HABITUAL RESIDENCE AND BRUSSELS II*bis*: DEVELOPING CONCEPTS FOR EUROPEAN PRIVATE INTERNATIONAL FAMILY LAW

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A. Introduction

The continuing importance of habitual residence in private international family law has recently been confirmed by its adoption as the primary basis of jurisdiction under Council Regulation (EC) No 2201/2003 of 27 November 2003[1] concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, colloquially known as Brussels II*bis*.

Brussels II*bis* is the latest in a series of interventions in the area of private international family law by the EU.[2] It signals an increasing willingness by the EU to intervene in family law as an aspect of its expanding competence under Title IV of Part III of the EC Treaty, developing judicial co-operation in civil matters further. It is part of an agenda recognising the increasing impact of EU policies on the family and the importance of issues such as the recognition of divorces to citizens of the Union as they exercise their free movement rights.[3]

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1 [2003] OJ L 338/1–29. Applicable to all States in the EU except Denmark. Preamble, Rec 31.

2 Following the Brussels II Convention, drawn up on the basis of Art K.3 of the Treaty on European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters, and Brussels II, Reg (EC) No 1347/2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, [2000] OJ L160. The Commission is investigating the potential for further integration; see eg the Commission's Green Paper on conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition. COM(2006)400 Final. The UK has opted out of the controversial Proposal for a Council Regulation amending Reg (EC) No. 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters. (Rome III) COM(2006) 399 final. *Family Law Week* 11 November 2006 http://www.familylawweek.co.uk/library.asp?i=2628, accessed 8 March 2007.

3 The importance of these issues has been recognised in the context of the desire to create an area of freedom, security and justice in Europe, placed on the political agenda by the Tampere European Council on 15 and 16 October 1999. These aims have been continued by the Hague Programme Strengthening Freedom, Security and Justice in the European Union, approved by the European Council on 5 November 2004. The Commission and the Council have been taking action pursuant to these aims: see the Council and the Commission Action Plan translating the Hague Programme into specific measures of 2 and 3 June 2005.

Brussels II*bis* instigates a greatly simplified system for the recognition and enforcement of judgments. Free movement of family judgments is promoted by unifying the grounds upon which jurisdiction is assumed in divorce, legal separation and marriage annulment,[4] and parental responsibility cases.[5] Recognition and enforcement of the resulting judgment is then almost automatic.[6] This leaves the choice-of-law rules to the domestic law of the court hearing the case and the substantive family law involved untouched. The aim is to eventually abolish exequatur in the area of family law, a process started in relation to some judgments under Brussels II*bis*.[7] Brussels II*bis* also creates a remedy for the abduction of children across internal EU borders.[8]

Habitual residence is the primary connecting factor for jurisdiction over matrimonial and parental responsibility disputes[9] under Brussels II*bis*, and also forms the basis upon which the Regulation's child abduction remedy operates.[10] Thorpe LJ has acknowledged that the most controversial issue arising out of the new Regulation is the correct interpretation of the term habitual residence.[11] Habitual residence is no longer the factual concept it was conceived as, with a plethora of cases on its application and interpretation. Difficulties have been encountered, particularly in relation to children's habitual residence and, more generally, whether actual residence is required, or whether an individual's intention is enough to establish habitual residence. In English law this has been resolved in *Re J (a minor) (Abduction: Custody Rights)*[12] and *Nessa v Chief Adjudication Officer and another*[13] in favour of a requirement of actual residence, whereas European law has focused on the element of intention in *Swaddling v Adjudication Officer*.[14]

This article will therefore explore the concept of habitual residence and its application in the context of Brussels II*bis*. First, the difficulties of defining habitual residence and the different interpretations placed on the concept will be examined. Within this framework, the role of habitual residence within Brussels

4 Art 3, Brussels II*bis*.
5 Arts 8–15, Brussels II*bis*.
6 Chap III, Brussels II*bis*.
7 Arts 41 and 42 in relation to access rights and some return orders following child abduction. See Council Draft Programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters, [2001] OJ C12/1, on the abolition of exequatur. M Tenreiro and M Ekström, "Recent Developments in EC Judicial Co-operation in the Field of Family Law" [2004] *International Family Law* 30, 30.
8 Arts 2(11), 10, 11, 60 and 62.
9 Art 3 and Arts 8–15 Brussels II*bis*.
10 Art 2(11) Brussels II*bis*.
11 Thorpe LJ, "The Work of the Head of International Family Law" *Family Law Week* http://www.familylawweek.co.uk/library.asp?i=1981, accessed 25 September 2006.
12 [1990] 2 AC 562.
13 [1999] 1 WLR 1937.
14 Case C-90/97, [1999] ECR I–1075.

II*bis* will be considered to discover how the difficulties in defining habitual residence may be resolved in this new European context.

B. Habitual Residence as a Connecting Factor

Habitual residence in private international family law is intended to factually connect an individual to a jurisdiction, reflecting some form of assimilation to that country to try to ensure that it is an appropriate forum for litigation.[15] It is commonly used to establish jurisdiction, rather than as a choice-of-law rule. It is regarded as simple to apply and flexible, changing as the circumstances of an individual, or family, changes over time. This makes it an effective jurisdictional connecting factor in the light of the increasingly global lives of families,[16] resolving the problem of using the legalistic concepts of nationality and domicile. However, habitual residence is also used in a wide variety of legal contexts beyond family law.[17]

The term "habitual residence" implies at least some period during which an individual has been present in a State long enough to make their presence there a matter of routine. Residence for a year is always regarded as sufficient for habitual residence because it indicates some integration into that society.[18] However, in some circumstances it is regarded as desirable for habitual residence to be established quickly, to protect individuals and prevent gaps in jurisdiction.

The desire to establish habitual residence after a very short period of time has meant that the individual's intentions in being resident have become relevant to whether they are habitually resident. The tension between the desire to quickly establish habitual residence and the requirement of a period of actual residence has been mediated by varying the length of the period of actual residence required and the weight placed upon an individual's intention, depending on the legal context.[19] The shorter the period of residence, the more important the issue of intention is in establishing whether an individual is habitually resident. This arguably deprives habitual residence of its factual focus as it becomes overlaid by the concept of intention and manipulated depending on the legal context.[20] However, accounting for an individual's intention in being resident allows

15 R Schuz, "The Hague Child Abduction Convention: Family Law and Private International Law" (1995) 44 *International and Comparative Law Quarterly* 771, 789.

16 E Clive, "The Concept of Habitual Residence" [1997] *Juridical Review* 137, 137.

17 For an examination of the various contexts in which habitual residence is used as a connecting factor in English law see P Stone, "The Concept of Habitual Residence in Private International Law" (2000) 29 *Anglo-American Law Review* 342, 343.

18 Clive, *supra* n 16, 141.

19 P Rogerson, "Habitual Residence: The New Domicile?" (2000) 49 *International and Comparative Law Quarterly* 86, 96

20 *Ibid.*

habitual residence to remain flexible, adapting to different legal roles whilst retaining its factual basis by requiring some form of actual residence in the State.

Under English law, following the House of Lords decisions in *Shah and others v Barnet LBC* [21] and *Re J (a minor) (Abduction: Custody Rights)*,[22] for habitual residence to be established, there must be an appreciable period of actual residence, and a settled intention to remain.[23] The element of intention becomes less important the longer the period of residence.[24] Where the period of residence has been for less than a year, the question of the intention of the individual has become important for determining whether there is habitual residence.[25] A period of actual residence is a necessary factor to establish habitual residence in English law,[26] retaining its factual basis. However, the period of residence required varies with the legal context; the period required is less in tax litigation, for example, than for social security claims.[27] This definition remains flexible and usually ensures that there is some form of connection between the individual and the forum for litigation.

The English definition of habitual residence has therefore accepted that habitual residence may be established quickly by accounting for an individual's intention, but retains a requirement of actual residence. In contrast, the EU definition of habitual residence has rejected this period of actual residence as a requirement.

The EU has utilised the concept of habitual residence in relation to social security co-ordination law.[28] The definition of the term was elucidated in the leading case of *Swaddling v Adjudication Officer*.[29] *Swaddling* was a preliminary reference[30] from the English Social Security Commissioners. Swaddling, a UK national, had moved to and worked in France, exercising his EC free-movement rights, but retaining links with the UK. He eventually returned to relatives in the UK having been made redundant and failing to find another job in France.

Swaddling claimed income support on arrival in the UK but was not entitled to the benefit because he was not habitually resident. A habitual residence test for claiming income support had been introduced in the UK,[31] aimed at preventing

[21] [1983] 2 AC 309.
[22] [1990] 2 AC 562.
[23] *Ibid*, 578, confirmed in *Nessa v Chief Adjudication Officer and another* [1999] 1 WLR 1937.
[24] Clive, *supra* n 16, 141.
[25] *Nessa*, *supra* n 23.
[26] *Ibid*, 1942.
[27] Rogerson, *supra* n 19, 96.
[28] Reg (EC) No 1408/71of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community [1971] OJ L 149, Art 1(h). To be replaced by Reg (EC) No 883/2004 on the co-ordination of social security systems.
[29] Case C-90/97, [1999] ECR I–1075.
[30] Under Art 234 EC.
[31] Under the Income Support (General) Regulations 1987 SI 1987/1967, s 21, implementing the Social Security Contributions and Benefits Act 1992.

benefit tourism.[32] This habitual residence requirement affected work-seekers moving between EU Member States. *Swaddling* was referred to the European Court of Justice (ECJ) to establish whether the actual residence requirement for habitual residence breached Article 39EC by inhibiting freedom of movement of workers. However, the ECJ did not consider this point, deciding the case under EC social security co-ordination law.

Swaddling was covered by Regulation 1408/71, which co-ordinates social security entitlement between EU Member States.[33] Under Annex IIa of Regulation 1408/71, income support was classified as a special non-contributory benefit which can only be received in the Member State of residence. They cannot be exported.[34] The requirement of habitual residence for claiming income support was therefore derived from EC law under Article 1(h) Regulation 1408/71, which defines residence as being "habitual residence".[35]

The ECJ held that habitual residence is where a person's "habitual centre of their interests is to be found".[36] To determine this, under Regulation 1408/71, the length and continuity of residence, the employment situation, the family situation, the reasons for any move and the person's intention as it appears from all the circumstances are all relevant issues.[37] The length of residence is only a *factor* in determining whether a person is habitually resident, but is not intrinsic to acquiring habitual residence.[38]

The definition of habitual residence in *Swaddling* is suitable for the EC social security context in which it was developed, allowing the social security co-ordination system to work effectively. To require a period of actual residence before claiming income support would deter workers from moving between Member States because they may not be able to support themselves until the benefit becomes available. Allowing habitual residence to be established immediately on arrival is particularly relevant in the context of the case because Swaddling was returning to his country of origin, having exercised his free-movement rights.[39] Swaddling could be regarded as being penalised for working abroad by the actual residence requirement. The focus on intention assists both in the claiming of social security benefits and expatriation allowances, helping migrants to become established in a new State.

The EU definition therefore allows individuals to become habitually resident immediately on their arrival in a State based largely on their intentions. This is

[32] S Cox, "The Habitual Residence Test and EC Law" (1999) 21 *Journal of Social Welfare and Family Law* 316, 318.
[33] Under Art 1(a) and Art 2(1), Reg 1408/71.
[34] Art 10A, Reg 1408/71.
[35] *Swaddling*, *supra* n 29, para 10.
[36] *Ibid*, para 29.
[37] *Ibid*.
[38] *Ibid*, para 30.
[39] *Ibid*, para 33.

appropriate in the particular legal context, but it is odd to call residence "habitual" immediately, or very shortly after, arrival.

It is in relation to children that the question of when residence is habitual has posed particular problems. Jurisdiction over issues relating to children requires a strong link between the child and the State.[40] Under English law, the habitual residence of a child follows that of their primary carer.[41] However, the child must actually be resident[42] and, after one year, the settled residence of the child will establish that they are habitually resident. The desire to protect children and prevent gaps in jurisdiction has meant that relatively short periods of residence may be accepted as sufficient to establish habitual residence.[43] The definition of habitual residence developed at EC level, because of its social security context, has not so far addressed the issue of children's habitual residence.

The factual link created by a period of actual residence is important in relation to children as it guarantees personal ties to a country and a connection with the court deciding their futures.[44] As young children cannot form an intention to reside anywhere, a period of actual residence potentially becomes more important. If only a slight connection is established it may be inappropriate for the courts of that State to have jurisdiction over that child. The litigation may then occur in a forum where the language and procedure are unfamiliar to the child, which, although not an insurmountable obstacle, is not desirable.[45] In child abduction cases, there is a risk that a child will be returned for the subsequent custody litigation to a State where they have no personal ties.[46] It should be acknowledged that children adjust to new environments differently depending on their individual circumstances, but a period of actual residence should be required as some evidence of the child's integration into their new environment.[47]

If a period of actual residence is required before habitual residence is established, the State where the child was formerly resident will potentially continue to have jurisdiction in relation to the child. There are practical problems associated with a former place of residence, if habitual residence continues for a period in that State, continuing to have jurisdiction, such as the taking of evidence across borders.[48] Information regarding the child relevant to these

40 P Beaumont and P McEleavy, *The Hague Convention on International Child Abduction* (Oxford University Press, 1999), 101.

41 *Re F (a minor) (child abduction)* [1992] 1 FLR 548, 551, from *Re J*, *supra* n 22, 579.

42 *Al Habtoor v Fotheringham* [2001] EWCA Civ 186, [2001] 1 FCR 385, 402.

43 *Re F*, *supra* n 41, 555.

44 A Evans, "Acquisition of Habitual Residence: Is Time of the Essence?" Unpublished thesis. Aberdeen University 2005, 92.

45 Schuz, *supra* n 15, 789.

46 Beaumont and McEleavy, *supra* n 40, 112.

47 R Schuz, "Habitual Residence of Children under the Hague Child Abduction Convention – Theory and Practice" (2001) 13 *Child and Family Law Quarterly* 1, 15.

48 Although this is addressed to some extent within the EU by Reg (EC) No 1206/2001 on co-operation between the courts of the Member States in the taking of evidence in civil or commercial matters, OJ L174, 27/06/2001.

proceedings is also likely to remain in the other jurisdiction, making assessments of best interests more difficult and causing delay.[49] A requirement of actual residence also potentially creates circumstances where there is a gap in jurisdiction. This occurs where one habitual residence has been lost and the period of residence in the new State is not long enough for a new habitual residence to be established.

Requiring a period of actual residence also poses problems in relation to children where a child is part of a "shuttle custody" arrangement, whereby they spend specified, long periods of time with each parent. If their parents live in different States, it may be unclear where the child has their habitual residence. In these circumstances, the child's opinion may be relevant to deciding which place they regard as their habitual residence, or "home". However, where a child is too young to express an opinion, it should be accepted that a child can be factually connected to two States and is habitually resident in both unless it is clear that the connection to one State is substantially more sustained.

In these circumstances, and more generally in relation to habitual residence, the child's relationship with their parents, or primary carer, must also be accounted for. The factual nature of habitual residence means that the child's habitual residence cannot depend solely on that of their parent's. The child should themselves have a factual connection with the State. This may be regarded as even more important given the development of children's rights, particularly child autonomy and the right of a child to express their views on matters affecting them.[50]

Schuz argues that an independent assessment of the child's connections to a State would be the most appropriate, factual way of assessing a child's habitual residence, respecting children's rights and avoiding the problems of intention.[51] However, this attributes an artificial independence to the child when the issue of where a child lives cannot be clearly divided from where their principal carer lives. Indeed, it is desirable to recognise the importance of the family unit to the child and their process of integration into a new State. For children, their parent's intentions must be a relevant factor, as dividing their interests from their principal carer's is unrealistic.

Focusing on the place where the child's principal carer is habitually resident is a simpler method of establishing a child's habitual residence and gives appro-

[49] Art 55, Brussels II*bis* requires the co-operation of central authorities in the collection and exchange of information in parental responsibility proceedings, but this is still likely to be subject to delay.

[50] As enshrined in the UN Convention on the Rights of the Child 1989, Art 12. See also Case C-540/03 *Parliament v Council* Judgment of 27 June 2006, para 37, where the ECJ refers to the UNCRC 1989 for the first time, and Charter of Fundamental Rights of the European Union, Art 24.

[51] Schuz, *supra* n 47, 13. This method of establishing a child's habitual residence has been rejected by the English courts. *Re J (A Child) (Custody Rights: Jurisdiction)* [2005] UKHL 40, paragraph 31, [2006] 1 AC 80 as per Baroness Hale of Richmond.

priate weight to the relationship between a child and their principal carer. This interpretation of a child's habitual residence has been adopted by English law and remains factual as long as the focus remains on the carer with whom the child has a home.[52] Depending on the age and competence of the child, their opinions on the place they view as "home" may also be taken into account.

Habitual residence is no longer the simple, factual concept it was once regarded as. Its application varies on the legal context in which it is utilised, depending on the degree of connection regarded as desirable. However, for the purposes of private international family law, and for the concept to retain a factual emphasis, a period of actual residence before habitual residence is established should be required. This is particularly important in relation to children. This may be a short period of time, even as little as a month, for example where an individual is returning to a former habitual residence, although defined time periods are arbitrary in this context. The intention of the individual is then important in establishing that the residence can be described as habitual. Accounting for intention alongside actual residence provides an element of flexibility to the application of the concept. In contrast, the *Swaddling* definition focuses on intention and is clearly adapted to its particular context. However, it is as yet unclear whether the *Swaddling* definition will be extended to the new Brussels II*bis* Regulation.

C. Habitual Residence and Brussels II*bis*

1. The Interpretation of Habitual Residence under Brussels II*bis*

The ECJ has made it clear that the uniform interpretation of concepts in Community legislation is necessary to secure the uniform application of Community law across the Member States.[53] The meaning of habitual residence will therefore be given an autonomous definition for the purposes of Brussels II*bis*, applicable throughout the Community.

Under Article 24 Brussels II*bis*, it is prohibited for a court to review the grounds upon which jurisdiction was assumed in a case when recognising a judgment. Uniform jurisdictional grounds form the basis of the simplified recognition and enforcement regime under the Regulation. All Member State courts must therefore trust one another to assume jurisdiction on identical grounds and assume that there was an appropriate connection between the Member State court and the dispute. The interpretation of habitual residence must be uniform so all Member States are assuming jurisdiction on the same basis. Habitual resi-

[52] Schuz, *supra* n 47, 7.

[53] See eg Case C-55/02 *Commission v Portugal* [2004] ECR I–9387 paras 44 and 45, on the interpretation of the concept of "redundancy".

dence is also key to establishing whether there has been an abduction under Article 2(11) Brussels II*bis*. For the uniform application of the return remedy, habitual residence must bear the same interpretation in all Member States.[54] These aspects of Brussels II*bis* reinforce the need for an EC interpretation of habitual residence to ensure uniformity, encouraging trust between courts and the free movement of judgments.[55]

The ECJ must therefore decide on a definition of habitual residence for the purposes of Brussels II*bis*, but it is unclear whether it will maintain and adapt the current definition in *Swaddling*, or develop a new one. Whilst the ECJ makes reference to the specific legislative context in *Swaddling*, it also stated that this was the Community-wide meaning of habitual residence.[56] This suggests that this definition could be applied in contexts beyond social security co-ordination.[57] Advocate-General Saggio in his Opinion considered the use of habitual residence in other contexts, and concluded that the definition did not vary between them.[58] Since *Swaddling*, this definition of habitual residence in EC law appeared to be accepted as unchanged by Advocate-General Ruiz-Jarabo Colomer in *Collins v Secretary of State for Work and Pensions*.[59]

When reaching the interpretation of habitual residence in *Swaddling*, the ECJ did not account for the potentially far-reaching effects of the definition. Relying on *Swaddling* in wider legislative contexts beyond those envisaged by the court may be unwarranted. When interpreting the concept of habitual residence, the ECJ will take into account its context and the purpose of the legislation in question.[60]

The Practice Guide accompanying Brussels II*bis* states that the term habitual residence is not defined by the Regulation, but is a question of fact in each case,

[54] For the problems caused by varying interpretations of habitual residence in the context of abduction law, see eg J Schiratzki, "Friends at Odds – Construing Habitual Residence for Children in Sweden and the United States" (2001) 15 *International Journal Law Policy and the Family* 297.

[55] A Richez-Pons, "Habitual Residence Considered as a European Harmonization Factor in Family Law", in K Boele-Woelki (ed), *Common Core and Better Law in European Family Law* (Antwerp, Intersentia, 2005) 355, 360.

[56] *Swaddling*, n 29, para 28.

[57] Habitual residence is also used in other areas of EC law, see eg Art 3(4)(b) Reg No 1346/2000 on insolvency proceedings [2000] OJ L160.

[58] Case C-90/97 *Swaddling v Adjudication Officer* [1999] ECR I–1075, Opinion of Mr Advocate General Saggio, 19 September 1998, para 17.

[59] Case C-138/02, [2004] ECR I–2703, Opinion of Mr Advocate General Ruiz-Jarabo Colomer, para 33. In *Collins* the ECJ imposed a requirement to consider whether the imposition of a habitual residence test for the claiming of benefits by a migrant is proportionate in the light of their search for work where a claimant is found not to be habitually resident. For details see M Dougan, "The Court Helps Those who Help Themselves . . . The Legal Status of Migrant Work-seekers under Community Law in the Light of the Collins Judgment" (2005) 7 *European Journal of Social Security* 7. This additional proportionality requirement is irrelevant to the establishment of jurisdiction because access to benefits is not an issue. *Collins* does however confirm the application of the *Swaddling* definition to initially determining whether there is habitual residence. Case C-138/02 *Collins v Secretary of State for Work and Pensions* [2004] ECR I–2703, paras 63–69.

to be interpreted in accordance with the objectives of the Regulation.[61] This may indicate that a new interpretation of habitual residence will be developed under Brussels II*bis* to serve the new family law context. However, the *Borrás* Report,[62] the explanatory report attached to the Brussels II Convention,[63] the predecessor to both Brussels II[64] and Brussels II*bis,* states that account would be taken of the ECJ's interpretation of habitual residence.[65] The ECJ's interpretation of habitual residence in the case of *Swaddling* was regarded as sufficiently defined by the drafters of the Convention to prevent the inclusion of a definition.[66]

The case law on jurisdiction developed under the Brussels II Regulation, the quickly repealed predecessor to Brussels II*bis,* is unhelpful in resolving whether the *Swaddling* interpretation will be applied in the new family law context. In *C v FC (Brussels II: Free Standing Application for Parental Responsibility)*,[67] in an extensive examination of the habitual residence of the children under Article 3(1), the judge referred exclusively to the English law on the subject.[68] This is not the correct approach to the analysis of habitual residence under an EC Regulation. A European definition of the term is necessary to prevent conflicts over jurisdiction and referring exclusively to English law risks developing inconsistencies between the Member States.[69]

There has been little case law as yet under Brussels II*bis,* and there has been little discussion of the interpretation of habitual residence.[70] In *L v L*[71] Nicholas Mostyn QC considered the habitual residence under Brussels II*bis* of two children who had legitimately moved to Austria with their mother 13 months previously. He referred to *Swaddling* briefly in the context of an adult's habitual residence, saying that the interpretation focused on the economic centre of their interests.[72] In relation to the children's habitual residence, he regarded it as solely

60 *Commission v Portugal*, *supra* n 53, para 45.

61 Practice Guide for the application of the new Brussels II Regulation (Council Regulation (EC) No 2201/2003 of 27 November 2003), 12.

62 Explanatory Report on the Convention, drawn up on the basis of Art K3 of the Treaty on European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters prepared by Dr Borrás OJ C221, 16/07/1998.

63 Brussels II Convention, *supra* n 2.

64 Reg (EC) No 1347/2000, *supra* n 2.

65 *Borrás* Report, *supra* n 62, para 32.

66 *Ibid.*

67 [2004] 1 FLR 317.

68 *Ibid*, 345.

69 P Stone, "The Developing EC Private International Law on Family Matters" (2001) 4 *Cambridge Yearbook of European Legal Studies* 373, 387.

70 *Re C and C* [2005] NI Fam 3. This was an intra-UK jurisdictional dispute referring to Brussels II*bis,* which did not comment on the meaning of habitual residence, although it was assumed that habitual residence was established after a year's residence. There was no comment on the interpretation of habitual residence in *Vigreux v Michel and Michel* [2006] EWCA Civ 630 or *J v W* [2007] EWHC 1349 (Fam), which were both abduction cases where the child had been resident for a period of time before the abduction.

71 [2006] EWHC 2385 (Fam).

a question of fact, but in this case the length of residence meant that the children could not sensibly be regarded as still habitually resident in England.[73]

The content of the definition of habitual residence is particularly important in the light of the *lis pendens* provisions in Brussels II*bis*, which allocate jurisdiction over matrimonial and parental responsibility disputes between Member State courts.[74] The court first seised has exclusive jurisdiction. An individual's habitual residence must therefore create a suitable connection with the court because cases can only be transferred to a more appropriate forum in certain circumstances in parental responsibility cases.[75] Once a court is seised, the case is governed by the applicable law rules and substantive law of that State, which vary widely between the Member States. The individual should therefore have some connection to that State.

It is questionable whether the *Swaddling* definition would ensure that there is an appropriate connection for the purposes of Brussels II*bis* because it potentially allows habitual residence to be established on arrival in a State. However, if the terms of the Regulation support the interpretation of habitual residence given in *Swaddling*, the ECJ may wish to maintain a consistent interpretation of habitual residence for application across EU law. McEleavy states that the communitarisation of family law puts the concept of habitual residence under increasing pressure,[76] and the desire to maintain consistency may mean that an inappropriate interpretation is adopted. Whatever the definition, it must create appropriate jurisdictional connections in all of the legal contexts in Brussels II*bis*. It is unclear whether the ECJ will view the *Swaddling* definition as providing the appropriate degree of connection and flexibility for the new family law context. However, the terms of Brussels II*bis* will be examined to discover whether it will support the interpretation placed on habitual residence in *Swaddling*, the potential consequences of this and whether *Swaddling* would ensure appropriate connections for the assumption of jurisdiction.

2. Habitual Residence and Matrimonial Causes Jurisdiction

Habitual residence is the main connecting factor used to establish jurisdiction for divorce, legal separation or marriage annulment under Article 3(1) of Brussels II*bis*.[77] Jurisdiction is established under the Regulation where both spouses are habitually resident in the Member State, and also where the spouses were last habitually resident together and one remains there. In addition, jurisdiction is

[72] *Ibid*, para 10.
[73] *Ibid*. An argument that fraud had prevented the change in habitual residence did not succeed.
[74] Art 19, Brussels II*bis*.
[75] Art 15, Brussels II*bis*.
[76] P McEleavy, "The Communitarisation of Divorce Rules: What Impact for English and Scottish Law?" (2004) 53 *International and Comparative Law Quarterly* 605, 622.
[77] For full details on how the jurisdictional grounds in relation to divorce work, see McEleavy, *ibid*, 610.

established where the respondent is habitually resident, or in the place where the applicant has been habitually resident for one year. If the applicant is a domiciliary or a national of the Member State and has been habitually resident there for six months, this is sufficient to found jurisdiction. The nationality or domicile of both spouses will found jurisdiction in that Member State. Domicile is specified as bearing the meaning attributed to it under English and Irish law,[78] perhaps implying, in contrast, that habitual residence has a European meaning.

Article 3(1) ground 5 is phrased in an interesting way, stating that: "the applicant *is* habitually resident if he or she resided there for a least a year immediately before the application was made".[79] This implies that habitual residence will be established if an individual has been actually resident in a Member State for a year, regardless of their intention, echoing the English case law.[80] It is unclear whether this is a general principle for the interpretation of habitual residence under Brussels II*bis*. However, to ensure consistency this interpretation may be maintained throughout the Regulation. This would assist the development of a sensible interpretation of habitual residence, as settled residence for one year would normally indicate assimilation into the host society.

In addition, under Article 12, jurisdiction over issues of parental responsibility arising out of the divorce, annulment or separation application is awarded to the court with jurisdiction under Article 3. At least one of the spouses must have parental responsibility under Article 12(1)(a) or, alternatively, the court's jurisdiction must be accepted by both spouses and all holders of parental responsibility. This jurisdictional provision sensibly ensures that any parental responsibility issues are dealt with by the same court that handles the divorce.

The definition in *Swaddling* is unproblematic in relation to most of the grounds of matrimonial jurisdiction because, although habitual residence can theoretically be established on arrival in the Member State, the grounds require both spouses to be habitually resident, favour the respondent or require a period of actual residence.[81] Although there is some limited potential for forum shopping,[82]

[78] Art 3(2), Brussels II*bis*.

[79] Author's emphasis.

[80] Clive, *supra* n 16, 141.

[81] Art 3(1) Brussels II*bis*.

[82] Art 3(1) ground 6, where jurisdiction is founded on the applicant's domicile or nationality and six months' habitual residence, may potentially facilitate forum shopping. If habitual residence can be established on arrival in a Member State, the six months' habitual residence requirement can start to run immediately. As domicile can also be established on arrival, as long as there is an intention to remain permanently *Udny v Udny* (1869) LR 1 SC & Div 441, 458, jurisdiction can theoretically be established by the applicant in England and Wales in six months. Also see Evans, *supra* n 44, 59 on Art 3(1) ground 2, the last common habitual residence of the spouses forming a spurious link where the residence was for a short period of reconciliation. However, forum shopping is rare in practice, although it may assume great importance in "big money" divorce cases. See 'Judges Attack Millionaire's Divorce Battle as 'Grotesque'", *The Independent* 21 April 2007 commenting on *Moore v Moore* [2007] EWCA Civ 361.

the jurisdictional links have been carefully structured to ensure some form of connection with the court hearing the case. The impact of the *Swaddling* definition would be diffused by the Regulation itself enforcing a link. It also perhaps indicates that habitual residence alone, especially if it could be established immediately on arrival in a State, was not viewed as providing sufficient grounds for jurisdiction. Article 3 therefore provides safeguards against forum shopping for financial provision and favourable custody terms in relation to children following marriage breakdown.

3. Habitual Residence and Parental Responsibility Jurisdiction

Article 8 of Brussels II*bis* specifies that the habitual residence of the child founds jurisdiction over parental responsibility disputes. This is the primary ground of jurisdiction. Article 8 covers free-standing applications.[83] Stalford comments that the use of habitual residence to primarily found jurisdiction over parental responsibility disputes facilitates the participation of the child in the proceedings.[84] A child's actual presence in the State where the proceedings commence means there are greater opportunities for their views to be heard.[85]

A definitive and comprehensive interpretation of when a child is habitually resident under Brussels II*bis* must be developed for the purposes of Article 8. Obtaining a definition of habitual residence for children will require a preliminary reference to the ECJ. This is potentially problematic because of the delay in obtaining a judgment from the ECJ and the provisions of Article 68(1)EC which exacerbate this problem under Title IV, because a preliminary reference can only be made by the court of last instance. This will delay proceedings further as cases make their way through the national court system before a reference can be made.[86] This can be amended to allow references under the normal rules of Article 234EC by a unanimous vote in Council,[87] but this has not yet occurred. Even if the rules are amended, the additional Title IV references will further overload the ECJ.[88] The problem of delay in obtaining a preliminary reference from the ECJ, particularly in relation to family law issues, has been recognised by the institutions and the Member States.[89] The ECJ has recognised this problem

[83] Art 3, Reg (EC) No. 1347/2000 limited jurisdiction over parental responsibility disputes to those linked to divorce proceedings. Jurisdiction over parental responsibility can still be ancillary to divorce proceedings under Brussels II*bis*, Art 12.

[84] H Stalford, "EU Family Law: A Human Rights Perspective", in J Meeusen, G Straetmans, M Pertegás and F Swennen (eds), *International Family Law for the European Union* (Antwerp, Intersentia, 2007) 101, 119.

[85] *Ibid.*

[86] Editorial Comment, "Preliminary Rulings and the Area of Freedom, Security and Justice" (2007) 44 *Common Market Law Review* 1, 3.

[87] Under Art 67(2) EC.

[88] Editorial Comment, *supra* n 86, 5.

[89] The problem was also recognised by a Declaration annexed to the minutes of the Council on 28 and 29 May 1998 when drawing up the Convention on Jurisdiction and the Recognition and

and is considering procedural ways in which to address it.[90] Until that point there will be considerable delay in obtaining a judgment, which is inappropriate for family proceedings, particularly those involving children.[91]

Using the *Swaddling* definition of habitual residence would risk the attribution of habitual residence to a child who has little connection to a State, potentially allowing a child to become habitually resident immediately on arrival. If a child arrives in a State with their parent, who has the appropriate intention to become habitually resident, and this was attributed to the child, they would also become immediately, or very quickly habitually resident. This jurisdictional connection may be too slight as the child's links will remain for a period with the former habitual residence.

The desire to protect children and allow the assumption of jurisdiction may mean that the *Swaddling* interpretation is adopted. In relation to children, it may be regarded as undesirable for them to have no habitual residence. Requiring a period of actual residence before the child becomes habitually resident may mean that there is no court with jurisdiction over parental responsibility issues which arise. If the period of residence is not significant in the new State, the child may not have become habitually resident there. *Swaddling* would, however, allow the assumption of jurisdiction where the child has little or no factual connection to that State and makes the child's habitual residence potentially dependent on the intention of their principal carer. This is undesirable, and it is preferable to require a period of actual residence despite the potential for gaps in jurisdiction to develop. Brussels II*bis* accounts for this situation, allowing the assumption of jurisdiction on the basis of presence if no habitual residence can be established.[92]

If the *Swaddling* definition of habitual residence was adopted in relation to Article 8 the problems are potentially mitigated to some extent by the provision in Article 15, allowing a transfer of jurisdiction to a court with a closer connection to a parental responsibility dispute. This is an exception to the usual European approach to jurisdictional conflicts whereby the court first seised must accept jurisdiction, even if there is another Member State court which has a closer connection to the dispute.[93] The provision relies on continental judges

Enforcement of Judgments in Matrimonial Matters ([1998] OJ C 221/02). The European Council recognised the issue in The Hague Programme, *supra* n 3, point 3.1 requiring thought as to how the Statutes of the Court could be amended for the speedy and appropriate handling of requests. The ECJ has suggested an emergency reference procedure which the Council have requested further details on. Council draft letter to the President of the Court of Justice of the European Communities 21 March 2007, 7647/07.

90 A Moylan, "The European Court of Justice and Brussels II Revised" [2006] *International Family Law* 188, 192.

91 N Lowe, "New International Conventions Affecting the Law Relating to Children – A Cause for Concern?" [2001] *International Family Law* 171, 173.

92 Art 13, Brussels II*bis*.

93 This method is adopted for the rest of Brussels II*bis* under Art 19. Similar provisions exist in

being sensitive to the benefits of a transfer of jurisdiction. Under Article 15(3)(b), one of the grounds for establishing a closer connection is that the Member State is the former habitual residence of the child. The transfer must be in the best interests of the child under Article 15(1). A transfer may be instigated by any of the parties, the court first seised or by application of the court with the particular connection under Article 15(2).

The provision in Article 15 is a surprising aspect of Brussels II*bis* as EC private international law rules usually aim to eliminate discretion. It may represent recognition that habitual residence alone, especially if the *Swaddling* definition is adopted, is insufficient to establish jurisdiction over parental responsibility proceedings. Article 15 could be useful in ensuring a genuine connection between the child and the court with jurisdiction over parental responsibility proceedings and may facilitate the involvement of a child in the proceedings. It may also help to ensure that cases are heard in the most appropriate forum.[94]

The application of the *Swaddling* interpretation in the family law context is supported by Article 9 of Brussels II*bis*.[95] Under Article 9, following a move to a new place of habitual residence, jurisdiction over parental responsibility issues continues for three months for the courts of the child's previous place of habitual residence. Someone holding access rights must remain in the former place of habitual residence for Article 9 to operate. This provision only works effectively if the child acquires a new habitual residence on arrival,[96] which is possible if the *Swaddling* definition was adopted.

Article 9 ensures that a case is heard in a court to which a child has a connection if a person with access rights remains in the child's former place of habitual residence. The provision seems to be for the benefit of the holder of access rights rather than the child. If no holder of access rights is left behind, as the child's habitual residence changes, Article 9 will not operate.

4. Brussels II*bis* and the Hague Convention 1996

By Decision 2003/93[97] the Council authorised the Member States to sign the Hague Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection

relation to commercial disputes under Art 27 Brussels I Council Reg (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2000] OJ L12/1.

94 Lowe, *supra* n 91, 175.

95 Evans, *supra* n 44, 60.

96 P McEleavy, "Brussels II*bis*: Matrimonial Matters, Parental Responsibility, Child Abduction and Mutual Recognition" (2004) 53 *International and Comparative Law Quarterly* 503, 508.

97 Council Decision 2003/93/EC of 19 December 2002 authorising the Member States, in the interest of the Community, to sign the 1996 Hague Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children (OJ L 048 21/02/2003).

of children 1996 ("Hague Convention 1996").[98] This Convention covers substantially the same issues of parental responsibility jurisdiction as the Brussels II*bis* Regulation. Article 61(1) of Brussels II*bis* specifies that the Regulation will apply in preference to the Convention where the child is habitually resident in the territory of an EU Member State.

Article 13 of Brussels II*bis* allows jurisdiction over parental responsibility based on the presence of the child where the habitual residence of the child cannot be determined, or jurisdiction is not ancillary to divorce proceedings.[99] This appears to accept that a child may have no habitual residence under EC law, and would accommodate a requirement of a period of actual residence before habitual residence is established. However, it is also potentially in conflict with Article 61 of Brussels II*bis*.

When a child has no habitual residence, Article 6(2) of the Hague Convention 1996 also allows the assumption of jurisdiction on the basis of presence. The child is not habitually resident in any Member State, and so under Article 61(1) the Regulation does not apply in preference to the Convention. Article 6(2) is potentially applicable instead of Article 13 Brussels II*bis*. This is a serious conflict over which instrument will apply where the child's habitual residence cannot be determined, which could significantly delay the court in giving judgment. The court, in assessing whether it has jurisdiction over a parental responsibility case, has no guidance on whether Brussels II*bis* or the Hague Convention 1996 applies. If the court decides to apply the Hague Convention 1996, the ensuing decision and the terms of the Convention itself are not subject to the jurisdiction of the ECJ.

The Member States have all signed the Hague Convention 1996, but have not as yet ratified it.[100] Before that occurs and the Convention enters into force, it would appear necessary to consider the relationship between the two documents more closely, changing the basis upon which priority is accorded to the application of Brussels II*bis* in the EU to avoid potential conflicts of jurisdiction between the instruments.

5. Habitual Residence and International Child Abduction

International child abduction was already successfully dealt with by the Hague Convention on the Civil Aspects of International Child Abduction 1980 ("Hague Convention 1980") to which all Member States are party.[101] The inclu-

98 *Ibid*, Art 1(1).

99 Under Art 12, Brussels II*bis*.

100 Hague Conference on Private International Law status table, http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=70, accessed 23 July 2007. Ratification is being held up by a dispute between Spain and the UK as to how to accommodate Gibraltar; see Hansard HC 21 June 2006 Column 460 – 461WH, http://www.publications.parliament.uk/pa/cm200506/cmhansrd/cm060621/halltext/60621h0216.htm#06062154000398, accessed 7 March 2007.

101 McEleavy, *supra* n 96, 509.

sion of abduction within the scope of Brussels II*bis* was therefore controversial and resulted in compromise provisions.[102] The Hague Convention 1980 remains in force between EU Member States[103] and forms the legal basis for the return application.[104] Brussels II*bis* takes precedence over the Hague Convention 1980 where its rules alter those contained in the Convention.[105] This is a complex legal arrangement, but the Regulation is intended to build on and develop the principles of the Hague Convention 1980.

The Hague Convention 1980 operates on the basis that the child should be quickly returned to their habitual residence following abduction,[106] for any parental responsibility issues to be resolved in a substantive hearing there.[107] This principle of return of the child is subject to only limited exceptions.[108] It is therefore particularly important in child abduction cases that habitual residence ensures a meaningful connection so that the child is returned to a known environment and it is appropriate for the courts in that State to assume jurisdiction over the custody dispute.[109]

Article 2(11) of Brussels II*bis* creates a new definition of when an abduction has occurred[110] upon which the return remedy will then operate.[111] This definition will be subject to ECJ interpretation. Under Article 2(11)(a) a removal or retention is wrongful when it is in breach of custody rights existing under the law of the child's habitual residence before the removal or retention. The child must therefore have a habitual residence for an abduction to have occurred.

The *Swaddling* definition means that, potentially, a child could acquire habitual residence immediately upon arrival in a Member State. This would mean that a child could be protected from abduction from that State from the moment of arrival.[112] However, if there is no factual connection, it would be inappropriate for the courts to assume jurisdiction over a parental responsibility dispute on return.[113]

If a period of actual residence was required, the child would take longer to

[102] Tenreiro and Ekström, *supra* n 7, 31.
[103] Art 62, Brussels II*bis*.
[104] Art 11(1), Brussels II*bis*.
[105] Art 60(1)(e), Brussels II*bis*.
[106] Art 12, Hague Convention 1980.
[107] For full discussion of Hague Convention 1980 and its operation, see Beaumont and McEleavy, *supra* n 40.
[108] Hague Convention 1980. Return of the child may be refused: under Art 12(2) where the child has remained for one year in the State abducted to and has settled there; under Art 13(1)(a) where there was consent or acquiescence to the abduction by the person holding custody rights; under Art 13(1)(b) where there is a grave risk of harm to the child if returned; or under Art 13(2) where the child objects to return.
[109] Beaumont and McEleavy, *supra* n 40, 101.
[110] P McEleavy, "The New Child Abduction Regime in the European Union: Symbiotic Relationship or Forced Partnership?" (2005) 1 *Journal of Private International Law* 5, 29.
[111] Under Art 12, Hague Convention 1980.
[112] Beaumont and McEleavy, *supra* n 40, 90.
[113] *Ibid.*

become habitually resident, potentially making them vulnerable to abduction. During the period where the child is not habitually resident where they are living, they could be removed from that State without the Brussels II*bis* return remedy being invoked.[114] In these circumstances, any abduction is likely to be back to the State that the child had recently moved from.[115] The child would presumably still have connections there, justifying that State having jurisdiction over parental responsibility disputes.[116] There does, however, remain the risk that the child will be removed to a State with which it has no connection, and in these circumstances the return remedy would not operate.

A balance must be drawn to protect children from abduction, but to also ensure parental responsibility issues are litigated in an appropriate forum. The number of children potentially affected by a gap in habitual residence is small[117] and hopefully resolvable through other means such as mediation, or enforcement of a parental responsibility judgment. There is nothing in these provisions to prevent the adoption of the *Swaddling* definition and it would theoretically protect some children from abduction from the moment of their arrival in a State, but the use of the return remedy in these circumstances would be inappropriate.

In addition, habitual residence is used as a connecting factor in both Brussels II*bis* and the Hague Convention 1980 to define when the return mechanism will operate.[118] The interpretation of habitual residence in the context of the Hague Convention 1980 under English law[119] is different to that given by the ECJ in *Swaddling*.[120]

Parallel meanings of the term habitual residence in the context of abduction law will occur if the ECJ adopts *Swaddling* as the definition for use under Brussels II*bis*. The ECJ only has jurisdiction to determine the meaning of the concept in the context of Article 2(11) Brussels II*bis*. The ECJ cannot interpret Article 3 of the Hague Convention 1980, because this has not been communitarised. The definition of habitual residence in cases where the Hague Convention 1980 alone applies remains subject to national interpretation. This potentially means that an abduction within the EU may not be regarded as such outside because of the ease of establishing habitual residence under *Swaddling*. This would create unjustifiable differences in the application of the return mechanism. This is an

114 Schuz, *supra* n 15, 19.
115 *Ibid*.
116 *Ibid*.
117 Evans, *supra* n 44, 80.
118 Under Art 2(11), Brussels II*bis* and Art 3, Hague Convention 1980. The House of Lords held in *Re J (A child) (Custody Rights: Jurisdiction)* [2005] UKHL 40, para 33, [2006] 1 AC 80, that habitual residence is not required in non-Convention abduction cases, although a close connection to the jurisdiction the child was taken from is. The distinction seems to bear little difference.
119 *Re J, supra* n 22, 578.
120 *Gingi v Secretary of State for Work and Pensions* [2001] EWCA Civ 1685, [2002] 1 CMLR 20 confirms that the English definition of habitual residence is different to the EC definition.

arbitrary difference resulting from the unusual legal structure created by the Regulation.[121]

However, if the ECJ drew its interpretation of habitual residence from Member State practice under the Hague Convention 1980, this would potentially help to develop a better definition for use under Brussels II*bis*. Instead of drawing on an unrelated case from another area of law such as *Swaddling*, a definition appropriate to the specific context of Brussels II*bis* could be developed. The ECJ can be influenced by national practice when interpreting concepts for the purposes of EC law.[122] The requirement of a period of actual residence would be adopted from national law, enforcing a connection between the child and the State.

Additionally, the definition of habitual residence would then be uniform within all EU Member States, which is not necessarily the case between signatory States of the Hague Convention 1980.[123] The uniform interpretation of key terms under the Hague Convention 1980 is regarded as desirable and has been pursued in the English courts by drawing on the case law in foreign jurisdictions.[124] A definitive definition provided by a supranational court will avoid these problems of interpretation, because the same definition will apply automatically in all Member State courts.

Article 11 of Brussels II*bis* alters how the Hague Convention 1980 return remedy works when return is refused on the basis of one of the Hague Convention's Article 13 defences. In these circumstances, the courts of the child's habitual residence before the abduction may be given ultimate control over whether the child is returned.[125] Where return of the child is refused, the courts of the child's habitual residence before the abduction must notify the parties and invite them to make submissions. If the parties make submissions within three months, the court will conduct a full custody hearing and the resulting judgment may involve the return of the child from the State they were abducted to.[126] The

[121] Although parallel systems of law is a common issue in relation to EU and national law, eg in relation to public law remedies: see R Caranta, "Judicial Protection against Member States: A New *Jus Commune* Takes Shape" (1995) 32 *Common Market Law Review* 703, 716. However, the practice under Brussels II*bis* is also likely to influence the application of the Hague Convention 1980 see *Re D (a child) (abduction: foreign custody rights)* [2006] All ER (D) 218 (Nov), [2006] UKHL 51, para 62.

[122] R Caranta, "Learning from our Neighbours: Public Law Remedies Homogenization from Bottom Up" (1997) 4 *Maastricht Journal of European and Comparative Law* 220, 233 in relation to public law concepts.

[123] L Silberman, "Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence" (2005) 38 *University of California Davies Law Review* 1049, 1065.

[124] See eg *Re P (a child) (abduction: acquiescence)* [2004] EWCA Civ 971, [2004] 2 FLR 1057 on the meaning of Art 5, Hague Convention 1980.

[125] Art 11(6), (7), (8). It is not proposed to explore in detail how Brussels II*bis* alters the Hague Convention 1980 remedy: see McEleavy, *supra* n 110.

[126] This mechanism was applied to return a child to England from Malta in *Re A (abduction: non-return order)* [2007] All ER (d) 149 (Feb), [2006] EWHC 3397 (Fam).

justification for awarding this court the power of review and the right to decide the custody arrangements of the child in these circumstances is unclear.[127] This provision assumes that the State where the child was habitually resident before the abduction is the most appropriate forum for the custody dispute, which is not necessarily the case.[128] If the *Swaddling* definition of habitual residence were adopted, the connection may actually be very limited.

Article 10 of Brussels II*bis* defines which courts have jurisdiction over parental responsibility disputes following an abduction. Article 10 ensures that the courts of the child's habitual residence prior to the abduction retain jurisdiction, preventing the abductor gaining any advantage through their wrongful action. This is achieved by imposing a series of requirements in addition to the acquisition of habitual residence before the courts in the State the child was abducted to acquire jurisdiction under Article 10(1)(a) and (b). The child must be habitually resident and those with parental responsibility must have acquiesced to the abduction under Article 10(1)(a). Under Article 10(1)(b), the child must be habitually resident, have been in the State they were abducted to for a year and settled there. In addition, either no request for the child's return has been received in that time, despite those holding parental responsibility rights knowing where the child is, or a request has been made but withdrawn. Alternatively, the case must additionally have been closed, either because return was refused and not disputed in the courts of the child's former habitual residence under Article 11(7), or, if it was, the refusal to return was confirmed.

The Article 10 provisions appear to imply that the child's new habitual residence is not always the most appropriate forum for the dispute, unless additional factors are taken into account. The extra requirements may acknowledge that if a child can become habitually resident on arrival in a Member State under *Swaddling*, safeguards are needed to prevent the inappropriate assumption of jurisdiction where there is too tenuous a connection between the child and the State they have been abducted to.

D. Conclusions

The central role that habitual residence plays within Brussels II*bis* augurs further judicial development of this concept. These developments have to occur at a European level to secure the free movement of judgments within Europe. However, the judicial interpretation so far placed on habitual residence at a European level is not designed for application in a family law context and it is questionable whether it can be suitably adapted. Brussels II*bis* will support the interpretation of habitual residence given in *Swaddling*, and certain Articles of

[127] McEleavy, *supra* n 96, 509.
[128] Schuz, *supra* n 15, 789.

the Regulation actually support this interpretation. Despite this, it is to be hoped that the ECJ will regard the new context in which habitual residence is used as requiring further principled development of the concept in favour of a requirement of a period of actual residence, particularly in relation to children. The need to enforce a factual connection between the individual and the jurisdiction in family law is more desirable than maintaining a uniform definition of habitual residence throughout European law. A decision by the ECJ on this important issue under Brussels II*bis* is awaited with interest.