination of that case**, taking into account, *inter alia*, the rules of procedure applicable in that other Member State;

– in order to determine that such a transfer is in the best interests of the child, the court having jurisdiction in a Member State must be satisfied, in particular, **that that transfer is not liable to be detrimental to the situation of the child**

(CJEU, 27.10.2016, C-428/15, *Child and Family Agency*)

(CJEU, 10.07.2019, C-530/18, *EP v FO*)

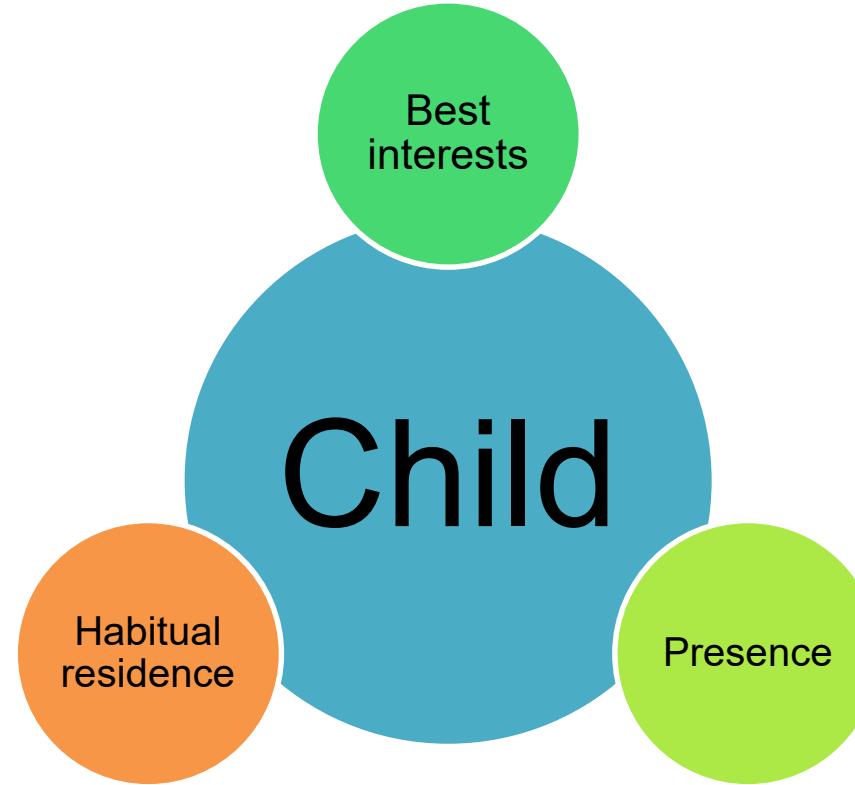
11) Art 20 – provisional measures

In **urgent** cases

'measures in respect of persons or assets in that State as may be available under the law of that Member State, even if, under this Regulation, the court of another Member State has jurisdiction as to the substance of the matter'.

Exceptional rule

Summarising conclusions



Jurisdiction in parental responsibility matters

Case study

FACTS

Anita and Luc are former cohabitants. Anita is from Hungary and worked for EU, Luc is from France. They met in Brussels, lived together there and their common child Julie was born in Brussels. When the child was one month old, they separated.

They have severe discussion on the two-month-old child's habitual residence. Anita would like to leave Brussels as she does not work there anymore and argues that she always maintained her Hungarian 'habitual residence'. She argues that she was not ever really integrated into Belgium as she does not like French language, spoke to her child always Hungarian and had a definite-time employment in Brussels. By the way, her mother and sister lived temporarily with her and the child in Brussels to help her in taking care of Julie. Julie heard a lot of Hungarian and was not integrated to anywhere in Belgium.

Luc would like to argue for Belgium as the habitual residence of the child. He could not meet too much with her child as he worked as a soldier and actually could meet her only once, when she was born. He lived in Brussels with Anita only six months long, before Julie was born. He does not want actually to settle in Belgium but would like the Belgian court to proceed in the issue of parental responsibilities.

Related questions

- 1) Are Anita's arguments relevant? If not, or not enough, what kind of arguments would be relevant, if any?
- 2) Is Julie's habitual residence in Belgium? If yes/not, why?

VARIATION No. 1

Anita leaves the family's common home to Portugal when the child is one month old and Luc does not have any parental responsibilities or he has but agrees to the move to Portugal.

Related questions

- 3) Can the child change her habitual residence lawfully?
- 4) If Luc recognizes suddenly that he cannot keep contact with Julie well after their move into Portugal, which country has jurisdiction on contact?

VARIATION No. 2

Now assume that Julie is not an infant but four years old.

The parents lived separately since the child was one month old. Luc kept contact with Julie, however worked as a soldier and met her relatively rarely.

Related questions

- 5) Can Anita argue for having her and Julie's habitual residence established in Hungary?
- 6) What are the arguments for and against the establishment of the habitual residence in Hungary?
- 7) Is Julie's opinion relevant?

VARIATION No. 3

Now assume that Julie is 15 years old.

The parents lived separately since the child was two years old. Julie kept contact with her father but spent all holidays in Hungary. She is eager to develop her Hungarian and come to Hungary for a longer time as a secondary school student.

Related questions

- 8) Can Anita argue for having her and Julie's habitual residence established in Hungary?
- 9) What are the arguments for and against the establishment of the habitual residence in Hungary?

VARIATION No. 4

Julie is 15 years old.

The parents lived separately since the child was one month old. Luc left the army and works as an officer in France. The child lives alternately one week with Anita in southern Belgium, one week with Peter in northern France. She attends the same school which is very close to the border.

Related questions

- 10) Where is Julie's habitual residence?

VARIATION No. 5

Anita and Luc were married and both of them have Hungarian nationality. Julie is four years old. Anita would like to divorce in Hungary as she has quite good friends working as attorneys there. She would like that the Hungarian court should decide about the parental responsibilities.

Related questions

- 11) Is it possible that the Hungarian court which has jurisdiction in divorce should decide also on parental responsibilities? What are the requirements?
- 12) Are the requirements fulfilled?

LEGAL INSTRUMENT(S) TO BE APPLIED

Regulation No. 2201/2003

Questions with guidelines

1) Are Anita's arguments relevant? If not, or not enough, what kind of arguments would be relevant, if any?

Actually it is a point which can be heavily discussed. However, Anita's arguments do not seem to be convincing. The fact that she has maintained her habitual residence in Hungary may have an emotional meaning but it is not the fact. Similarly, the fact that little Julie could hear almost only the Hungarian language cannot be decisive as Julie was a little child at that time.

It is a key point that habitual residence is not defined at all in Brussels IIa Regulation. On the other side it has to be emphasized that habitual residence has to be interpreted according to the standards of the EU law and the judgments of the CJEU and not according to the national legal requirements.

Habitual residence depends upon a lot of circumstances. There are many valid arguments and those have to be weighed in their entirety. Habitual residence has factual and juridical components as well.

2) Is Julie's habitual residence in Belgium? If yes/not, why?

Julie's habitual residence is in Belgium as she has not lived anywhere else but in Belgium. It is a pure matter of fact.

Habitual residence is partly a matter of fact and as Julie has not lived anywhere else, she has her habitual residence in Belgium. It seems hard to argue for the fact that she has her habitual residence somewhere else. However, it is a great opportunity for the participants to discuss about the components of someone's habitual residence under Brussels IIa Regulation.

Possible issues to be discussed:

- Does it seem to be necessary that the components of habitual residence should be incorporated in the regulation itself?
- What would be the advantages and disadvantages of a definition of 'habitual residence'?
- Is habitual residence a matter of fact or a matter of juridical components?
- What are the differences between an adult's habitual residence and that of a child?
- What is the importance of the concerned child's age?

3) Can the child change her habitual residence lawfully?

The child can change his or her habitual residence only with his or her parents or at least the approval of the parents. Lacking the approval of one parent, a child abduction may occur with a lot of disadvantageous consequences. In this case Luc did not have

parental responsibilities or he agreed to the child's move to Portugal so Julie's habitual residence could change lawfully.

4) If Luc recognizes suddenly that he cannot keep contact with Julie well after their move into Portugal, which country has jurisdiction on contact?

According to Article 9 of Brussels Ila Regulation, Luc can turn to the court in Brussels. Where a child moves lawfully from one Member State to another and acquires a new habitual residence there, the courts of the Member State of the child's former habitual residence shall, by way of exception to Article 8, retain jurisdiction during a three-month period following the move for the purpose of modifying a judgment on access rights issued in that Member State before the child moved, where the holder of access rights pursuant to the judgment on access rights continues to have his or her habitual residence in the Member State of the child's former habitual residence.

5) Can Anita argue for having her and Julie's habitual residence established in Hungary?

Actually she cannot argue for that. It does not matter whether the parents lived together or separately or whether one parent maintained a regular contact with the child or not.

6) What are the arguments for and against the establishment of the habitual residence in Hungary?

There are many arguments which may be referred to as habitual residence is not defined at all. However, it seems to be difficult to argue for having a habitual residence in Hungary or somewhere else than Belgium.

7) Is Julie's opinion relevant?

There are different viewpoints on the child hearing and the importance of his or her opinion.

Possible issues to be discussed:

- In case of the child's habitual residence what is the importance of the child's views and opinion?

8) Can Anita argue for having her and Julie's habitual residence established in Hungary?

Although there are different circumstances than in Variation No 2, the main points have not changed. As Julie always lived in Brussels, her habitual residence is in Belgium irrespective of the fact whether she loves another country or not or whether she speaks the language of this other country or not.

9) What are the arguments for and against the establishment of the habitual residence in Hungary?

There is no special argument for having a habitual residence in anywhere else as in Belgium.

Possible issues to be discussed:

- The meaning of the child's age and his/her emotions and knowledge of language. It can be also a point that she is not so young anymore.

10) Where is Julie's habitual residence?

This variation directs the thoughts to a new direction, namely a new possible legal consequence of the parents' separation. Although the starting point of Brussels IIa Regulation is that the child has only one habitual residence, there are new styles of living – e.g. alternative residence of the child – which can have very thought-provoking consequences. We can suppose that if Julie belongs to the school of one country, she belongs to a doctor or other authorities in that country and she has her habitual residence in the country of the school.

Possible issues to be discussed:

- Any new situation which can emerge as a consequence of the changes in family law may be discussed.

11) Is it possible that the Hungarian court which has jurisdiction in divorce should decide also on parental responsibilities? What are the requirements?

According to Article 12 of Brussels IIa Regulation, the courts of a Member State exercising jurisdiction by virtue of Article 3 on an application for divorce, legal separation or marriage annulment shall have jurisdiction in any matter relating to parental responsibility connected with that application where: (a) at least one of the spouses has parental responsibility in relation to the child; and (b) the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by the spouses and by the holders of parental responsibility, at the time the court is seised, and is in the superior interests of the child.

As the Hungarian court has jurisdiction in divorce (as both spouses have Hungarian nationality) and as there are parallel jurisdictional grounds in the Regulation, they can refer to Article 12.

In this case, the requirements are as follows: the Hungarian court has jurisdiction in the divorce case, at least one of the spouses has parental responsibility in relation to

the child, the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by the spouses and it serves the child's superior interests.

12) Are the requirements fulfilled?

As the Hungarian court has jurisdiction and both parents have parental responsibilities, they have to accept expressly that the Hungarian court has jurisdiction in the issue of parental responsibilities. This latter can be a crucial point as the CJEU's case law requires a real and expressed acceptance. The question whether this prorogation of jurisdiction serves the child's interests has not been decided very clearly yet.