

Parental responsibility in a cross-border context including child abduction



Thematic Unit 1

Parental responsibility in a cross-border context

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1. Parental responsibility: Jurisdiction under Brussels IIbis Regulation

1.1. Introduction

Background

Regulation 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation 1347/2000 [OJ \[2003\] L 338/1](#); known as Brussels II Revised or Brussels IIbis

- Free movement of citizens within Europe has encouraged the creation of 'international' families, where the parents are of different nationalities or live in a country other than that of their nationality. Where family disputes arise, particularly in relation to children, this can cause uncertainty about which country the case should be heard in and the cross-border effect of any judgment.
- The Regulation covers jurisdiction over parental responsibility disputes, i.e. identifying which Member State's courts should hear the case, and the recognition and enforcement of any subsequent judgments within the EU, i.e. giving legal effect to judgments outside the Member State that issued the judgment.
- Once a court has jurisdiction over a dispute under Brussels IIbis, the resolution of the dispute and the substantive law applied, decisions about the child's welfare and the order to be made are decided under the family law of the Member State. EU law identifies which court has jurisdiction and ensures that the judgment will be recognised and enforced in other Member States. It does not affect the substantive family law of the Member States.
- Brussels IIbis creates a regime to protect children in disputes throughout the EU
 - Overarching protections provided by Article 24 [Charter of Fundamental Rights of the European Union](#) and the protection of children's right to be heard; to have decisions made in their best interests and to have contact with both parents included in the Regulation
 - The child should never be left without a court to protect their interests
 - EU law should work alongside substantive national law on family disputes
 - National courts should work together across borders to protect children
- Brussels IIbis uses the principles of mutual trust and mutual recognition of judgments underlying the Regulation to ensure its smooth operation:
 - Harmonise jurisdiction to ensure judgments are recognised throughout the EU
 - International family disputes should be resolved in appropriate forum

for protection of child's rights and interests and recognised and enforced in all other Member States

- Brussels IIbis takes precedence over other international instruments

Scope of applicatons

Brussels II bis: contents	
Preamble	
Chapter I – Scope and definitions	Articles 1 - 2
Chapter II - Jurisdiction	Articles 3 - 20
Chapter III – Recognition and enforcement	Articles 21 - 52
Chapter III – Cooperation between the central authorities in matters of parental responsibility	Articles 53 - 58
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Brussels IIbis applies to disputes over parental responsibility with an international dimension. It covers international disputes between EU Member States, excluding Denmark. In terms of the subject-matter, [Article 1](#) states that the Regulation covers disputes over:

- Rights of custody and rights of access
- Guardianship, curatorship and other institution
- The designation and function of any person having charge of the child's person or property

- Placement of the child in foster or institutional care
- Measures for the protection of the child relating to the administration, conservation or disposal of the child's property

Following [Case C-435/06 C \[2007\] E.C.R. I-10141](#)

- The terms in the Regulation must be defined autonomously from national law by the European Court of Justice to ensure equal treatment of children throughout the EU

'Parental responsibility' is a broad term including *'...all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect.'* (Para 53)

1.2. Jurisdiction under Brussels IIbis

Case study

Marilyn (M) and Jack (J) are Spanish and married in Spain. They have been married for 12 years. Blossom (B) is their only child and is 10 years old and has Spanish nationality. The family moved to The Netherlands 2 years ago because Jack has work in The Netherlands. Blossom goes to an English language school and has made friends in The Netherlands. Marilyn and Jack's extended family live in Spain and they visit regularly during Blossom's school holidays.

Jack and Marilyn's marriage has broken down. Marilyn has issued divorce proceedings in Spain and plans to return to live in Spain. Jack wants to remain in The Netherlands where his work is based. Both Marilyn and Jack want custody of Blossom.

- Which court should make the decision about B's future?
- If a judgment is given, and M and J eventually live in different countries, how are those arrangements given effect in both countries?

The first question is jurisdiction. Which court has the power to hear the dispute over Blossom's welfare and give orders on custody and access?

1.2. a. General ground of jurisdiction Article 8

Article 8(1) – The courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised.

The key connecting factor in the Regulation is habitual residence. The national court determines *where the child is habitually resident*. A court has jurisdiction under Article 8 when the child is habitually resident within the territory. Finding the child's habitual residence should find the court with the closest connection to the child.

[Case C-523/07 A \[2009\] E.C.R. I-02805](#) – the child's habitual residence is the place where the *centre of the child's interests* are. There must be some degree of integration by the child in their social and family environment. Consider:

- duration and regularity of residence in a Member State;
- conditions and reasons for stay on the territory and the family's move;
- child's nationality;
- place of attendance at school;
- family and social relationships of the child;
- linguistic knowledge.

Back to the case study

- Where is Blossom habitually resident?

Blossom has been in The Netherlands for 2 years with family unit which moved for work purposes and has spent holidays in Spain. She has Spanish nationality. She attends a Dutch school taught in English; speaks Spanish, English and some Dutch; and has friends in The Netherlands, family and friends in Spain.

Question 1: Where is Blossom habitually resident? (choose)

Spain – The Netherlands

1.2. b. Special grounds of jurisdiction Article 9

Article 8 is the *most important ground of jurisdiction*, the court of the child's habitual residence is normally the most appropriate to hear any dispute in relation to the child. In some circumstances, it may be appropriate to seise a different court.

- Article 8(2) – *Paragraph 1 shall be subject to the provisions of Articles 9, 10 and 12.*
- Article 10 – jurisdiction relating to international child abduction (see E-learning course, Thematic Unit 1, Part 2)

Dispute over Access to Children who have Relocated

Article 9(1) – Where a child moves lawfully from one Member State to another and acquires a new habitual residence there, the court 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 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.

- Limited exception to Article 8 where a child moves lawfully between Member States.
- Article 9 permits access rights to be adjusted in the child's former habitual residence to ensure ongoing contact between the child and their parent, even though child's habitual residence has changed.
- Attempts to ensure that access rights are amended in the former habitual residence so that arrangements are in place as soon as the child relocates to another Member State.
- It *only* applies to the lawful movement of children between Member States.

Back to the case study

The Dutch courts award Marilyn rights of custody over Blossom whilst Jack has rights of access. J has B to stay with him every weekend. M subsequently seeks permission from the Dutch court to relocate with B to Spain and M and B move to Spain.

- B moves to Spain with the permission of the Dutch court – lawful move
- B must now be habitually resident in Spain
- Dutch court retains jurisdiction for three months (B's former habitual residence)
- J can modify his judgment on access rights in the Dutch court since J is still habitually resident in The Netherlands

The operation of Article 9, Brussels IIbis

Dispute over Access to Children who have Relocated

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Member State (a)



Marilyn (M) and Jack (J) were married in Member State (a) and have one child, Blossom (B). They are all habitually resident in MS(a) but M is a national of MS(b).



Member State (b)

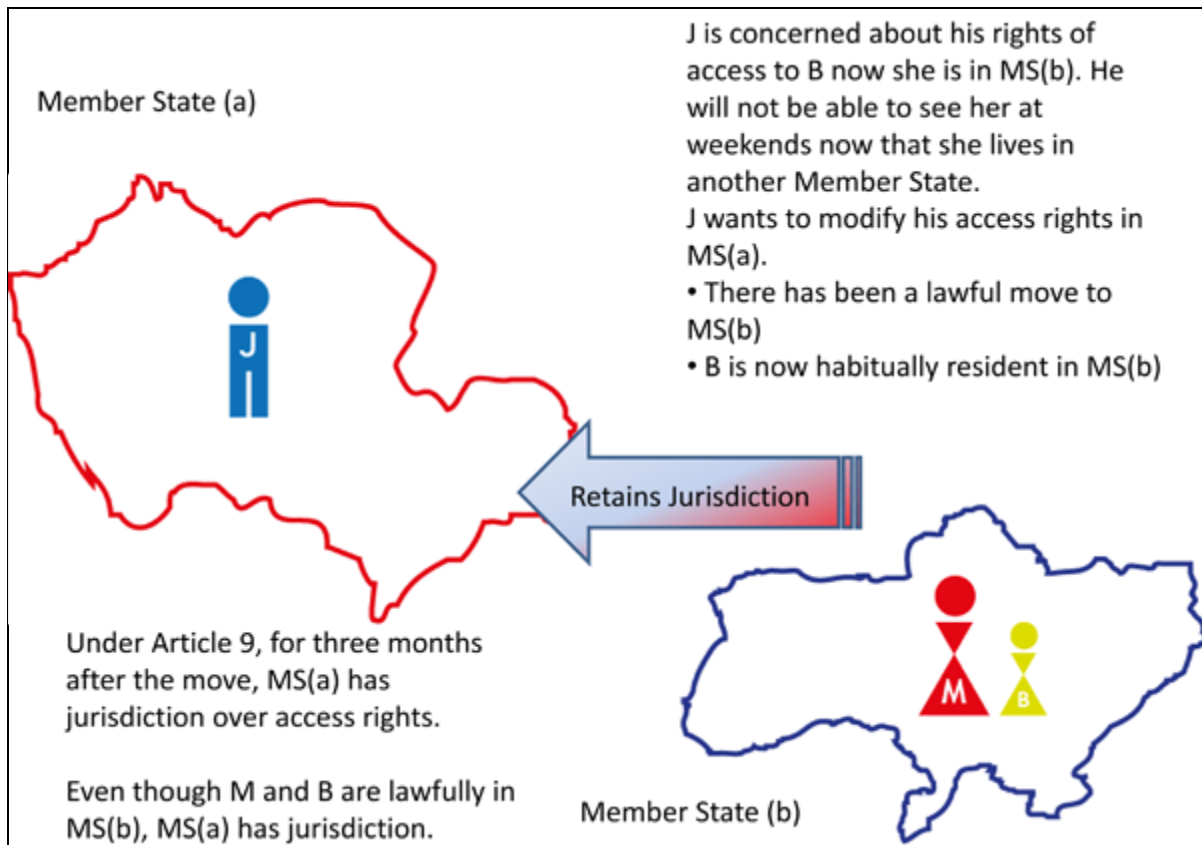
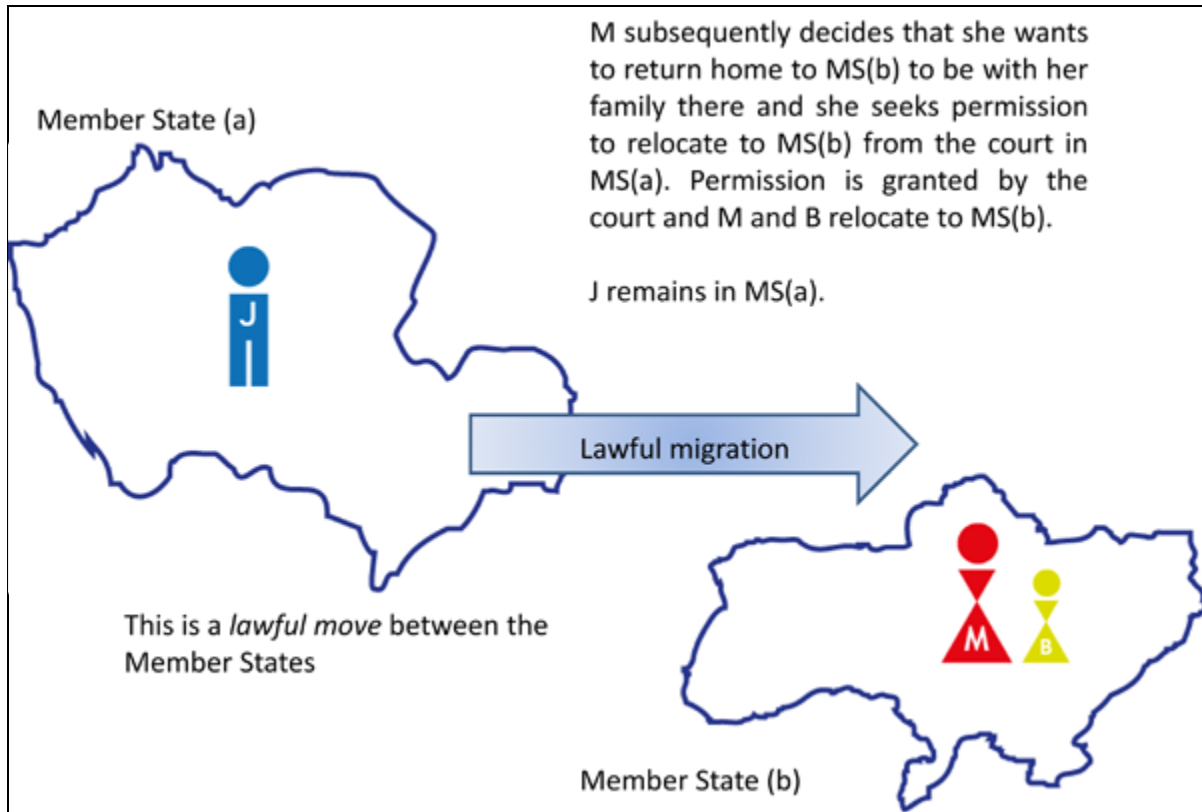
Member State (a)

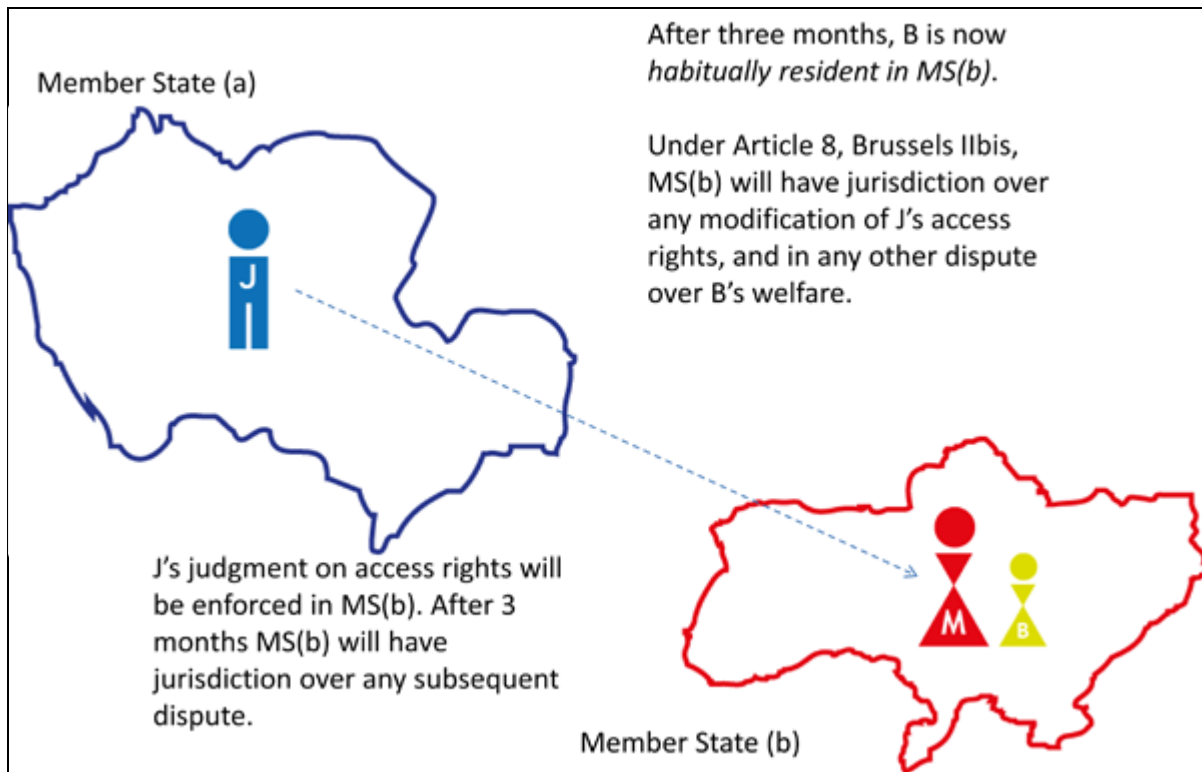


J and M get divorced in MS(a). M is awarded custody of B and J has access at weekends and during holidays by the court's of MS(a).



Member State (b)





1.2. c. Special grounds of jurisdiction Article 12(1)

Hearing a Parental Responsibility Dispute alongside a Divorce

Article 12(1) – The courts of a Member State exercising jurisdiction by virtue of Article 3 on an application for divorce... shall have jurisdiction in any matter relating to parental responsibility relating to that application where:

- (a) at least one of the spouses had 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 it is in the superior interests of the child.

- Article 12(1) links divorce jurisdiction, which is governed by Article 3 Brussels IIbis, to jurisdiction over associated parental responsibility disputes. This is a sensible provision permitting both the divorce and decisions about the future arrangements between the spouses regarding any children will be heard in the same court.
- Article 12(1) is not restricted to children of the marriage, where both parents will have parental responsibility, but covers the situation where only one parent may have parental responsibility e.g. step-children from a former marriage.

Back to the case study

Jack and Marilyn's marriage has broken down. M has issued divorce proceedings in Spain and plans to return to live in Spain. J wants to remain in The Netherlands where his work is based. Both M and J want custody of Blossom.

B is habitually resident in The Netherlands under Article 8. M successfully seises the Spanish court of divorce proceedings and argues that any custody proceedings should also be heard in Spain. J wants the custody dispute to be heard in The Netherlands under Article 8.

Question: What is required under Article 12(1) for the proceedings in relation to parental responsibility to be heard in the Spanish court, alongside the divorce proceedings between M and J? (choose)

- Both M and J must hold parental responsibility over B and J needs to agree to a hearing in Spain

This was an incorrect answer.

M and J are likely to both hold parental responsibility over B and both must agree to a hearing in Spain but it must also be in the 'superior interests of the child'.

- Both M and J must agree to a hearing in the Spanish court and a hearing in Spain would be in the superior interests of the child

This is the correct answer.

The provisions of Article 12(1) are cumulative: M and J are likely to be the holders of parental responsibility over B and so they must both agree to a hearing in Spain, and the hearing must be in the superior interests of the child.

The Spanish court will assess whether the hearing in Spain will be in the superior interests of the child, which is an assessment of best interests. If accepted, the

Spanish court's jurisdiction will last until the divorce is made final or a decision on parental responsibility is made under Article 12(2).

- J must hold parental responsibility over B and the hearing in Spain must be in the superior interests of the child

This was an incorrect answer.

Both M and J are likely to hold parental responsibility over B and must agree to a hearing in Spain and the hearing must be in the superior interests of the child.

1.2. d. Special grounds of jurisdiction Article 12(3)

Jurisdiction with a Substantial Connection to the Child

Article 12(3) – The courts of a Member State shall also have jurisdiction in relation to parental responsibility in proceedings other than those referred to in Article 12(1) where:

- (a) the child has a substantial connection 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
- (b) 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.

- Article 12(3) provides flexibility in cases where the child has a connection to more than one State but it is an *exception* to Article 8, where jurisdiction is based on the child's habitual residence. Normally, the court of the child's habitual residence is the most appropriate court to hear the case.
- The requirements for Article 12(3) are cumulative and must all be demonstrated before jurisdiction may be assumed. They will be strictly interpreted because Article 12(3) is an exception to Article 8.

Requirements:

1. A substantial connection to a State *other than* the State of the child's habitual residence: *either* a holder of parental responsibility is habitually resident in that State *or* the child is a national of that State

2. All parties accept the jurisdiction of the alternative court
3. Alternative court hearing the case is in the best interests of the child

- Requirement (1) may be quite easily demonstrated if parents and children are in different Member States
- Requirement (3) – the important question is the *child's best interests*.

o Hearing the case in the court of the child's habitual residence under Article 8 is normally assumed to be in the child's best interests because the majority of the information about the child's welfare and relationships are likely to be in that court and litigation in that State is likely to cause the least disruption to the child's life.

o There must be a clear welfare justification for the use of Article 12(3).

1.3. Managing disputes over jurisdiction

1.3. a. The *lis pendens* principle – Article 19(2)

A court is seised under Article 16:

- At the time when the document instituting proceedings is lodged at the court and the applicant has taken steps to have service effected on the respondent *or*
- If the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service.

In some circumstances, more than one court in more than one jurisdiction will be seised of the same proceedings. Article 19(2) regulates what happens in this situation using the *lis pendens* principle.

Article 19(2) – where proceedings relating to parental responsibility relating to the same child and involving the same cause of action are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

- Where two courts are seised of the same cause of action in relation to the same child, the court first seised takes priority. The court second seised must stay proceedings while the court first seised considers whether it has jurisdiction to hear the case.
 - It must be determined whether the two cases concern the same cause of action in relation to the same child. If the cases concern two different causes of action, the two separate causes of action may be heard in separate courts if they both have jurisdiction.
- If the court first seised has jurisdiction under Brussels IIbis, it will hear the substantive issues of parental responsibility and issue judgment. The court second seised will decline to hear the case.
- If the court first seised does *not* have jurisdiction under Brussels IIbis, it will decline to hear the case. The court second seised can then revive its proceedings and consider whether it has jurisdiction to hear the case.

Issues for consideration:

1. Is the court first seised, or second seised of the proceedings?
2. Do the cases concern the same child, and the same cause of action?
3. If so, the court first seised takes priority and can determine its own jurisdiction under Brussels IIbis.

Back to the case study

Both Marilyn and Jack want custody of Blossom. B remains in The Netherlands. M issues proceedings in Spain under Article 12(3) on the basis of a substantial connection between B and Spain based on her nationality. J issues proceedings in The Netherlands under Article 8 on the basis that B is habitually resident in The Netherlands. M's action is first in time.

- These are the same proceedings, between the same parties, but in different courts.
- Spanish court was first seised and has the right to examine its own jurisdiction.
- Dutch court must stay proceedings whilst the Spanish court considers whether it has jurisdiction to hear the case.

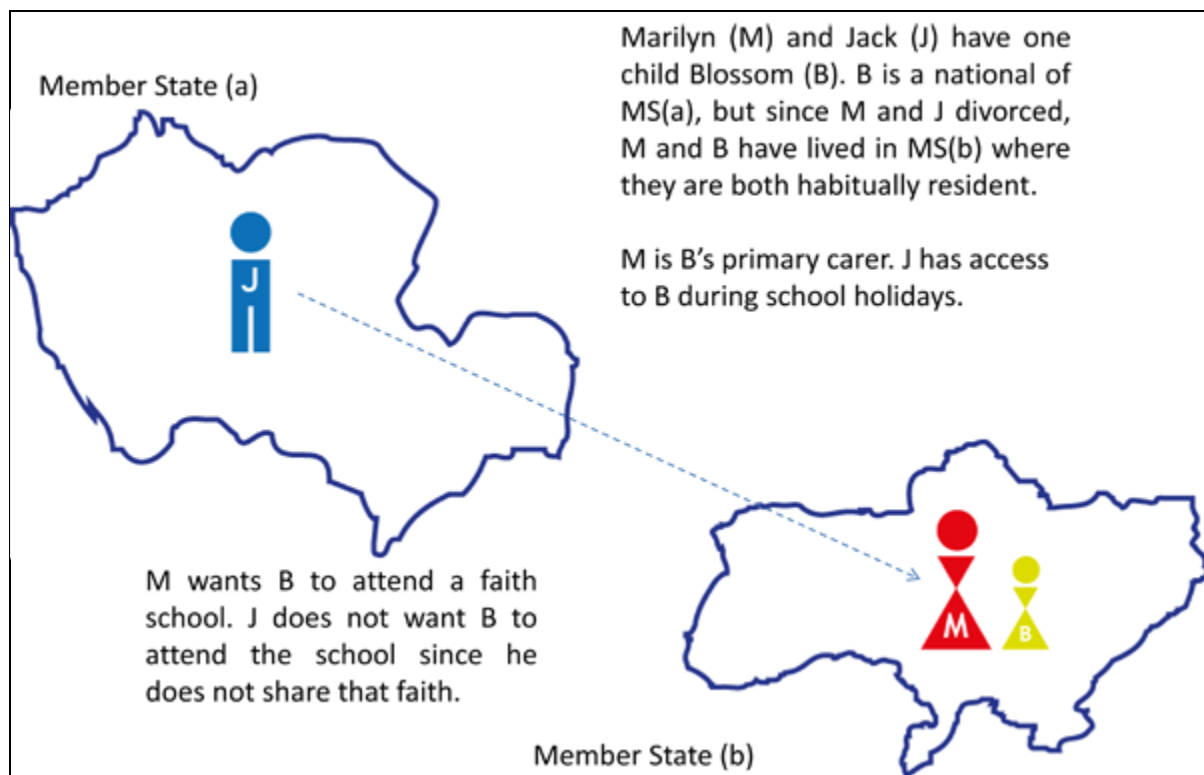
What is the likely outcome?

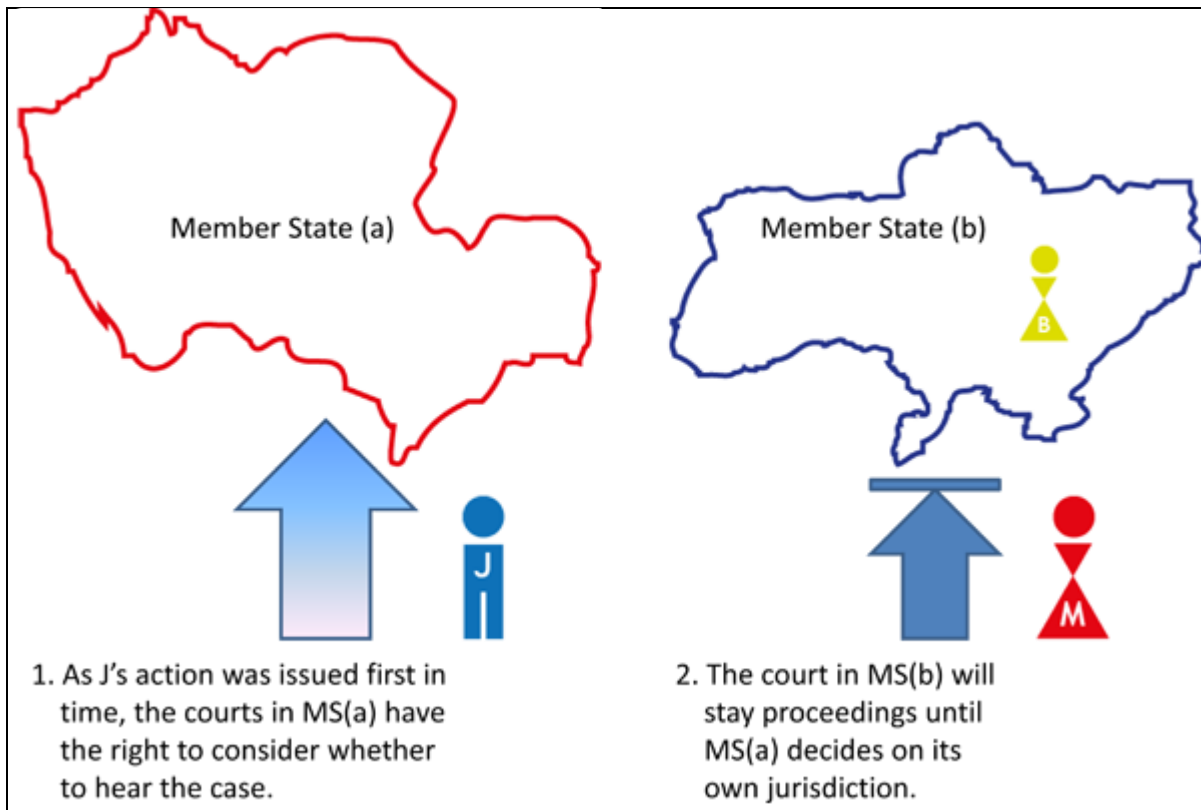
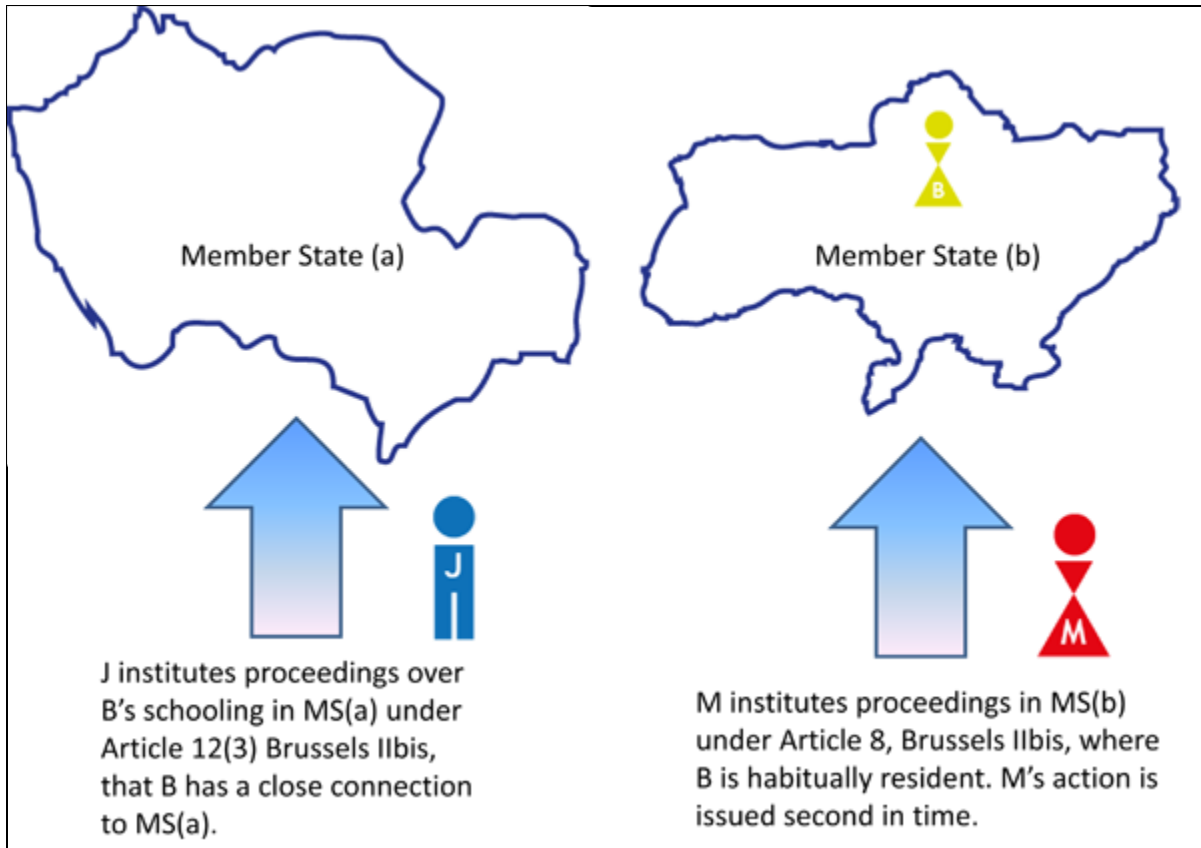
- Spanish court will decline jurisdiction if J does not agree to a hearing in Spain under Article 12(3) and if a hearing in Spain is not in B's best interests. Since B remains in The Netherlands, it is unlikely that a hearing in Spain is in her best interests.
- Dutch court can then revive J's proceedings and consider whether B is habitually resident in The Netherlands to assume jurisdiction under Article 8.

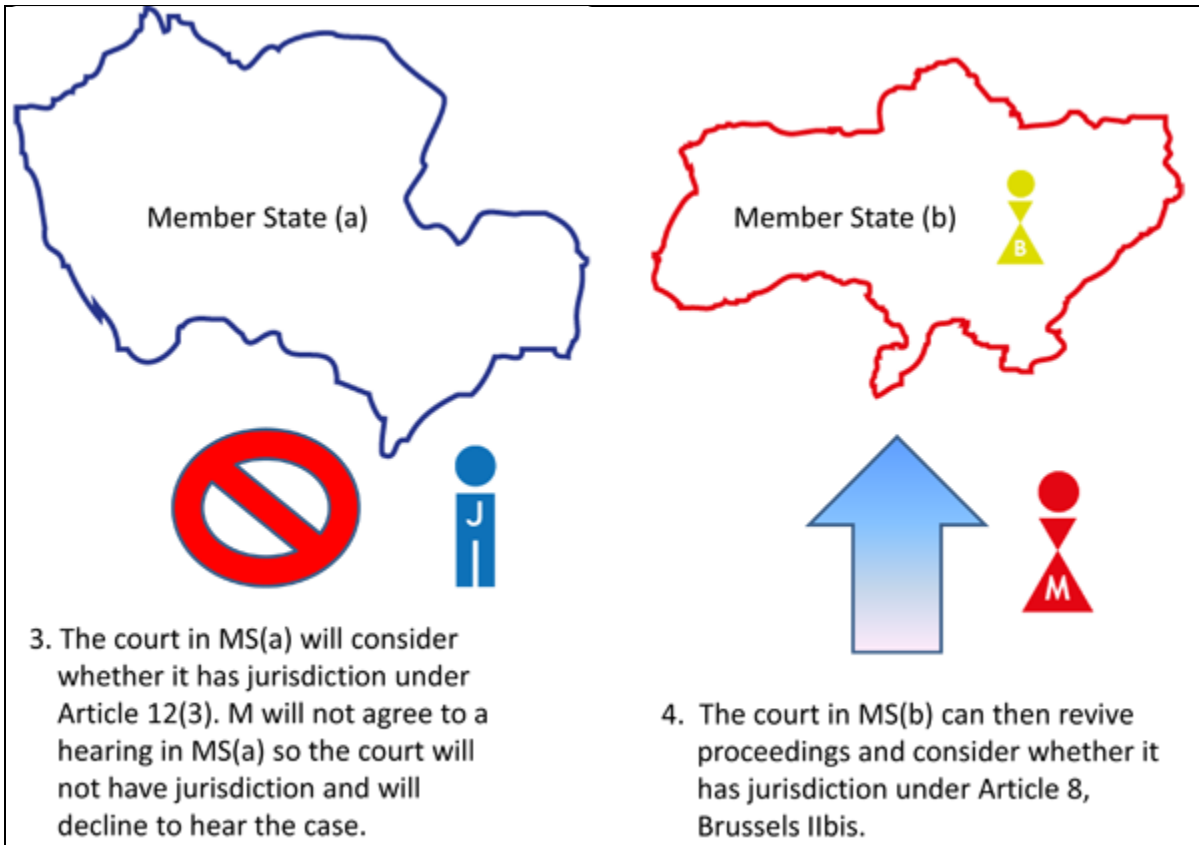
The operation of Article 19(2), Brussels IIbis

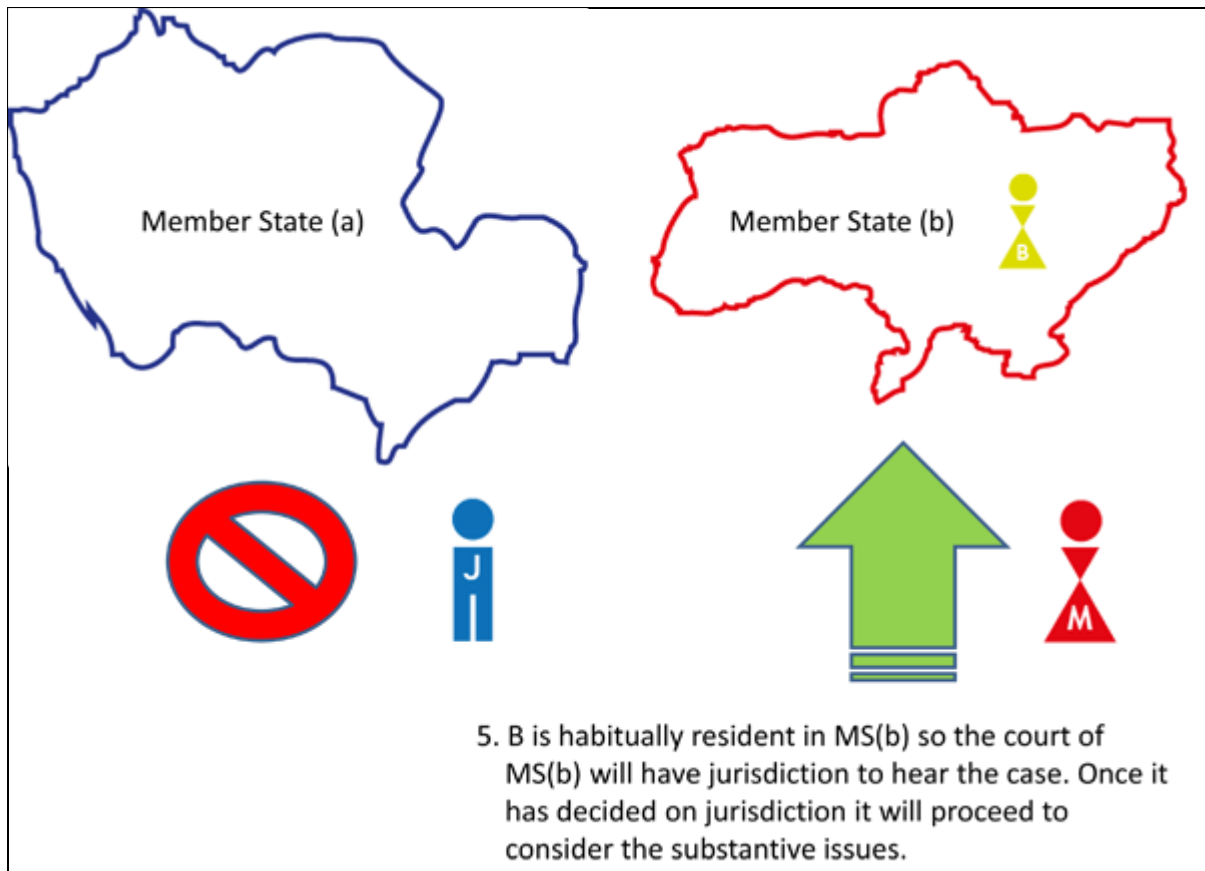
The operation of the lis pendens principle for resolving disputes over jurisdiction

Article 19(2) – where proceedings relating to parental responsibility relating to the same child and involving the same cause of action are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such as the jurisdiction of the court first seised is established.









1.3. b. Transferring the case – Article 15

Article 15(1) – By way of exception, the courts of a Member State having jurisdiction as to the substance of the matter may, if they consider that a court of another Member State, with which the child has a particular connection, would be better placed to hear the case... and where this is in the best interests of the child: (a) stay the case... and invite the parties to introduce a request before the court of that other Member State OR (b) request a court of another Member State to assume jurisdiction.

- Article 15 is an exception to the general principle that the court first seised will hear the case if it has jurisdiction under the Regulation.
- Article 15 accounts for the situation where it is more appropriate to hear the case in another State with a substantial connection to the dispute, but it is a tightly controlled *exception* to the general rule and is strictly interpreted.

It must be demonstrated that:

- The case should be transferred to another EU Member State court which must be *better placed* to hear the case
- That the child has a particular connection to the alternative Member State, either:
 - The child's habitual residence which has changed, subsequent to the court being seised
 - It is the former habitual residence of the child
 - It is the place of the child's nationality
 - It is the habitual residence of a holder of parental responsibility
 - Or in cases concerning the child's property, the place of the location of the property
- That the transfer is in the child's best interests

The requirements of Article 15 are cumulative, so they must all be demonstrated before the court will permit the transfer to another jurisdiction. The closer the child's connection to the alternative jurisdiction and the more linked the dispute to the jurisdiction, the more likely it is that that court is better placed to hear the case and transfer will be in the child's best interests.

1.3. c. Emergency jurisdiction – Provisional measures under Article 20

Article 20(1) – In urgent cases, the provisions of this Regulation shall not prevent the courts of a Member State from taking such provisional, including protective, measures in respect of 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.

- Article 20 enables a court to take provisional, protective measures where a child in the territory is at risk but there is no jurisdictional ground available under the Regulation for the court to take action.
- The use of Article 20(1) is tightly controlled; *it cannot be permitted to undermine the normal use of the jurisdictional grounds* under the Regulation.
- It accounts for the situation where a child is present on the territory and is at risk but the court would not otherwise have jurisdiction e.g. because the child is habitually resident in another Member State.

In [Case C-523/07 A \[2009\] E.C.R. I-02805](#) the children and the parents were of Swedish nationality but had moved to Finland where they were travelling from place to place, with no fixed abode or schooling for the children. The Finnish authorities took the children into temporary care.

- Could the Finnish court act to take the children into care if they were still habitually resident in Sweden? (i.e. Swedish court would have jurisdiction under Article 8).
- Was the action taken by the Finnish court 'provisional' and 'protective' in nature?

[Case C-523/07 A \[2009\] E.C.R. I-02805](#) European Court of Justice, para 47:

- *It follows from the very wording of Article 20(1) that the adoption of measures in matters of parental responsibility by courts of Member States which do not have jurisdiction as to the substance of the matter is subject to three cumulative conditions, namely: the measures concerned must be urgent; they must be taken in respect of persons or assets in the Member State where the court seised of the dispute is situated, and they must be provisional.'*
- The child must be in a situation that will endanger their welfare justifying taking immediate action to protect the child. The form of the protective measure adopted is decided by national family law, but it must be provisional, in the sense that the measure must not permanently resolve the future of the child.
 - o If the children were habitually resident in Finland, the Finnish court could take substantive measures to protect the children in Finland.
 - o If the children were habitually resident in Sweden, the Finnish court could take provisional protective measures to protect the children until the Swedish court was seised. Taking the children into temporary care would be a 'provisional, protective measure'.

2. Cross-border child abduction within the EU

2.1. Background

This part of the course concerns the situation where a parent wrongfully takes his or her child to another country, or wrongfully retains the child in another country. It concerns only abduction by a parent, and not abduction by a third person. This chapter deals only with the civil aspects of cross-border child abduction, the quest for the return of the child and resolving the dispute about the parental responsibility for the child. It does not regard the criminal prosecution of the abducting parent (a matter which is regulated differently in different States).

For more information about the occurrence of international child abduction, see the [statistical analysis](#) that Professor Nigel Lowe made for the Hague Conference on Private International Law.

2.2. Relevant legal texts

On the EU-level, the Brussels IIbis Regulation deals with parental responsibility, including international child abduction (Regulation 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation 1347/2000 OJ [2003] L 338/1, available [here](#)). The European Commission has drawn up a [Practice Guide](#) on the application of this instrument.

This Regulation must be applied in conjunction with the Hague Child Abduction Convention (Convention of 25 October 1980 on the civil aspects of international child abduction, available [here](#)). This is confirmed in Consideration 17 and Article 11 of the Regulation. Article 60e) provides that the Brussels IIbis Regulation takes precedence over the Hague Child Abduction Convention in relations between Member States. Reading these provisions together, the result is:

- when a child is abducted from one EU Member State to another, the Hague Convention applies, but is supplemented by the Brussels IIbis Regulation (this is illustrated under heading 4 below);
- when a child is abducted from a Hague Convention Contracting State outside the EU to an EU Member State, or from an EU Member State to a Hague Convention Contracting State outside the EU, the Hague Convention applies.

Note that all EU Member States are Party to the Hague Child Abduction Convention, which has more than [80 States Party](#).

In order to understand the interaction between the Brussels IIbis Regulation and the Hague Child Abduction Convention, one must bear the context and the goals of the instruments in mind. The Hague Child Abduction Convention is a global instrument with the objective of returning abducted children as soon as possible to their home countries. The Convention does not deal with the underlying problem of the dispute between the parents about the parental responsibility for the children and the question where the children should reside. The Brussels IIbis Regulation, on the other hand, provides for a broader range of rules: it applies to questions of parental responsibility, irrespective of whether the parents are married, unmarried or divorced; it applies to all aspects of parental responsibility, including but not limited to international child abduction to another EU Member State. When enacting the Brussels IIbis Regulation, the European Union sought to comprehensively regulate the matter of parental responsibility, including the civil law aspects of international child abduction. The legislator however left the Hague Convention intact for the situations of child abduction between EU Member States and third States.

Situations of parental responsibility and child abduction and applicable legal texts

(Note that for purposes of the table below Denmark should be considered a third State as the Brussels IIbis Regulation is not in force in this Member State.)

Situation	Application of Brussels IIbis	Application of Hague Child Abduction Convention (1980)
Question of parental responsibility & parents unmarried: determination of jurisdiction	Yes	No
Question of parental responsibility & parents married: determination of jurisdiction	Yes	No
Question of parental responsibility & parents divorced: determination of jurisdiction	Yes	No
Question of where children will reside after divorce: determination of jurisdiction	Yes	No
Request for authorisation to remove children to another EU Member State: determination of jurisdiction	Yes	No
Request for return of children wrongfully removed to or wrongfully retained in another EU Member State	Yes	Yes
Request for return of children wrongfully removed to or wrongfully retained in a third State	No	Yes

(non-Member State)		
Consideration of grounds for refusing to return children wrongfully removed to or wrongfully retained in another EU Member State	Yes	Yes
Consideration of grounds for refusing to return children wrongfully removed to or wrongfully retained in a third State (non-Member State)	No	Yes
Cooperation between Central Authorities concerning children wrongfully removed to or wrongfully retained in another EU Member State	Yes	Yes
Cooperation between Central Authorities concerning children wrongfully removed to or wrongfully retained in a third State (non-Member State)	No	Yes
Question of where the children will reside after return from the wrongful removal or retention	Yes	No
Question of where the children will reside after a ruling of non-return from a court in another EU Member State	Yes (second chance for return – see below)	No
Question of where the children will reside after a ruling of non-return from a court in a third State (non-Member State)	If children still habitually resident in the EU: Yes If children habitually resident in third State: No	No
Enforcement of a judgment concerning parental responsibility in other EU Member States	Yes	No

There are other conventions on international child abduction, such as the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children, concluded under the auspices of the Council of Europe in Luxembourg on 20 May 1980, available [here](#). There are also several bilateral treaties.

The Brussels IIbis Regulation takes precedence over these instruments (see [Articles 59](#) and [60](#) of the Regulation)

2.3. Definitions

International child abduction can consist of wrongfully removing or wrongfully retaining the child.

Removal is where a parent takes the child to a country other than that of the child's habitual residence.

Retention is where a parent lawfully takes a child to a country other than that of his or her habitual residence, but does not return the child.

Wrongfulness must be considered with regard to custody rights of the other parent (the left-behind parent). Such custody rights can exist:

- by operation of law in the country of the child's habitual residence prior to the abduction;
- by a judgment or decision of an administrative body (the powers of judicial and administrative bodies vary in the various States);
- by an agreement which has legal effect (Art. 2(11) Brussels IIbis Regulation and Art. 3 Hague Child Abduction Convention).

Custody rights include rights and duties relating to the person of a child, and in particular the right to determine the child's place of residence (Art. 2(9) Brussels IIbis Regulation and Art. 5 Hague Child Abduction Convention).

The custody rights must actually have been exercised. If not, the removal or retention will not be considered wrongful (Art. 3 Hague Child Abduction Convention).

Note that the custody rights attributed to unmarried fathers differ in the various EU Member States. The European Court of Justice has ruled in [C-400/10, J. McB. v. L.E.](#) that although an autonomous definition exists about what custody rights are (see above), national law determines who possesses such rights. The fact that some

national law systems require unmarried fathers to take certain judicial or administrative steps in order to obtain custody rights, does not infringe the right to family life (Art. 7 of the [Charter of Fundamental rights of the EU](#)). For an overview of the different national rules on custody rights of unmarried fathers, see the [View of Advocate General Jääskinen](#) in this case.

2.4. Quest for return of an abducted child

Case study

Let us return to the Spanish couple Jack and Marilyn, who live in The Netherlands. Assume that the divorce proceedings are still pending. M takes their child, Blossom, to Spain where they visit relatives. J had agreed to the visit and M had told him that they would be back in The Netherlands after two weeks. However, they do not return as planned. When J phones M, she says that she is sick of The Netherlands and that she will stay in Spain with Blossom. She has started looking for an apartment and a school for Blossom. She says that Blossom is happy in Spain. What can J do?

Step 1:

J can contact the Central Authority in The Netherlands. Each EU Member State has a Central Authority which deals with international child abduction. The contact details of the Central Authorities of the EU Member States are available on the [Judicial Atlas](#) and on the website of the [Hague Conference for Private International Law](#).

J must submit certain documents.

Documents the applicant must submit to the Central Authority:

- Information about the identity of the left-behind parent, of the child, and of the abducting parent.
- The date of birth of the child, where available.
- The grounds of the application for return.
- All available information about the whereabouts of the child and the person with whom the child is presumed to be (this might be M's relatives in Spain).

(Art. 8 Hague Child Abduction Convention)

Documents the applicant may submit to the Central Authority:

- An authenticated copy of the judicial or administrative decision or the agreement on custody rights.
- A certificate or affidavit from the Central Authority or another competent authority of the State of the child's habitual residence about that State's national law.
- Any other relevant documents.

(Art. 8 Hague Child Abduction Convention)

Tasks of Central Authorities

- Practical assistance to the left-behind parent (parent whose child was abducted by the other parent, J in this case). The Central Authorities will tell J which documents he needs etc.
- Assistance in finding the child if his or her whereabouts are unknown.
- Avoiding further harm to the child by taking provisional measures if necessary.
- Exchanging information about the social background of the child where necessary.
- Forwarding the request to the Central Authority of another Contracting State if it appears that the child is in that State.
- Assistance in finding an amicable solution in the dispute. The Central Authorities of some countries mediate, or refer the parents to mediation.
- Provision of information about the relevant provisions of national law.
- Assistance in instituting court proceedings where the abducting parent refuses to voluntarily bring back the child. In some countries the Central Authority takes a lawyer for this purpose. In other countries the Central Authority or some other State authority may act in the proceedings.
- Assistance in finding legal aid where necessary.
- Assistance in the enforcement of a court order for the return of the child.
- Informing the court in the country of the previous habitual residence of the child if a non-return order has been issued.
- Facilitate communication between the courts of the EU Member States.

- Keeping each other informed about the application of the Hague Child Abduction Convention and participating in the European Judicial Network.

(Art. 7, 9 and 10 Hague Child Abduction Convention; Consideration 25 and Articles 11(6), 54 and 55 Brussels IIbis Regulation)

Step 2:

The Central Authority of the Netherlands will contact the Central Authority in Spain.

Note that J may also, if he prefers, contact the Central Authority in Spain. This might be useful if he speaks Spanish and is familiar with the authorities in that country.

Step 3:

The Central Authority in Spain will contact M and attempt to establish the voluntary return of the child.

Central Authority's possible routes



Establishing voluntary return

Seeking solution through mediation

Instituting legal proceedings ensuring an order for the return of the child

Step 4:

If no amicable solution can be found, the Spanish Central Authority will assist in instituting legal proceedings for the return of the child. Note that these proceedings are instituted in the country to which the child has been abducted. Frequently lawyers fail to institute these proceedings, and only institute proceedings in the country of the habitual residence of the child. While the courts in that country have jurisdiction to hear a dispute on parental responsibility (Art. 8 Brussels IIbis; see E-learning course, Thematic Unit 1, Part 1), the special procedure for the return of the child offers a quicker route.

Note: it sometimes happens that the abducting parent, M in this case, institutes legal proceedings in the State to which he or she has abducted the child, Spain in this case, requesting for sole custody. In such a case, the Spanish courts must take care to investigate the habitual residence of the child (see E-learning course, Thematic Unit 1, Part 1), and not consider Spain the habitual residence if the child has been abducted to this country. Cross-border child abduction cannot lead to the acquisition of a new habitual residence, unless all persons with parental responsibility have acquiesced to the removal or retention or the left-behind parent has known, or should have known, for more than a year that the child resides in the country to which he or she has been abducted and has failed to institute return proceedings, or has withdrawn such proceedings, or a case in the country of the former habitual residence has been closed, or there has been a judgment on custody from a court in that country does not entail the return of the child (Art. 10 Brussels IIbis Regulation).

Step 5:

The Spanish court considers the application for the return of the child. In doing so, it respects certain procedural requirements and it considers the limited number of grounds for refusal. For these matters the Brussels IIbis Regulation and the Hague Child Abduction Convention are applied together.

Procedural requirements

- The child must be heard unless it is inappropriate given the child's age or degree of maturity. The practices of the Member States vary on this issue. If a judge decides not to hear a child because it considers that the child is not mature enough, it is important that this is motivated in the judgment.
- The person requesting the return of the child must be granted the opportunity to be heard before the return can be refused.
- The court must use the most expeditious procedures available in its national law.
- The court must issue a judgment within six weeks (unless exceptional circumstances make this impossible).

(Art. 11 Brussels IIbis Regulation)

Procedural possibilities

- The court may take judicial notice of the law of the country where the child was habitually resident immediately prior to the abduction.
- The court may request the applicant to submit a decision or other determination that the removal or retention was wrongful.

(Art. 14 and 15 Hague Child Abduction Convention) The purpose of these provisions is to allow a quick determination of the content of foreign law, but also to enable a request for information where necessary.

Grounds for refusal

1. The child has been abducted more than a year earlier and has become settled in his or her new environment.
2. The person requesting the return has not actually exercised his or her rights of custody at the time of the removal or retention or had subsequently acquiesced in the removal or retention (averred and proved by the person opposing the return).
3. There is a grave risk that returning the child would expose him or her to physical

or psychological harm or otherwise place him or her in an intolerable situation (averred and proved by the person opposing the return), and the Member State to which the child is to be returned has not put adequate measures in place to protect the child after his or her return.

4. The child objects to the return while it is appropriate to take account of his or her views, given his or her age and degree of maturity.
5. Returning the child is not permitted under the law of the requested State as it would be contrary to the fundamental principles (of human rights and fundamental freedoms). (Note that this ground for refusal is used only in exceptional circumstances.)

(Art. 11 Brussels IIbis Regulation; Arts. 12, 13 and 20 Hague Child Abduction Convention. See also [the Explanatory Report to the Hague Child Abduction Convention by Elisa Pérez-Vera.](#))

The Spanish court may only consider these grounds for refusal. If none of these are present, the court is obliged to order the return of the child. The court may not at this stage consider the substance of the case, i.e. the question of who should have custody or where Blossom should reside in future. The Dutch court has retained its jurisdiction to deal with these issues.

Step 6:

The Spanish court's order is executed in Spain through the national means in order to establish Blossom's return to The Netherlands.

2.5. Subsequent to return

If the Spanish court has ruled that Blossom must return and the judgment is executed, this means that Blossom returns to the place where she was habitually resident immediately before the wrongful retention in Spain by her mother.

Thus Blossom's habitual residence is re-established and with it the jurisdiction of the courts of that Member State. The courts of the Netherlands (still) have jurisdiction to decide on matters of parental responsibility (see E-learning course, Thematic Unit 1, Part 1).

2.6. Subsequent to non-return

The situation is of course different if the Spanish court has ruled that Blossom must not return, in other words the court has used one of the grounds for refusal listed above. The next phase depends on the reason for the non-return. Two categories of non-return orders can be identified:

Category 1 non-return orders (Art. 12 and 20 Hague Child Abduction Convention)	Category 2 non-return orders (Art. 13 Hague Child Abduction Convention)
<ol style="list-style-type: none">1. The abduction took place more than a year earlier and the child has become settled in his or her new environment (Art. 12).5. The law of the requested State does not permit return, as it would be contrary to its fundamental principles (Art. 20).	<ol style="list-style-type: none">2. The person requesting return has not actually exercised his or her custody rights at the time of the removal or retention, or has acquiesced in the removal or retention.3. There is a grave risk that returning the child would expose him or her to physical or psychological harm, or would place him or her in an intolerable situation, while no adequate measures to protect the child have been taken in the State to which the child is to be returned.4. The child objects to the return and given his or her age and degree of maturity, it is appropriate to take account of his or her views.

For Category 1, the abduction case is over and the child acquires a new habitual residence in the State to which he or she has been taken or where he or she has been retained. Further disputes concerning the parental responsibility for the child must be brought before the courts of this State, although a court in another Member State might have jurisdiction pursuant to one of the other provisions of the Brussels IIbis Regulation ([see E-learning course, Thematic Unit 1, Part 1](#)).

For Category 2, the case is not yet over: an extra phase exists. The steps are:

Step 1:

The court that has issued the non-return order informs the court that has jurisdiction or the Central Authority in the State where the child was habitually resident immediately prior to the removal or retention. The first court may send the information directly, or through the Central Authority of its State. In our example: the Spanish court sends the information, either directly or through the Spanish Central Authority, to the Dutch court or to the Dutch Central Authority. The information includes a transcript of the hearings and must be received within one month following the order.

Step 2:

The court in the State where the child was habitually resident immediately before the removal or retention, notifies the parties and invites them to make submissions so that the court can examine the question of the custody of the child. The submissions must be made within three months. In this way, the Dutch court takes up the jurisdiction that it has on the basis of Blossom's habitual residence. This jurisdiction has not been lost due to the wrongful retention of Blossom in Spain.

Step 3a):

If the court receives no submissions, it closes the case.

Step 3b):

If the court receives submission, it deals with the merits of the case.

Step 4a):

If the decision of the Dutch court entails that Blossom must stay in Spain, Spain becomes her new habitual residence.

Step 4b):

If the decision of the Dutch court entails that Blossom must return to The Netherlands, this decision will prevail over the Spanish non-return order.

Step 5:

The Dutch court issues a certificate with the judgment entailing Blossom's return. This certificate takes the form of Annex IV to the Brussels IIbis Regulation. The court issues the certificate of its own motion. The certificate is completed in the language of the judgment. The judgment must comply with certain requirements for the certificate to be issued.

Requirements for certificate

- The child was given the opportunity to be heard, unless this was inappropriate given the child's age or degree of maturity.
- The parties were given the opportunity to be heard.
- The court took account of the reasons for the non-return order.

* If the court or another authority takes measures for the protection of the child after his or her return, details of these measures are also mentioned in the certificate.

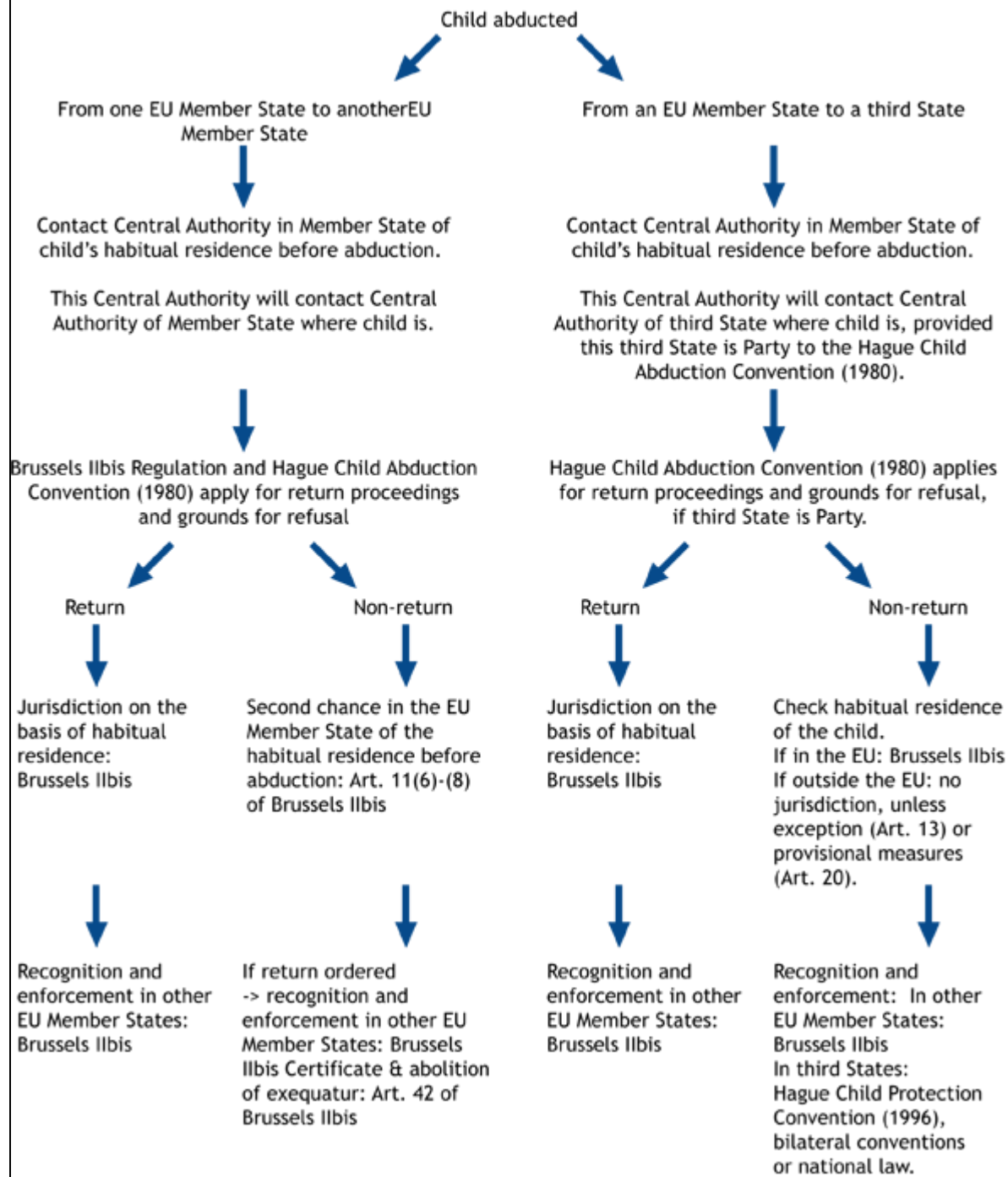
(Art. 42 Brussels IIbis Regulation)

Step 6:

With this certificate, proceedings for the declaration of enforceability are not required (exequatur has been abolished). This means that the Dutch judgment is directly enforceable in Spain, and throughout the EU, notwithstanding the prior Spanish non-return order. The European Court of Justice has confirmed this effect of the certificate. Even if the certificate contains an error, the judgment remains directly enforceable. If a party wishes to contest the content of the certificate, it has to address the court that has issued the certificate (see [C-491/10, Aguirre Zarraga v. Pelz](#)).

(Art. 11(6) – 11(8), 40 and 42 Brussels IIbis Regulation)

Flow chart of procedure



3. Recognition and enforcement of judgments

3.1. Introduction

The process of recognising and enforcing a judgment is the means by which a judgment is given legal force in a country other than where it was issued (the originating State/court). Recognising a judgment issued abroad means accepting its legal force and enforcing the judgment means to give effect to its contents. A judgment must be recognised as having legal value before it can be enforced.

Effective rules for the recognition and enforcement of family law judgments are the underlying aim of Brussels IIbis. The rules of jurisdiction are harmonised to make this process simpler, so the court recognising a judgment under Brussels IIbis must assume the originating court had jurisdiction under the Regulation. The process is intended to be as straightforward as possible, with the minimum of legal formality and available defences.

In Brussels IIbis, the EU is aiming to encourage the recognition and enforcement of family law judgments, to make this process as simple and as useful as possible for families so that they do not have to go through litigation more than once to secure their rights. In relation to rights of access, the Regulation creates an expedited procedure for recognition and enforcement of the judgment to make sure that the person with access to the child does not lose contact despite the cross-border nature of the relationship.

3.2. The principle of mutual recognition of judgments

Article 21(1) – A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.

- Judgments from one Member State should be recognised as having valid legal status in other Member States with the minimum of procedure.
- Brussels IIbis aims to provide for the free circulation of parental responsibility judgments throughout the EU for the convenience of parents and the courts of the Member States. The principle of mutual recognition is strongly supported by the European Court of Justice in its case law.
- A judgment on custody of the child; deciding where the child should live and with whom, who the child has access to and when and for how long; where the child should attend school and the future care of the child can therefore

have legal force in any other Member State (except Denmark) under Brussels IIbis. The judgment may therefore have legal effect in Member States other than that which issued it.

Exceptions to the principle of mutual recognition of judgments

The EU wants judgments to circulate freely throughout the Member States so there are *very limited defences* available to the recognition of a judgment on parental responsibility emanating from another Member State. As exceptions to the general principle of recognition, they are interpreted very strictly and there are further restrictions on what can be considered as an aspect of the defence:

Article 23 – A judgment relating to parental responsibility shall not be recognised:

- (a) If such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought taking into account the best interests of the child;
- (b) If it was given, except in case of urgency, without the child having been given an opportunity to be heard, in violation of fundamental principles of procedure of the Member State in which recognition is sought;
- (c) It was given in default of appearance where the person in default was not served with the document in time to arrange a defence;
- (d) The judgment was given without a holder of parental responsibility being heard;
- (e) There is a later irreconcilable judgment.

The recognising court is *prohibited* from considering:

- The jurisdiction of the court of origin
- Differences on the substance of the judgment, even if the recognising court would have reached a different decision on the facts or on the welfare of the child

The court asked to recognise a judgment from another Member State under Brussels IIbis cannot re-consider the decision taken in the originating court or the decision it would have taken under national law.

- A defence of 'public policy' cannot be used to re-assess the decision of the foreign court; there must be some aspect of the judgment that is sufficiently

offensive to the legal system of the recognising court to refuse recognition of the judgment, for example that the rights of the parties were not protected during the original proceedings. The right of the child to be heard in proceedings is accepted as a defence under Article 23(b).

- The restrictions on the available defences reflect the aim of Brussels IIbis to ensure that the great majority of judgments will be recognised without difficulty by the Member States.

Question

Would these judgments be recognised? (choose)

- A judgment where one party claims that the court issuing the judgment did not have jurisdiction under Brussels IIbis

Yes - This is the correct answer

Harmonising jurisdiction through Brussels IIbis means that all courts have to trust that foreign courts have correctly assumed jurisdiction. The recognising court cannot review the jurisdiction of the court of origin.

No - This is an incorrect answer

- A judgment where a child of 14 was not heard during the proceedings

Yes - This is an incorrect answer

NO - This is the correct answer

The child has not been heard and Article 23(b) is likely to be successful.

- A judgment refusing access between a father and his child where the father has previously been violent to the mother

Yes - This is the correct answer

Father may argue Art. 23(a) that the judgment infringes his right to a private and family life and public policy, but even if the recognising court would have reached a different decision on the substance, it is likely to be recognised.

No - This is an incorrect answer

3.3. Enforcement of a Parental Responsibility Judgment under Brussels IIbis

- Once the judgment has been recognised a judgment on parental responsibility will be enforceable if it is declared enforceable, or registered for enforcement in the UK.
- The procedure for enforcement is governed by national law.
- The party seeking enforcement of the judgment must produce an authentic copy of the judgment.
- Once a judgment has been declared as enforceable, it has legal effect in the country where it is being enforced i.e. the parties can rely on it to ensure that its terms are complied with.

3.4. The enforceability of access rights

During the drafting of the Regulation, it was regarded as highly important that holders of rights of access to the child should be able to enforce their rights quickly and easily, for the benefit of the child and for the holder of access rights.

- Under the Regulation, 'rights of access' includes the right to take the child to a country other than their habitual residence, and usually refers to the situation where a parent has contact with the child but is not the primary carer.
- As the holder of access rights is not the primary carer, it is important that they can ensure their rights are protected in relation to the child so that the child does not lose contact with one parent, especially if they live in different countries. The Regulation aims to ensure that these access rights are effectively protected in cross-border situations so that contact is not lost.

The enforcement of a judgment regarding rights of access is made very straightforward by Article 41.

Article 41(1): The rights of access... granted in an enforceable judgment given in a Member State shall be recognised and enforceable in another member State without the need for a declaration of enforceability and without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin.

- There are no defences to the recognition of a judgment that has been certified.
- Enforcement requires no declaration of enforceability.

This is a simpler procedure than recognition and enforcement of other judgments under Brussels IIbis. It *only* applies to judgments defining rights of access. The holder of rights of access can approach a foreign court for the expedited procedure if certain requirements are made out:

Requirements before a certificate may be issued under Article 41(2):

- Where the judgment was given in default of appearance, the documents instituting proceedings were issued in sufficient time to enable the person in default to prepare a defence
- All the parties concerned were given an opportunity to be heard
- The child was given an opportunity to be heard if they were of an appropriate age and maturity

These requirements are checked by the court of origin, the court issuing the judgment on access rights. Even if the court asked to recognise and enforce the judgment knows that there is a problem with the procedure leading up to the judgment, for example that a child of appropriate age and maturity has not been heard in the proceedings, it must recognise and enforce it if the certificate is issued.

The enforcement of access rights under Brussels IIbis

The issuing and effect of a certificate for enforcement of a judgment on rights of access

- Article 41(1) – Rights of access granted in an enforceable judgment given in a Member State shall be recognised and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin.
- Article 42(2) – The judge of origin shall issue the certificate only if:
 - (a) where the judgment was given in default, the person defaulting was served with the document which instituted proceedings in sufficient time and in such a way as to enable that person to arrange for a defence, or the person accepted the decision unequivocally
 - (b) all the parties concerned were given an opportunity to be heard
 - (c) the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity

