

HONG KONG / JUDGMENT

BLW v. BWL

COURT

Court of Appeal

DECIDED

13 February 2007

CASE / FILE NUMBER

CACV416/2006

Source: legalref.judiciary.hk · Research copy typeset by Esheria. Not court-issued or certified.

bjbj CACV 416/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF APPEAL CIVIL APPEAL NO. 416 OF 2006 (ON APPEAL FROM HCMP 2063 OF 2006) BETWEEN Plaintiff and BWL (akaBWSL) Defendant (Re Hague Convention : Habitual Residence : Wrongful Retention) Before : Hon Cheung JA, Yeung JA and Sakhrani J in Court Date of Hearing : 1 February 2007 Date of Judgment : 1 February 2007 Date of Reasons for Judgment : 13 February 2007 Reasons for Judgment Hon Cheung JA : The Hague Convention AUTONUMOUT The Convention on the Civil Aspects of International Child Abduction signed at the Hague on 25 October 1980 (the Hague Convention) is an agreement reached by the international community to protect children internationally from wrongful removal or retention. The Hague Convention was incorporated into Hong Kong law by the Child Abduction and Custody Ordinance (the Ordinance), Cap. 512 on 5 September 1997. AUTONUMOUT The objective of the Hague Convention is to secure the prompt return to the state of their habitual residence (that state being a contracting state) of children in two categories : children who have been wrongfully removed from the state of their habitual residence to another contractual state; and children who have been wrongfully retained in a contractual state other than the state of their habitual residence instead of being returned to the latter side. AUTONUMOUT In the first category a child only comes within it if it is wrongfully taken out, i.e. across the frontier of the state of its habitual residence. In the second category a child can only come within it if it has been first removed rightfully (for example under a court order or an agreement between the parents) out of the state of its habitual residence and subsequently retained wrongfully (for example contrary to a court order or an agreement between its two parents) instead of being returned to the state of its habitual residence : see the Preamble and Article 1(a) of the Hague Convention and the judgment of Lord Brandon in Re H, re S (minors) (abduction : custody rights) [1991] 2 AC 476 at 498. Although the Preamble and Article 1 of the Hague Convention are not incorporated into the Ordinance, this objective is clear and is accepted by the parties : see also LM v. HTS [2002] 1 HKC 194 per Hartmann J. The issue AUTONUMOUT The issue in this appeal is whether one of the parents, namely the mother has wrongfully retained the children of the family in Hong Kong. The father said the children were habitually resident in the United States of America () at the time of their wrongful retention thereby engaging the operation of the Hague Convention. Hong Kong and USA are contracting parties to the Hague Convention. Article 3 AUTONUMOUT The

relevant Article for the purpose of this case is Article 3 which provides that The removal or the retention of a child is to be considered wrongful where- it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. The rights of custody mentioned in sub-paragraph (a) above may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State. The facts AUTONUMOUT The parties in this case BLW (the father) and BWSL (the mother) married each other in USA on 14 September 2002. On 21 July 2004 the mother gave birth to two twin sons. AUTONUMOUT Both parents were born in 1973. The father was born and grew up in USA. The mother was born in Hong Kong. Her family emigrated to USA when she was four. The parents met each other while they were at high school in Philadelphia. Between 1999 and 2004 the parents lived and worked in Atlanta. In 2000 they were engaged and married in 2002. AUTONUMOUT Both the parents are high achievers. The father is a neurologist. He completed his four year residency training in Atlanta in 2003. The mother, after graduating from university, pursued a career in journalism. She had worked in New York, Hong Kong and Taiwan between 1996 and 1999. When she lived in Atlanta she was the local bureau chief of an international news media. Her stories received awards. She also appeared as a guest analyst on international and local television programmes. She also gave commentary for the local radio station. AUTONUMOUT In May 2004 the parties moved to Cleveland, Ohio. At that time the mother was seven months pregnant and was on maternity leave from her job. She was writing a book. The father took a position with a clinic in Cleveland. AUTONUMOUT In March 2005 the mother applied for a job with another international news media and was offered a job to work in Hong Kong in May 2005. She signed a contract with the new employer on 30 June 2005. The contract was for a period of two years from 8 August 2005 to 7 August 2007. It was then agreed by the parents that the entire family would move to Hong Kong with the father looking for suitable employment in Hong Kong and the children joining the mother once she had settled in and found a suitable apartment and helper. AUTONUMOUT In August 2005 the mother came to Hong Kong after receiving a week s training in Singapore. On 1 November 2005 the father with the help of his own mother (the paternal grandmother) brought the twins to Hong Kong. The father stayed for 13 days and then came back again in December 2005 to be with the mother and the children. He stayed for 15 days. AUTONUMOUT In February 2006 the father informed the mother that he would not be looking for a job in Hong Kong. There were arguments as where the father s future career should be and the father told the mother that the marriage between them was over. Nonetheless in March 2006 the father came to Hong Kong again to see the children. AUTONUMOUT In May 2006 the mother went to USA to promote her new book which had been published. The children remained in Hong Kong during this trip. They were being looked after by the mother s father who came to visit her in Hong Kong. AUTONUMOUT When the mother was in USA the father told her that the marriage was over and he wanted a divorce. Both, however, agreed to work on the marriage although by that time both were not wearing their wedding rings and had considered themselves separated. AUTONUMOUT In July 2006 the father came to see the

children again in Hong Kong. During this time both parties again discussed reconciliation. The father also wanted the children to go to USA in the autumn and stayed there for three months. It is apparent from the correspondence that the mother actively explored how the children should be looked after while they were in USA. Because of the work of the father his proposal was to put them in a day-care centre. This was not agreed to by the mother who was uncomfortable with his proposal. There were discussions to have a nanny and the father's own mother to look after the children. The latter proposal came into difficulties because of objections from the new spouse of the paternal grandmother. AUTONUMOUT To cut the long story short, attempts at reconciliation failed and on 8 August 2006 the mother filed for a divorce in Hong Kong. In the divorce petition she also sought custody of the children. AUTONUMOUT On 15 September 2006 the father filed an acknowledgment service of the petition. He disputed the jurisdiction of the Hong Kong court. AUTONUMOUT In early September the father left their home in Ohio and moved to another address without telling the mother of his new address. On 20 September 2006 the father also commenced divorce proceedings in Cleveland, Ohio and asked for orders to freeze the mother's bank accounts. A request for the return of the children was issued on the 21 September 2006 by the father. AUTONUMOUT Fearing that the children may be removed from Hong Kong the mother commenced wardship proceedings in Hong Kong on 22 September 2006. The order was, however, not served and had lapsed. AUTONUMOUT On 27 September 2006 the father issued a summons in Hong Kong to stay the mother's divorce proceedings on the basis of lack of jurisdiction by the Hong Kong court and forum non-conveniens. AUTONUMOUT On 9 October 2006 the mother issued a summons in Hong Kong seeking non removal of the children and maintenance from the father. AUTONUMOUT On 10 October 2006 the father commenced the Hague Convention proceedings in Hong Kong seeking the removal of the children from Hong Kong on the ground that the children had been wrongfully retained here. On 19 October 2006 the father filed another set of Hague Convention proceedings in the US on the ground of wrongful removal of the children. This was amended on 1 November 2006 when the father relied on the wrongful retention of the children in Hong Kong. AUTONUMOUT Both the father and mother's summonses were adjourned by agreement pending the determination of the Hague Convention proceedings. AUTONUMOUT The matter was heard by Deputy High Court Judge Gill on 23 November 2006. On 27 November 2006 he ordered the children to be removed to the United States of America. The mother appealed against the decision. At the conclusion of the hearing we allowed the appeal and discharged the removal order. The two issues AUTONUMOUT This appeal requires a resolution of two issues : Were the children habitually resident in USA on 8 August 2006 when the mother applied for their custody in Hong Kong? Did the mother's application for custody constitute a wrongful retention of the children within the meaning of the Hague Convention? The agreement of the parties AUTONUMOUT In considering these two issues it is important to bear in mind a significant factor in this case which in my view the judge had not properly taken into regard when he found that the children's habitual residence was in USA and the mother had wrongfully retained the children. This significant factor is that the children came to Hong Kong in November 2005 pursuant to an express agreement between the father and the mother. The express agreement is that the children will stay with their mother in Hong Kong for a period of two years up to August 2007. AUTONUMOUT In paragraph 6 of the father's Originating

Summons which sought the removal of the children from Hong Kong it was stated that The Defendant (i.e. the mother) requested to see the said children in Hong Kong. The Plaintiff (i.e. the father) agreed to take the said children to Hong Kong to visit the Defendant and allowed the said children to stay with the Defendant until about August 2007 when the Defendant's employment contract comes to an end or when she returns to the States permanently, whichever is earlier. On or about 1st November 2005, the said children were brought by the Plaintiff from USA to Hong Kong to visit the Defendant. AUTONUMOUT This does not provide a full picture of the arrangement. It seems to suggest that the father took the children to Hong Kong because the mother requested him to do so. It is clear that the father took the children to Hong Kong pursuant to the agreement between the parties. In essence the children would stay with the mother during her employment in Hong Kong until August 2007 or when she returns to USA permanently whichever is earlier. That the parents had agreed to this arrangement can be seen from the contemporaneous documents when in May 2005 before the mother took up her new job she informed her employers that the father and the children would be joining her in Hong Kong after her arrival. This can also be found from the reference letter dated 16 September 2005 jointly from the father and the mother for the nanny who had been looking after the children when they said the reason why they could no longer employed the nanny as of 1 November was that we would be moving overseas . AUTONUMOUT In paragraph 5 of the affidavit of the father dated 14 November 2006 he stated that I wish to say at the outset that it was always our understanding that B (i.e. mother) would work in Hong Kong for the 2 year period provided in her contract and would return to the United States thereafter. If this had not been understood, I would not have agreed to B taking up the job. It was further understood that the twins would split their time with us, spending a few months with B with me visiting the vice versa over the 2 year period. B and I never agreed or intended that either she and/or the twins would leave the United States with a settled intention not to return and/or to remain in Hong Kong on a permanent basis. AUTONUMOUT Although the father said that the understanding that the children would split their time with the parents spending a few months with the mother and the father visiting and vice versa over the two-year period, the overall arrangement must be that the children would spend a substantial period of their time in Hong Kong. After all while they are in Hong Kong, the children would be looked after by the mother and a helper whereas the father is working full-time and is unlikely to be able to be with them for an extended period. His profession as a neurologist would not have permitted him to do so. As can be seen from the episode concerning the proposed visit in autumn the father's proposal was to put the children in a day-care centre until the evening when he would look after them after work. Clearly all the objective factors suggested that from November 2005 to August 2007 a substantial time of their children's lives would be in Hong Kong. The mother's job allowed her to return home at 12:30 p.m. and spent the afternoon and evening with the children. Further as the children are growing up obviously they will have to be enrolled in preschools or playgroups. Even if they were to visit the father in USA from time to time one would not imagine this would happen at regular intervals. Habitual residence Meaning AUTONUMOUT As to the meaning of habitual residence the following principles can be stated :

- (1) The question whether a person is or is not habitually resident in a particular country is a question of fact: *Re J (A Minor) (Abduction: Custody Rights)* [1990] 2 AC 562, 578, *C v S (A Minor) (Abduction)* [1990] 2 FLR 442, 454 per Lord Brandon. The concept of habitual residence is not an artificial legal construct. While it is not necessary for a person to remain continuously present in a particular country in order for him to retain residence there it is not possible for a person to acquire residence in one country while remaining throughout physically present in another. Where both parents have joint parental responsibility, neither of them can unilaterally change the habitual residence of the child by removing the child wrongfully and in breach of the other party's rights: *Re J* at 572 and 449 respectively per Lord Donaldson MR. See : *Re M (Abduction: Habitual Residence)* per Millet LJ at 895.
- (4) The habitual residence of the young children of parents who are living together is the same as the habitual residence of the parents themselves.
- (5) Habitual residence is a term referring, when it is applied in the context of married parents living together, to their abode in a particular place or country which they have adopted voluntarily and for settled purposes as part of the regular order of their life for the time being, whether of short or of long duration. All that the law requires for a settled purpose is that the parents shared intentions in living where they do should have a sufficient degree of continuity about them to be properly described as settled.
- (6) Although habitual residence can be lost in a single day, for example upon departure from the initial abode with no intention of returning, the assumption of habitual residence requires an appreciable period of time and a settled intention. See : *Re B (Minors) (Abduction) (No 2)* [1993] 1 FLR 993 and *LM v. HTS*. Case law from other jurisdictions
AUTONUMOUT There is cross fertilisation of jurisprudence by countries which adopted the Hague Convention. This can be seen from some of the cases on this topic. USA : *Whiting v. Krassner* AUTONUMOUT In *Whiting v. Krassner*, 391 F.3d 540 (3rd Cir. 2004) a child was born to a couple in September 2000 in New York. The couple were unmarried at that time and never married subsequently. The couple resided with the child C in New York until October 2001 whereby they agreed to separate and the mother W took the child to live with her in Canada. The parties had reached an agreement whereby both of them would retain joint custody of the child and that the child would be returned to USA no later than 19 October 2003. During this period the father K would have the right to have the child with him for a period of 30 to 45 days during the summer. Pursuant to this agreement the mother took the child to live in Canada and in December 2001 the father came to Canada and took the child away and returned to USA without the mother's consent. The mother applied for the return of the child under the Hague Convention. AUTONUMOUT The United States Court of Appeals for the Third Circuit held that the habitual residence of the child was in Canada. It adopted the English case of *Re Bates* (1989) CA 122-89 where the court stated that in deciding whether a place constitute the child's habitual residence There must be a degree of settled purpose. The purpose may be one or there may be several. It may be specific or general. All that the law requires is that there is a settled purpose. That is not to say that the propositus

intends to stay where he is indefinitely. Indeed his purpose while settled may be for a limited period. Education, business or profession, employment, health, family or merely love of the place spring to mind as common reasons for a choice of regular abode... All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled. *Id.* at 223. AUTONUMOUT The US Court held that Unlike many cases arising under the Hague Convention, the parents intent in this case is embodied in the Agreement and therefore need not be inferred from their actions. The District Court found that the Agreement specifically stated that W and C would reside in Wallaceburg, Ontario Canada and C would return to the United States no later than 19 October 2003 depending upon certain conditions. Thus, we have a shared intent by C s parents that she live in Canada for a period of two years. This fulfills the requirement set out by this Court in *Feder* that W and C s move to Canada was accompanied by a degree of settled purpose. AUTONUMOUT The Court in *Whiting* also referred to the case of *Mozes v Mozes* 239 F.3d at 1076 where the Court of Appeals for the Ninth Circuit discussed three categories of cases : where the family as a unit has translocated and manifested a settled purpose to change its habitual residence despite the fact that one parent may have had qualms about the move. This usually leads the court to find a change of habitual residence; where the petitioning parent initially agreed to allow the child to stay abroad for an indefinite duration. The court generally finds that there is no clear answer and a very fact dependent;

- (3) where the children s initial move from an established habitual residence was clearly intended to be for a specific limited duration. Most courts will find no change in habitual residence. However a child may become habitually resident even in a place where he or she was intended to live only for a limited time if the child s original habitual residence has been effectively abandoned by the shared intent of the parents. AUTONUMOUT The Court in *Whiting* dealt with intent to abandon as follows In this case, we do find an intent to abandon New York for a definite and extended period in the life of an infant. For the fact that W. and C. were to return to the United States, subject to certain conditions, does not in any way diminish the parties settled intention that the two were to remain in Canada for at least two years. [FN7] Furthermore, the fact that the agreed-upon stay was of a limited duration in no way hinders the finding of a change in habitual residence. Rather, as we stated in *Feder*, the parties settled purpose in moving may be for a limited period of time. See *Feder*, 63 F.3d at 223. Logic does not prevent us from finding that the shared intent of parents to move their eighteen-month old daughter to Canada for two years could result in the abandonment of the daughter s prior place of habitual residence. Put more succinctly, in our view, the intent to abandon, need not be forever; rather, intent to abandon a former place of residency of a one year old child for at least two years certainly can effectuate an abandonment of that former habitual residence. (emphasis added) Scotland : *Watson v Jamieson* AUTONUMOUT In *Watson v. Jamieson* [1998] SLT 180 the children of the family had resided with their mother for many years in New Zealand. The parents then reached an agreement that the children would reside with each parent alternately for a two-year period. Having spent 1993 and 1994 with their mother in New Zealand the children moved to reside with their father in

Scotland for 1995 and 1996. They remained in regular contact with the mother by telephone and post, and had a long holiday with her in September 1995. In August 1996 their father indicated that he would not return them to New Zealand at the end of that year. The mother petitioned the Scottish court under the Hague Convention for the return of the children to New Zealand. AUTONUMOUT Lord Prosser of the Outer House found that the children's habitual residence was in Scotland that when the children left New Zealand to come to Scotland for a two-year period there was a settled purpose, according to which they would in any ordinary sense be living here for that two-year period notwithstanding that they would go back to New Zealand, to live there for the next two years up to the end of 1998. United Kingdom : In re S AUTONUMOUT In re S. (Minors) (Abduction: Wrongful Retention) [1994] FAM 70 the parents of two children were Israeli citizens living in Israel. In September 1992 they brought the children to England intending to reside there for a year before returning to Israel. The father came to England on sabbatical to carry out a research project. The mother was offered a scholarship to carry out research in the same university of the father for the same period of time. The father returned to Israel in April 1993 and commenced proceedings for divorce. The mother remained in England with the children. In May 1993 the mother obtained, ex parte, interim prohibited steps and residence orders for the children. On 6 May the father demanded the return the children and applied under the Hague Convention for the removal of the children on the ground that the mother had wrongfully retained them in England. AUTONUMOUT Wall J (as he then was) held that the habitual residence of the children remained that of Israel. He held that, Even if, which must be doubtful, the mother has herself lost her habitual residence in Israel, it seems to me plain that where both parents have equal rights of custody no unilateral action by one of them can change the habitual residence of the children, save by the agreement or acquiescence over time of the other parent, or court order determining rights of residence and custody. In my judgment, the matter is concluded on this point by the observations of Lord Donaldson of Lynton M.R. in In re J. (A Minor) (Abduction: Custody Rights) [1990] 2 A.C. 562, 572 AUTONUMOUT Wall J did not analyse why despite the agreement of the parents that they should live in England for that one year the habitual residence of the children remained in Israel. United Kingdom : Re N AUTONUMOUT In Re N (Abduction : Habitual Residence) [2000] 2 FLR 899 the parents and their children were British citizens. The family went to Spain, purchased a flat and despite not having residence status, purchased a house. Before moving into the house, the mother took the children back to England. The father claimed the mother wrongfully abducted the children and asked for their return to Spain. Black J refused to grant the order. He held the mother had not left England with a settled intention not to return; she was embarking on a conditional trial move to Spain. While the father had probably become habitually resident in Spain, the mother had not ceased to be habitually resident in England and certainly had not become habitually resident in Spain. Black J followed In re S and held that, In my view, it is important to recognise that what the father seeks to establish is that the children's place of habitual residence has changed. I have concluded that this cannot happen where he alone of the parents with whom they are living has lost the habitual residence that he shared with the mother and the children and

become habitually resident elsewhere. The present case AUTONUMOUT In this case for the first 14 months of their lives the children were no doubt in habitual residence in USA where their parents were habitually residing. However, in my view, by November 2005 when they came to Hong Kong they became habitually residing in Hong Kong. The parents had agreed that for a duration of 21 months the children would live in Hong Kong with the mother. This is a place where the mother has adopted voluntarily and for a settled purpose as part of the regular order of her life for the time being. The mother has a two-year contract employment in Hong Kong and she has acquired the lease of a flat in Hong Kong where she would live together with the children. This is a place where she would conduct her life for at least a period of two years. This is also a place where the parents had agreed that the children would conduct their lives with the mother for this substantial period of time. The shared intention was that the children would come to Hong Kong for a settled purpose.

AUTONUMOUT This is not a case where the mother suddenly removed away the children from USA to Hong Kong and tried to keep them here. This is also not a case where the children were taken to Hong Kong for the purpose of a short visit and the mother tried to keep them and refused to let them return to USA. The stay in Hong Kong is not for a temporary purpose only and the cases such as LCHY v. CWF and others (HCMP 5231/2001) and Re N (Child Abduction : Habitual Residence) [1993] 2 FLR 124 relied upon by Mr. Coleman S.C. and Mr. Enzo Wong, counsel for the father can be distinguished. Further the question of one parent changing the habitual residence without the express or tacit consent of the other party such as in In re S and Re N simply does not arise in this case when this arrangement is recognized. AUTONUMOUT Mr. Coleman also relied on the case of In re H (Abduction: Habitual Residence: Consent) [2000] 2 FLR 294 where Holman J stated that : the element of intention to take up long-term residence in country B is not in fact an essential prerequisite of ceasing to be habitually resident in country A. Thus a person might leave country A with a settled intention not to return to it but with no particular intention about residence anywhere else. For example, somebody who sets out to travel the world.

AUTONUMOUT I have no difficulties with this observation but I do not see how this case would assist the father. The reasons of the judge AUTONUMOUT In this case the judge s reasons that the habitual residence of the children has all along been in USA are as follows

38. There are I think two important features about this case. The first is that the parties in November 2005 and to date were and still are a married couple enjoying equal rights and responsibilities concerning the care and welfare of the twins. The decision jointly made for BWS to look after them for her time in Hong Kong did not disturb that. Secondly is that whilst attempts were made for the family to come here as a unit, for reasons given this proved to be not feasible.
39. These two factors distinguish the case from Whitney (sic) v Krassner, where there was a custody agreement between estranged parties, and the circumstances referred to by analogy in the excerpt from LM v HTS where, for a period of time, a family has decamped from one country to another as a single unit.

40. Allied to the circumstances of this case is that the family home in Cleveland was not disturbed when BWS left it, followed shortly afterwards by the twins. As I have found as matters of fact, she retained it as her postal address and where her belongings, shared and personal, were kept for her. She left open her US bank accounts and credit cards. And of course she left behind her husband, the father of her children.
41. Her decision to return to the US following the expiry of her existing contract has not, at least in print, wavered, notwithstanding the passage of events.
42. The decision to return the children to their father's care for an extended period over the course of this winter is also a significant factor going to the mindset of the parties as to where they belonged. That this did not transpire may be because of the increasing friction brought about by events of the summer, leading of course to the breakdown of the marriage and the filing of petitions. Had this the extended period of stay with their father transpired, it would seem to me that this would not have amounted to a temporary departure from their settled home, here in Hong Kong, but a temporary return to their not abandoned home in the US. And that, I think, is the key. The settled purpose, being the sine qua non of a transfer of habitual residence of the twins from one place to another, has not been made out. AUTONUMOUT My comments on these reasons are as follows. Although the father and mother are a married couple enjoying equal rights and responsibilities concerning the care and welfare of the children, they have also at the same time agreed and implemented an agreement concerning where the children should stay for a specific period of time. The fact that the couple in Whiting was not married does not detract from this point. After all they are the parents of the child to whom they have equal rights and responsibilities. The important thing is the agreement of the parties as to where the children should live for a fixed period of time. AUTONUMOUT It is perfectly understandable from the father's point of view that he would not wish to come to Hong Kong because he needed to pursue his career advancement in USA. It will be a setback if he has to re-qualify again in Hong Kong. In addition he had obtained financial grants which required him to work at approved institutions in USA. However, this does not detract from the basic premise that there was an agreement for children to live with the mother in Hong Kong for a fixed period of time. The father is of course an integral part and I wish to say an important part of the family unit, but it does not mean that the express agreement would have to be ignored if the father chose not to come to Hong Kong. He certainly had not advanced any argument that the arrangement was subject to the whole family moving to Hong Kong as a unit. AUTONUMOUT The fact that the possessions of the mother were left in USA and that she did not close her US bank account and credit cards does not necessarily mean that during the time she lives in Hong Kong she has not abandoned USA as her habitual residence or that the parents did not intend the children to abandon their habitual residence in USA because as Whiting shows the intent to abandon does not need to be forever. Rather the intent to abandon a former place of residency of two 14 months old children for at least 21 months together with its implementation can certainly effect an abandonment of that former habitual residence. AUTONUMOUT The fact that the mother in her correspondence with the father showed a

desire to live in USA does not mean that the parents agreement could not result in an abandonment of the children s habitual residence in USA during the time when they live in Hong Kong. AUTONUMOUT The judge also considered significant the decision of the parents to return the children to their father s care for an extended period of three months. My view is that, apart from the fact that this plan had never been implemented, one must consider the overall agreement on how the children should live during this extended time : the parents obviously intended the children to spend a substantial time in Hong Kong. My view on habitual residence AUTONUMOUT I am of the view that the habitual residence of the children after they came to Hong Kong is in Hong Kong and not USA. Wrongful retention Meaning AUTONUMOUT To establish that a child has been wrongfully retained within Article 3 the complaining parent must prove an event occurring on a specific occasion which constitutes the act of wrongful retention. Wrongful retention under the Hague Convention is not a continuing state of affairs : see the decision of the House of Lords in R H (Minors) (Abduction: Custody Rights) [1991] 2 AC 476. Retention and wrongful retention AUTONUMOUT In the father s affidavit of 14 November 2006 he relied on the mother s application for the custody of the children on 8 August 2006 as an indication of her intention to keep the children in Hong Kong. Mr. Coleman had argued that the retention of the children began when they first came to Hong Kong in November 2005 and the wrongful retention took place when the mother applied for custody on 8 August 2006. AUTONUMOUT I cannot understand the relevance of this argument. The children are physically in Hong Kong since November 2005 but for the purpose of considering whether they have been wrongfully retained, there must be a specific event which has taken place. That specific event must be the event as relied upon by the father namely, the 8 August 2006 application for custody by the mother. When the cases discussed retention they must be in the context of wrongful retention which requires a specific event. The importance of the agreement AUTONUMOUT Again in relation to wrongful retention the most significant factor in this case is that in August 2006 the children were in Hong Kong pursuant to an express agreement between the parents. Under this agreement they will remain in Hong Kong until August 2007. The mother could not have wrongfully retained the children prior to that day. The application by the father was premature. In my view the application by the mother for custody cannot be an act of retention let alone wrongful retention. The fact that the mother applied for custody does not mean that she would not return the children to USA after August 2007. She has never expressed an intention not to return to USA. On the contrary, her intention showed shortly before the hearing below was to return to USA. This can be seen from the letter from her solicitors dated 31 October 2006 in response to the query by the father s solicitors on her intention at the end of her employment contract in August 2007 The parties joint intention when our client accepted the contract in Hong Kong was that the family would relocate to Hong Kong for that period. We are instructed that it was equally our clients joint intention to return to the USA after the expiry of our client s contract but the exact location of their return was subject always to employment opportunities of both of our respective clients at that time, namely in or shortly before August 2007. My client s intention has not changed since our clients discussed and agreed the Hong Kong move in May 2005.

She intends to return to the USA, on the basis of obtaining appropriate employment there the possibility of which she remains suitably optimistic. AUTONUMOUT Mr. Coleman argued that it would be too late for the father if he had to wait for an actual custody order to be made before he began the application for the removal of the children. The answer to this argument is that the law requires a specific act for the purpose of wrongful detention and a wish to have the custody of the children even though it may be implemented by way of court proceedings cannot be such an act. At the end of the day the Court may not grant custody to the mother. Further the granting of a custody order to the mother may not necessarily mean that she would not return the children to USA. AUTONUMOUT Mr. Coleman then argued that the mother had applied for a wardship order for the children. This order was not relied upon as a wrongful retention by the father when the application was lodged. In any event the wardship application was made in response to the father's parallel divorce proceedings in USA. The order making the children wards of the court had lapsed and the order had not been served on the father. This argument does not assist the father. In *re S.* AUTONUMOUT In *re S.* Wall J held that there was wrongful retention. He held that However, it seems to me that where a parent, as here, announces as part of her case that she does not intend to return the children to Israel at all she can no longer herself rely on the father's agreement to the limited period of removal or retention as protecting her either under article 3 or under article 13(a). As Mr. Turner puts it, she cannot have the benefit of the agreement without the burden. Equally, as an issue of fact, it seems to me that the decision which precedes the announcement, even if not communicated to the father, must be capable itself of constituting an act of wrongful retention. AUTONUMOUT In my view what distinguished *In re S.* from the present case is that the mother in that case had actually announced that she did not intend to return the children to Israel. This is not the situation here. AUTONUMOUT Wall J relied on an English Court of Appeal authority *In re A. Z.*

[1993] 1 FLR 682 which was binding on him. The English Court of Appeal agreed with the lower court's decision that when an *ex parte* application was made to prevent the child from being removed from the jurisdiction it was a unilateral decision and constituted a wrongful retention of the child. But a member of the Court Sir Michael Kerr observed that it was odd that an otherwise lawful and unconcealed application to a court can constitute a wrongful retention. The same concern was expressed by Wall J when he said If a parent, pursuant to an agreement that a child may live with him for a given period, fears unilateral action by the other parent it seems to me very hard to suggest that an application to the court designed to protect the presence of the child for the agreed period constitutes an act of wrongful retention. Thus, if the mother in the instant case applied for prohibited steps and residence orders for the sole purpose of protecting the presence of the children within the jurisdiction until 1 September I would find it difficult to hold that to be an act of wrongful retention, alternatively, if it was, that the father had not consented to the retention until 1 September under article 13(a). U.S.A. : *Toren v. Toren* AUTONUMOUT Cases from other jurisdictions did not adopt the *In re S.* approach. For example in *Toren v Toren* 191 F.3d 23 (1st Cir. 1999) the parties were married in Israel and

two children were born. In December 1994 the couple was divorced in Israel. The divorce judgment incorporated the terms of the parties separation agreement which provided for joint custody of the children. The agreement also provided that the children would reside in Israel for at least two years after divorce. On 20 May 1996 the parties varied their agreement by providing that the children would live with the mother in USA for a period of years but not beyond 21 July 2000. Under the amended agreement the father had visitation rights of the children every summer. The variation was approved by the court in Israel. In July 1996 the mother and the children moved to USA. On 1 July 1997 just prior to the father's scheduled visit with the children in USA the mother filed proceedings in USA courts seeking to modify the terms of the divorce judgment issued by the Court in Israel. The father issued Hague Convention proceedings for the return of the children.

AUTONUMOUT The lower court granted the order which was reversed by the United States Court of Appeal for the First Circuit. It held that Up until that date i.e. (21 July 2000) the children's presence in the United States could not constitute a retention because it was entirely consistent with the parties 20 May agreement. AUTONUMOUT It further held that while it was conceivable that the US court could deny the father any visitation with his children, and that this denial of access could amount to a retention, the fact remains that this term of events has not yet occurred. Until that happens we failed to see how a mere request for modification of the terms of the visitation can, in and of itself, amount to a retention of children. AUTONUMOUT It further rejected the argument that the mother's filing of an application for custody in the US courts amounted to a wrongful retention. Even if the father had alleged facts sufficient to support his claim that the mother intended to retain the children in the United States after July 21, 2000, we do not believe that the Hague Convention or ICARA would enable us to exercise jurisdiction over such a claim. To the extent that the father's argument is based on the mother's future intent, the father is seeking a judicial remedy for an anticipatory violation of the Hague Convention. But the Hague Convention only provides a cause of action to petitioners who can establish actual retention. See supra note 1. Therefore, we do not see how a petitioner like the father, alleging only an anticipatory retention, can invoke the protections of the Hague Convention. AUTONUMOUT Although the father in Toren made a concession that there was no wrongful retention it is apparent from a reading of the judgment that the US Court did not decide the case simply on the basis of concession. I respectfully agree with its analysis. Watson AUTONUMOUT In Watson, the Scottish Court also declined to follow In S. Regarding the father's statement of intention that he would not return the children to New Zealand, Lord Prosser held that And the intention statement remained only an intention statement: to say that one will act in breach of an agreement at a future date is not itself to commit that breach, or necessarily any breach. New Zealand : P v. Secretary for Justice AUTONUMOUT In P v. Secretary for Justice [2004] 2 NZLR 28 the two children of the family originally resided with their parents in Australia. In January 2002 the parents reached an agreement allowing the mother to take the children to New Zealand for a period of two years. The mother was a New Zealander and the father was an Australian citizen. The mother took the children to New Zealand on 7 February 2002. On 3 July 2002 the mother

applied to the Family Court in New Zealand seeking an order granting her custody of the children. An application was made under the Hague Convention for the return of the children to Australia. AUTONUMOUT By a majority decision the Court of Appeal of New Zealand declined to follow *In re S.* and chose to follow *Toren and Watson*. Blanchard J said All that occurred on 4 July 2002 was that Mrs P. asked the New Zealand Court to assume jurisdiction and to make an order giving her custody, and she further indicated a wish that the children would not have to be returned to Australia in accordance with the agreement at the end of the two year period. Seemingly, however, Mrs s position in 2004 was to be dependent upon the making of an order for custody in her favour by the New Zealand Court. She did not evince an intention to retain the children in New Zealand even if refused a custody order. What she was doing was requesting the New Zealand Court to assume jurisdiction and make an order allowing her to retain them. That may have been in breach of the agreement, but until and unless either the Court did assume jurisdiction by making the order sought, i.e. an order extending beyond the two year period, or the two year period elapsed and the children were not returned, there would not be, in any ordinary sense, a retention of the children. AUTONUMOUT Glazebrook J agreed with Blanchard Gault P dissented. He held that On the assumption that the children s habitual residence was Australia at the material time, I take the view that, in effect, to open the way for the New Zealand Family Court to consider the mother s custody application, is to frustrate the operation of the Hague Convention. By deciding that the Convention does not apply because there will be no retention of the children in New Zealand until the expiry of the period their father initially agreed they could stay in New Zealand, is to allow their mother to both rely on and repudiate the agreement. The agreement was that the rights of custody were to be shared. It was in exercise of that joint right and responsibility that the father amicably agreed that the children should be taken to New Zealand and continue to live there for two years, after which they were to return to Australia. The application by the mother to the New Zealand Family Court for custody plainly repudiated the father s agreed right of custody. But relying on the father s agreement in arguing that there will be no retention until the two year period has expired is to rely on the exercise by him of his rights of custody for the very purpose of denying them. I prefer the analysis by Blanchard J in this regard.

Conclusion

AUTONUMOUT As the father failed to establish the habitual residence of the children in USA or that the children had been wrongfully retained in Hong Kong we accordingly allowed the appeal and discharged the removal order granted by the judge. We made no order as to costs for the appeal. The costs order made by the judge, namely no order as to costs of the application, was not disturbed. Hon Yeung JA AUTONUMOUT I agree with the judgment of Cheung JA and have nothing to add. Hon Sakhrani J AUTONUMOUT I agree. (Peter Cheung) (Wally Yeung) (Arjan H. Sakhrani) Justice of Appeal Justice of Appeal Judge of the Court of First Instance Mr. Russell Coleman, S. C. and Mr. Enzo Chow, instructed by Messrs Stevenson, Wong & Co., for the Plaintiff

Ms Audrey Eu, S.C. and Ms Anita Yip, instructed by Messrs Boase, Cohen & Collins, for the
Defendant PAGE - A B C D E F G H I J K L M N O P Q R S T U V 1udk 1udk S T U V A B C D E F G H I
J K L M N O P Q R S T U V (#p# rdTd r p# r p# (#p# r p# (#p# "@AB9D / Jz @m2z]C]6 uxB26I]C]6 &
6" abc-cacv-cheung.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document
MSWordDoc Word.Document.8

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=56120

CASE PAGE <https://chat.esheria.ai/case-law/hong-kong/blw-v-bwl-2007>

Prepared on 29 October 2026 · Esheria