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[13/12/2003; Court of Appeal (New Zealand); Superior Appellate Court]
P. v Secretary for Justice [2004] 2 NZLR 28

IN THE COURT OF APPEAL OF NEW ZEALAND

CA111/03

BETWEEN P. Appellant AND THE SECRETARY FOR JUSTICE AS THE NEW ZEALAND CENTRAL AUTHORITY EX PARTE A.P. Respondent

Hearing: 3 November 2003, Judgment: 19 December 2003

Coram: Gault P, Blanchard J, Glazebrook J

Appearances: P D McKenzie QC, J E Bryson and P A C Foster for Appellant; C R Pidgeon QC for Respondent

Solicitors: Bryson & Co, Raumati Beach for Appellant. Donald F C Fuller, Wellington for Respondent

GAULT P: Introduction

[1] This is an appeal under s31B(1)(b) of the Guardianship Act 1968 raising a question of the applicability of the Hague Convention. In a judgment delivered in the High Court on 26 February 2003, Goddard J upheld a decision of the Family Court (Judge Grace) directing the return of two children to Australia. The facts and issues are set out in the judgments of the courts below and in those of the other members of this Court.

[2] The other members of the Court, whose judgments I have read in draft, have determined that this appeal should be allowed and the application by the mother for custody of the two children may be decided in the Family Court.

[3] I would dismiss the appeal. I am not persuaded the conclusions reached in the Family Court and the High Court were not open. The finding that the habitual residence of the children was Australia in July 2002 when their mother applied in the Family Court at Porirua for custody, was a finding of fact against which there is no right of appeal to this Court. The Hague Conference has consistently resisted laying down rules or principles by which habitual residence is to be tested to ensure it remains a broad question of fact.

[4] While, in agreement with Blanchard J, I do not consider Goddard J should have allowed this matter to be argued for the first time on appeal. I do not consider we should revisit her conclusion on the childrens' habitual residence at the material time.

[5] On the assumption that the childrens' 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.

[6] 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.

[7] Wall J expressed a similar view in In re S (Minors) Abduction: Wrongful Retention [1994] 2 WLR 228, 239:

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. I therefore find that, by announcing her intention not to return the children to Israel at all and by asserting that she and the children have acquired habitual residence in England, the mother has wrongfully retained the children in England as at the date of that announcement. On the facts of this case the statement in her affidavit that she has settled and made a life in England is evidence of a previous determination to retain the children in England, which is capable of being fixed in time and which, whilst there is not direct evidence of when it was formed, I fix in time prior to the filing of the originating summons and upon or shortly after receipt of the letter from the father of 6 may 1993.

[8] It seems to me that to be able to apply for custody in New Zealand, maintaining that this does not amount to retention (so that the Convention does not apply) is to defeat the very purpose of the Convention; of having matters of custody determined in the courts of the country of habitual residence.

BLANCHARD J: Introduction

[9] The appellant, Mrs P., has been granted leave under the Guardianship Act 1968 to appeal to this Court concerning a custody dispute in which the Hague Convention has been invoked. The appeal is restricted to questions of law: s31B(1)(b).The Family Court at Porirua (Judge Grace) made an order on the application of the Secretary for Justice, acting as the New Zealand Central Authority and on behalf of Mrs P.'s husband, that two children of their marriage, now aged seven and five, be returned to Australia where Mr P. lives so that an Australian Court can determine their future living arrangements. In the High Court at Wellington Goddard J dismissed Mrs P.'s appeal.

Facts

[10] Mr P. is an Australian citizen. Mrs P. is a New Zealander who moved to Australia in 1993.They met there, married in 1995 and had the two children. They separated in March 2001, after which they shared the care of the children. In January 2002 Mrs P. advised Mr

P. of her intention to relocate to New Zealand with the children so as to be with her family. He then made an application to the Family Court of Australia for formal custody arrangements to be put in place. But before his application was heard an agreement was reached which was recorded in a "statutory declaration" written out in the hand of Mr P. and signed by Mrs P. on 18 January 2002.The informal document, upon which it appears neither party had legal advice, included the following terms:

That A.P. and myself have joint parental responsibility, in consultation with each other, for making decisions about the long-term care, welfare and development of the said children of the marriage.

That each parent have responsibility for making decisions about the day to day care and development of the said children of the marriage.

That upon a [sic] amicable agreement with A.P. to take the said children of the marriage to New Zealand, I agree to return the children to A. P. for full care for a period in two years for two years as so A.P. can maintain a relationship with the said children, I agree to continue with this until the children are 18 years old.

That upon a [sic] amicable agreement with A.P. to take the said children of the marriage to New Zealand. I agree to pay for a return airfare for children to New Zealand or a return airfare for the said children of the marriage to Australia to reside with A.P. I agree to pay for this once a year in December.

That if in two years time of this date 6.2.02 I don't return the said children of the marriage or I don't adhere to the above terms and conditions I forfeit all support, including child maintenance from A.P.

[11] Mr P. then withdrew his Family Court of Australia proceeding and Mrs P. brought the two children to New Zealand on 7 February 2002.

[12] Some five months later, on 3 July 2002, Mrs P. applied to the Family Court, on notice, seeking an order granting her custody of the children. In her supporting affidavit she made full disclosure concerning the agreement made with Mr P. on 18 January, annexing a copy of it. However, she stated that she was beginning a new life in New Zealand and believed that her children should have the security of knowing that they would not have to be returned to Australia to start a new life again "in 2 year's time", by which she must be taken to have meant in February 2004.

[13] In response, on 22 October 2002, the New Zealand Central Authority made application under s12 of the Guardianship Amendment Act 1991 for an order for return of the children to Australia.

The Hague Convention and statutory provisions

[14] The Guardianship Amendment Act implemented the Hague Convention on Civil Aspects of International Child Abduction of 25 October 1980.Article 1 of the Convention states that its objects are:

a. to secure the prompt return of children, wrongfully removed to or retained in any Contracting State; and

b. to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States. Australia and New Zealand are Contracting States.

[15] Articles 3 and 4 of the Convention provide:

Article 3

The removal or the retention of a child is to be considered wrongful where—

a. 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

b. 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.

Article 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

[16] Section 12 of the Act provides in relevant part:

12 Application to Court for return of child abducted to New Zealand

(1) Where any person claims—

(a) That a child is present in New Zealand; and

(b) That the child was removed from another Contracting State in breach of that person's rights of custody in respect of the child; and

(c) That at the time of that removal those rights of custody were actually being exercised by that person, or would have been so exercised but for the removal; and

(d) That the child was habitually resident in that Contracting State immediately before the removal,—

that person, or any person acting on that person's behalf, may apply to a Court having jurisdiction under this Part of this Act for an order for the return of the child.

(2) Subject to section 13 of this Act, where—

(a) An application is made under subsection (1) of this section to a Court; and

(b) The Court is satisfied that the grounds of the application are made out,— the Court shall make an order that the child in respect of whom the application is made be returned forthwith to such person or country as is specified in the order.

[17] Rights of custody are inclusively defined in s4:

4 Rights of custody

For the purposes of this Part of this Act, the term rights of custody, in relation to a child, shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence, attributed to a person, institution, or other body, either jointly or alone, under the law of the Contracting State in which the child was habitually resident immediately before the removal or retention of the child.

[18] Section 16 provides:

16 No order relating to custody to be made until application determined

Where an application is made to a Court under section 12(1) of this Act in respect of a child, the Court shall not, while those proceedings are pending, make any order or decision relating to the custody of that child in any other proceedings that are before that Court (whether those proceedings were commenced before, after, or at the same time as, the application was made), and the Court may adjourn those other proceedings pending the determination of the application.

The lower court decisions

[19] Judge Grace said that the parties were agreed that the children were present in New Zealand; that at the time of "removal" Mr P.'s rights were being exercised by him or would have been so exercised but for the removal; and that the children were habitually resident in Australia immediately before the "removal". Accordingly, he considered only whether there had been a wrongful retention of the children by Mrs P., as he put it, "in breach of the rights of custody attributed to Mr P. under the law of Australia". It was clear to the Judge that Mr P. only agreed to Mrs P. taking the children to New Zealand for two years on the basis of the statutory declaration. Now, the Judge said, she was asking the Court to grant her custody and to put her in the position where she was able to make a determination as to where the children reside. He noted, however, that on 13 November 2002 she had made an affidavit in which she said:

I have thought long and hard about this matter and have tried to do what I think is best for the children. I have come to the conclusion that we may in fact return to Australia. I cannot say at this time whether I will or not. All I can say is that unless ordered by a Court I will do what I think is best for the children.

[20] But the Judge did not accept that Mrs P. had changed her initial approach. Her application to the Court must have been made on the basis that a decision that the children should know that they did not have to return to Australia was in their best interests. The Judge was of the view that, by bringing her application, Mrs P. breached the implied understanding that neither party would take an action that would jeopardise the other's position. But such a breach did not in itself "invoke the rights under the Convention". The reality was that Mrs P. could still elect to take the children to Australia at the end of the agreed two year period. After referring to case law and saying that retention is an event that occurs at a particular point in time, at which the Convention comes into play, Judge Grace concluded that Mrs P. had breached the agreement by making her application "because its purpose is to remove Mr P. from a custodial role". As Mrs P. had resiled from the agreement it would be wrong to allow her the balance of the time to change her mind and return the children. The agreement had come to an end, the Judge said, by reason of the

retention. A warrant was therefore issued for the immediate return of the children to Australia.

[21] The appeal to the High Court was advanced on two grounds. The first challenged the conclusion that there had been a wrongful retention by Mrs P. Goddard J also allowed counsel for the respondent to withdraw the concession that the children were habitually resident in Australia and to argue that New Zealand had become their country of habitual residence by virtue of the time they had spent here and because of the "shuttle" nature of the custody arrangements.

[22] In her reserved decision delivered on 26 February 2003, now reported at [2003] 3 NZLR 54, Goddard J agreed with the Family Court Judge, for the reasons he had given, that the children had been wrongfully retained. She said that Mrs P.'s application clearly amounted to conduct on her part which had the effect of taking control of the children, contrary to the parental rights being exercised by Mr P. and contrary to his expectations. It had been a unilateral decision not done in consultation with Mr P. Goddard J agreed that the breach was "not merely anticipatory but actual".

[23] Moving then to the question of habitual residence, the Judge said that the situation was one where joint custodial parents had ceased to agree on their children's residence as a result of one of them seeking to resile from their agreement. The situation was not one where Mr P. had conceded jurisdiction to the New Zealand Family Court for Hague Convention purposes by agreeing to the joint custodial arrangement. On the other hand, Mrs P., having crossed an international boundary with his permission, appeared to be seeking "a more sympathetic court", adopting a phrase from the judgment of the United States Court of Appeals for the Ninth Circuit in Mozes v Mozes 239 F.3d 1067 (2001).Goddard J set out a passage from Mozes in which the Court distinguished three broad categories: On one side are cases where the court finds that the family as a unit has manifested a settled purpose to change habitual residence, despite the fact that one parent may have had qualms about the move. Most commonly, this occurs when both parents and the child translocate together under circumstances suggesting that they intend to make their home in the new country. When courts find that a family has jointly taken all the steps associated with abandoning habitual residence in one country to take it up in another, they are generally unwilling to let one parent's alleged reservations about the move stand in the way of finding a shared and settled purpose.

On the other side are cases where the child's initial translocation from an established habitual residence was clearly intended to be of a specific, delimited period. In these cases, courts have generally refused to find that the changed intentions of one parent led to an alteration in the child's habitual residence.

In between are cases where the petitioning parent had earlier consented to let the child stay abroad for some period of ambiguous duration. Sometimes the circumstances surrounding the child's stay are such that, despite the lack of perfect consensus, the court finds the parents to have shared a settled mutual intent that the stay last indefinitely. When this is the case, we can reasonably infer a mutual abandonment of the child's prior habitual residence. Other times, however, circumstances are such that, even though the exact length of the stay was left open to negotiation, the court is able to find no settled mutual intent from which such abandonment can be inferred. Clearly, this is one of those questions of "historical and narrative facts" in which the findings of the district court are entitled to great deference.

[24] Goddard J considered that the second category had direct application to the situation of the P. children; that they had been translocated in accordance with the joint agreement of

their parents from an established habitual residence for a specific, delimited period. The case was therefore one where the Court should refuse to find that Mrs P.'s altered intention should result in alteration of the habitual residence of the children for Hague Convention purposes. It was impossible, in the view of Goddard J, to say that the locus of the P. children's family and social development was now New Zealand simply because they had resided in New Zealand for five months and because their mother wished to resile from her agreement with their father as to their joint custodial arrangements. The children had not severed all links with the Australian jurisdiction.

[25] Goddard J considered that the judgment of Judge Grace was unassailable and that the warrant issued for the return of the children to Australia should be executed forthwith.

The questions

[26] The Family Court's jurisdiction to make an order on the respondent's application made on behalf of Mr P. under s12 of the Guardianship Amendment Act 1991 is exercisable only upon proof that all four conditions listed in that section are met. It must be shown that:

- The children are present in New Zealand.

- The children have been retained in New Zealand, i.e. not returned to Australia, in breach of Mr P.'s rights of custody, in particular, his right to determine their place of residence (s4).

- At the time of the retention those rights of custody were actually being exercised by Mr P. or would have been exercised but for the retention, and

- The children were habitually resident in Australia immediately before the retention.

[27] The disputed questions relate to:

(a) Whether the children were habitually resident in Australia or in New Zealand immediately before Mrs P. made her application to the Family Court on 3 July 2002 and made in that application the statement recorded in para [12] above; and

(b) Whether the making of that application (or her statement) amounted to a retention of the children in New Zealand in breach of Mr P.'s right to determine the children's place of residence.

Habitual residence

[28] If the children were not habitually resident in Australia any retention of them in New Zealand by Mrs P. could not have been contrary to the Convention, notwithstanding that it may have been a breach of the agreement between the parents as recorded in the statutory declaration. The issue over habitual residence is therefore the logically prior question.

[29] But there is a procedural complication for this Court. The present appeal is restricted to questions of law, but the determination of the habitual residence of children in Convention cases is well established to be a question of fact. The Perez-Vera Explanatory Report on the Convention (1982) treats habitual residence as a question of pure fact. It was deliberately not a defined term, the intention being to avoid any technical meaning and to allow the courts to give the expression its ordinary and natural meaning. The House of Lords has said as much in C v S (minor: abduction: illegitimate child) [1990] 2 All ER 961 at 965.

[30] There is a further difficulty. Because the issue was not raised between the parties in the Family Court, the affidavit evidence was not directed to it and there were no factual findings

in that Court concerning where the children were habitually resident. Whilst, in view of the importance of the issue, Goddard J was right to allow it to be raised for the first time on appeal, it may have been better for the matter to be remitted to the Family Court for factual findings to be made after the parties had had a further opportunity to adduce evidence on the point.

[31] Some observations can, however, be made for the guidance of the Family Court. Mr Bryson emphasised in his submissions on this question for the appellant that this was not a case in which the agreement between the parents was merely that the children would come to New Zealand for two years and then return to Australia. It was a "shuttle" agreement under which the children would live alternately in New Zealand and Australia until each attained 18 years of age. It was not, he said, a situation in which the children were to be out of Australia for a temporary period only. They would indeed return to Australia after two years but, equally, they would return to New Zealand at the beginning of the next two year period and so on. They would spend equal amounts of time in the two countries.

[32] There is much force in those observations, as there is in counsel's warning that most of the cited cases are concerned with very different situations which do not involve the concept of shuttling. For instance, in Mozes v Mozes the parents and their children had lived in Israel all their lives until 1997 when the father agreed that the wife and children could move to the United States for 15 months. A year after their arrival in the United States the mother sought a custody order in a Californian Court. The Court looked to see whether there had been a settled intention to abandon the prior habitual residence in Israel and, understandably, concluded that the translocation from the Israeli residence was intended to be for a specific, delimited period, so that the changed intentions of one parent, the mother, had not led to an alteration in the children's habitual residence. The Court commented:

Where, as here, the children already have a well-established habitual residence, simple consent to their presence in another forum is not usually enough to shift it there. Rather, the agreement between the parents and the circumstances surrounding it must enable the court to infer a shared intent to abandon the previous habitual residence, such as when there is effective agreement on stay of indefinite duration.

[33] Likewise in In Re S (Minors) (Abduction: Wrongful Retention) [1994] Fam 70, where the parents had brought the children to England intending to reside there for a year before returning to Israel, it was held that Israel remained the habitual residence of the children.

[34] The only cases to which we were referred in which a court was considering a shuttle agreement were the Scottish case of Watson v Jamieson 1998 SLT 180 and the Swedish case of Johnson v Johnson (Case No. 7505-1995, Supreme Administrative Court of Sweden).In Watson v Jamieson the separated parents and the children had all been living in New Zealand. In 1992 it was agreed that the children should reside alternately for two year periods with each parent, at least until the end of 1998.The father moved to Scotland. The children spent 1993 and 1994 with their mother in New Zealand and then moved to reside with their father in Scotland for 1995 and 1996.In August 1996 the father indicated that he would not return them to New Zealand at the end of the year. The Lord Ordinary (Lord Prosser) said that he was firmly of the view that in August 1996 it would have been quite unrealistic to describe the girls' habitual residence as being in New Zealand. He was equally satisfied that at that time their habitual residence was in Scotland. He accepted that there was no intention of their having settled permanently in Scotland and that they had not left New Zealand permanently, but where residence with the two parents was divided equally, it struck the Judge as unreal, in the absence of other differentiating factors, to see residence with one parent as primary, and the stays with the other parent as interruptions. He was

satisfied that there was a settled purpose according to which the children would in any ordinary sense be living in Scotland for the then current two year period, notwithstanding that they were to go back to New Zealand to live there for the next two years up to the end of 1998.He was satisfied that their habitual residence was not in New Zealand "looking as one must at a specific period in August 1996".

[35] In Johnson v Johnson a United States Court had confirmed an agreement reached by the parents under which they would have joint custody of their daughter. The mother was entitled to move to Sweden with the daughter but she was to stay with her father for a year every third year. That was subsequently varied by the United States Court and two year shuttle periods were established. The United States Court, in doing so, declared that it had continuing and exclusive jurisdiction to decide all matters relating to the care and custody of the child and that the courts of Sweden should not acquire jurisdiction over the custody of the child by virtue of the mother's residence in Sweden; and that the Commonwealth of Virginia should be the only forum for the adjudication of custody or visitation matters. Nonetheless, the Swedish Court determined that the child was for Convention purposes habitually resident in Sweden during a shuttle period in that country.

[36] Both decisions appear to have the support of the leading text, Beaumont and McEleavy, The Hague Convention on International Child Abduction (1999) p99-100. Lord Prosser's interpretation is said by the authors to be "entirely in keeping with the ordinary meaning of the words; each time the girls would have moved under the terms of the two year cycle their habitual residence would have changed accordingly."

Retention

[37] Without purporting to determine the factual question of country of habitual residence, and making the assumption that it was Australia, the question of whether there has been a retention of the children in New Zealand, contrary to the Convention, can now be considered. This does involve a question of law, namely whether, when the agreement between the P.s was that their children would reside with the mother in New Zealand for a certain period and then return to Australia, the making by the mother of an application to a New Zealand Court, while the New Zealand period was still current, seeking a custody order and/or her statement that the children should have the security of knowing that they would not have to be returned to Australia at the end of the period could amount to a retention in July 2002 in breach of Mr P.'s rights of custody. It is to be remembered that for a retention to be contrary to the Convention it must be in breach of rights of custody, including the right to determine a child's place of residence.

[38] As a matter of first impression, it would seem unlikely that either or both such actions could in law amount to such a retention. There had been nothing wrongful in the removal of the children to New Zealand in February 2002.For Mr P. to succeed on this ground, he would need to show an act of retention of the children on 4 July 2002, rather than a continuing situation. 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 P.'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.

[39] Moreover, by putting herself in the hands of the Family Court, Mrs P. was implicitly agreeing to accept its decision and it may be doubted that the Family Court, alerted by Mrs P. herself to the arrangements with her husband, would have made a custody order without giving Mr P. the opportunity of invoking the Convention and without first dealing with any application made on his behalf under s12.He was thereby to be afforded the right to participate in the process of determining the place of residence of the children beyond the two year period. Section 16 of the Guardianship Amendment Act expressly provides that where an application has been made under s12 in respect of a child, the Court is not, while those proceedings are still pending, to make any order or decision relating to the custody of the child in any other proceedings that are before the Court, and that it may adjourn such other proceedings pending the determination of the s12 application. Where the Convention may apply, the Court must first consider issues arising under it. Until they are resolved, any interim or other orders should, as far as possible, be consistent with any agreement between the parents and should protect possible rights under the Convention.

[40] Moving then to the relevant case law to see if it supports that first impression, it is established that retention means retention out of the jurisdiction of the courts of the State of the child's habitual residence: Re H [1991] 2 AC 476.Retention occurs when a child which has previously been outside the State of its habitual residence for a limited period is not returned to that State on the expiry of that limited period.

[41] In Toren v Toren 191 F 3rd 23 (1999), the United States Court of Appeals for the First Circuit concluded that the Hague Convention only provides a cause of action for a petitioner who can show actual retention of a child and that it is not enough to demonstrate an anticipatory retention, i.e. that at the end of an agreed period a child will be retained in breach of the Convention. The point was also made that while the filing of a proceeding may be a violation of the agreement between the parents, that event is not linked to the retention of the child.

[42] In the Scottish case of Watson v Jamieson it was also held that the making of a Convention application during the two year shuttle period when it had been agreed that the children would be living in Scotland was premature. And, despite a statement from the father couched in much more definite terms than the statement made in Mrs P.'s affidavit supporting her application of the Family Court, Lord Prosser took the view that it was not clear that the father was wishing to bring the agreement to an end.

[43] It is noticeable also that in the first instance decision of Wall J in Re S (Minors) (Abduction: Wrongful Retention) [1994] Fam 70, the Judge indicated that in the absence of authority he might well have concluded that that a mere statement of an intention not to return the children did not amount to a wrongful retention as at the date when that intention was communicated to the other parent and where the period of entitlement for the children to remain with the mother had not yet expired. The English Court of Appeal authority which ultimately led Wall J to a different conclusion, In re AZ (A Minor) (Abduction: Acquiescence) [1993] 1 FLR 682, is of limited assistance because the result in that case turned on a question of acquiescence. Butler-Sloss LJ gave no reason for saying that there had been a wrongful retention, Nicholls LJ did not address the point and Sir Michael Kerr, whilst agreeing with Butler-Sloss LJ commented that it seemed odd that an otherwise lawful and unconcealed application to a court could constitute a lawful retention (p81).The more considered view in Toren and the opinion of Lord Prosser in Watson v Jamieson are to be preferred.

Conclusions

[44] The Family Court and the High Court have therefore erred in law in finding that Mrs P.'s application for custody, coupled with her statement, amounted to a retention of the children in breach of the Convention and in ordering return of the children to Australia.

[45] By majority, the appeal is allowed and the proceeding remitted to the Family Court.

GLAZEBROOK J:

Table of Contents

Introduction [46]

Background facts [50]

The legislation and principles of interpretation [55]

Habitual residence [62]

Principles [66]

Case law where residence to be for a defined period [87]

Discussion of defined period cases [117]

Discussion of Goddard J's decision on habitual residence [125]

Conclusion on habitual residence [139]

Retention [140]

Introduction

[46] In January 2002 Mr and Mrs P. agreed, under what is commonly known as a shuttle custody arrangement, that their children were to spend two years in New Zealand with their mother to be followed by two years with their father in Australia. This arrangement was to continue until the children turned 18. In accordance with the agreement, the children came to New Zealand with their mother in early February 2002.

[47] At the beginning of July of that year, Mrs P. filed an application for custody in the Family Court at Porirua (New Zealand).Mr P.'s response was to apply, under the provisions of the Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention), for the return of the children to Australia.

[48] On 23 December 2002, Judge Grace directed that the children be returned to Australia. He held that Mrs P., by applying for custody in New Zealand, had wrongfully retained the children in New Zealand. This was because the purpose of her custody application was to remove Mr P. from a custodial role. Goddard J upheld this decision on appeal on 26 February 2003.She also held that the children's habitual residence remained Australia. That this was the case had been conceded by Mrs P. in the Family Court but Goddard J allowed the concession to be withdrawn and the issue to be argued before her.

[49] Mrs P. now appeals against Goddard J's decision, leave having been granted by this Court on 29 May 2003.The two issues for this appeal are:

(a) Was the High Court correct in law to uphold the decision of the Family Court that Mrs P.'s application for custody amounted to a wrongful retention of the children, even though the agreed period of two years in New Zealand had not expired?

(b) Was the High Court correct in law to hold that the children's habitual residence was in Australia?

Background facts

[50] Mr and Mrs P. have two children, a girl born on 3 April 1996 and a boy born 28 August 1998 (called A and B in this judgment). Both children were born in Australia and that was where their parents had met and married. Mr and Mrs P. separated on 22 March 2001.At first there was a joint custody arrangement, with the children spending four days with the mother and the rest of the week with the father. In June 2001, however, Mrs P. moved to a more distant suburb with the children and the earlier arrangement was no longer practical. There is some dispute between the parents over the extent of Mr P.'s contact with the children after Mrs P.'s move but it is clear that the children stayed with their father at least one weekend in two on average.

[51] On 7 January 2002 Mrs P. told Mr P. that she wished to come to New Zealand with the children. Mrs P. is a New Zealander and her parents and extended family live in this country. Mr P. immediately applied for various orders to secure his access and guardianship rights, including an order preventing the removal of the children from Australia. On 18 January the parties reached agreement on a number of matters relating to the care of their children, including the shuttle custody arrangement whereby the children were to alternate between New Zealand and Australia at two year intervals until they were 18 years old. The agreement was embodied in a statutory declaration prepared by Mr P. for Mrs P. to sign. The declaration was never, however, registered with the Australian courts (contrary to the understanding of Goddard J in the High Court).The relevant terms of that declaration are contained in para [10] of Blanchard J's judgment.

[52] As a consequence of the arrangement reached Mr P. withdrew his proceedings and, on 7 February 2002, Mrs P. left with the children to come to New Zealand. On 4 July 2002 she applied to the Family Court at Porirua for custody of her children. The application was made on notice and she disclosed the arrangement to the court, annexing the statutory declaration to her affidavit in support of her custody application. She said that: I am beginning a new life in New Zealand and I believe that my children should have the security of knowing that they will not have to be returned to Australia to start a new life again in two years time.

[53] As indicated above, Mr P. responded with a request under the Hague Convention for the return of the children. In Mrs P.'s affidavit of 13 November 2002, in opposition to the application for the return of the children to Australia, she said that, at the time of signing the statutory declaration, she had fully intended to abide by the agreement but, as she and the children had begun to settle in New Zealand, she decided that returning the children to Australia by 6 February 2004 might not be in their best interests. She also indicated that, since being served with the Hague Convention application, she had been thinking about where the best interests of her children may lie and had decided that she may possibly return with them to Australia. She said further that the agreement with her husband had anticipated that she may not return the children after two years. I set out the relevant portions of her affidavit:

5. A. and I then came to an agreement that I could take [A] and [B] to New Zealand for a period of two years and that at the end of the two year period I would return to Australia

and [A] and [B] would live with A. for two years. The agreement also anticipated that I might not return the children after two years and included a condition that if I failed to do so then I would forfeit all support including child maintenance from A.

6. A. wrote the agreement into a statutory declaration, which I signed. A true copy of that declaration was annexed to my affidavit of 3 July 2002.

7. AT the time of signing the agreement my preference would have been to keep the children in my care forever, however these were the conditions that A. insisted on before he would let me take [A] and [B]. Accordingly I agreed and at the time of agreeing I fully intended to abide by the agreement.

8. I arrived in New Zealand and settled on the Kapiti Coast in Paraparaumu.I enrolled [A] at the local Primary School and [B] at Kindergarten.

9. MY Dad and all my family live in New Zealand. We were all so very happy and beginning to settle. It was only as we began to settle that it struck me that being forced to return the children to Australia by 6 February 2004 might not be in the children's best interest. Accordingly I decided to apply for custody of the children in the Porirua District Court. My application was dated 3 July 2002.

10. SINCE applying for custody I have been served with A.'s application for the return of [A] and [B] to Australia. I have thought long and hard about this matter and have tried to do what I think is the best for the children. I have come to the conclusion that we may in fact return to Australia. I cannot say at this time whether I will or not. All that I can say is that unless ordered by a Court I will do what I think is best for the children.

[54] Mrs P. was not cross-examined on her affidavit. Mr P. does not appear to challenge Mrs P.'s evidence that she had intended to abide by the agreement at the time it was signed. He said in his affidavit in reply of 26 November 2002 merely that Mrs P. has now manifested her intention not to abide by the agreement through the filing of the custody application. He also says that he in no way anticipated at the time of entry into the agreement that his wife would take that step and that the penalty provisions he included in the statutory declaration were not indicative of a belief that his children would not return. The relevant portions of his affidavit follow:

5. In response to paragraph 5.I confirm that the agreement stated that if the children were not returned to Australia after two years, that [Mrs P.] would forfeit her right to all financial support from me. At this time I was unaware of the Hague Convention, and therefore unaware that I would have the option to apply for the children to be safely returned to Australia. I state that in making the agreement and allowing the children to travel to New Zealand for the agreed period, I in no way anticipated that [Mrs P.] would take the action she has in effectively retaining the children, and seeking custody in the New Zealand court.

6. I refute that the provision around financial responsibility is indicative of a belief my children would not return, and reiterate that the substance of the agreement was in fact what led to my withdrawal of the court application and allowing the children to travel to New Zealand.

7. In response to paragraph 7. [Mrs P.] states that she 'fully intended to abide by the agreement'. However, [Mrs P.] has not abided by this agreement, which was evident when she applied to the Porirua District Court, New Zealand, on 3 July 2002 for sole custody of [A] and [B].

The legislation and principles of interpretation

[55] The Guardianship Amendment Act 1991 (Amendment Act) was enacted to incorporate into New Zealand law the Hague Convention on the Civil Aspects of International Child Abduction which had been signed at The Hague on 25 October 1980.The Convention is annexed as a schedule to the Amendment Act. The provisions of the Amendment Act itself to a large extent mirror the main provisions of the Hague Convention. For present purposes the key statutory provision is s12(1) of the Amendment Act which provides as follows:

12 Application to Court for return of child abducted to New Zealand

(1) Where any person claims—

(a) That a child is present in New Zealand; and

(b) That the child was removed from another Contracting State in breach of that person's rights of custody in respect of the child; and

(c) That at the time of that removal those rights of custody were actually being exercised by that person, or would have been so exercised but for the removal; and

(d) That the child was habitually resident in that Contracting State immediately before the removal,—

that person, or any person acting on that person's behalf, may apply to a Court having jurisdiction under this Part of this Act for an order for the return of the child.

[56] Under s2 of the Amendment Act removal is defined as meaning removal or retention of the child within the meaning of Article 3 of the Hague Convention, which reads as follows:

Article 3

The removal or the retention of a child is to be considered wrongful where—

a. 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

b. 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.

[57] There is no substantive definition of habitual residence, either in the Amendment Act or the Hague Convention. The definitions merely deal with the situation where a Contracting State has more than one system of law. In this regard s2 of the Amendment Act provides:

"Habitual Residence", in relation to a Contracting State that in matters relating to the custody of children has 2 or more systems of law applicable in different territorial units, means habitual residence in a territorial unit of that state.

[58] The final definition of relevance is that of rights of custody. These are widely defined in s4 as including the right to determine a child's place of residence. Section 4 provides:

For the purposes of this Part of this Act, the term rights of custody, in relation to a child, shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence, attributed to a person, institution, or other body, either jointly or alone, under the law of the Contracting State in which the child was habitually resident immediately before the removal or retention of the child.

[59] Section 12(2) provides that, if the Court is satisfied that the grounds of the application are made out, the Court must make an order for the child to be returned forthwith to such person or country as is specified in the order unless s13 applies. Section 13 sets out a number of grounds upon which an order can be refused. The parties agree that none apply in this case. One of the grounds for refusal may, however, have some relevance to defining the concept of habitual residence. Section 13(1)(a) provides that the Court may refuse to make an order for the return of the child if the opposing party establishes:

That the application was made more than 1 year after the removal of the child, and the child is now settled in his or her new environment.

[60] Another section of relevance is s16, which prevents a Court from making any order or decision in relation to custody until a Hague Convention application is determined. If an application is dismissed s17 provides that the Court may make such interim or permanent order with respect to the custody of the child as it thinks fit and that such order may be subject to such conditions as the Court thinks fit.

[61] Although the Hague Convention is not directly incorporated into New Zealand law but is only annexed as a schedule to the Amendment Act this Court has said that the courts should endeavour to interpret the provisions of the Amendment Act consistently with the Convention – see Dellabarca v Christie [1999] 2 NZLR 548, 554-555 and Ryan v Phelps [1999] NZFLR 865 at para [14]. It was also noted that the provisions should be interpreted as far as possible in a manner consistent with the interpretation in other Contracting States. This means that foreign case law and official and other commentaries on the Convention can and should be studied. The Court referred in particular to the report by Professor Pérez-Vera who was Professor of International Law at the University of Madrid and the Rapporteur to the Commission that drafted the Convention. Such an approach is consistent with the Vienna Convention on the Law of Treaties 1969.I also note that, under article 31(3)(b) of that Convention (a provision considered to be declaratory of customary international law), subsequent practice in the application of a treaty is regarded as establishing agreement of the parties regarding interpretation and is to be taken into account in the interpretation of the treaty. In this context the reviews of the operation of the Hague Convention by the Special Commissions are relevant as interpretational aids.

Habitual residence

[62] The primary emphasis of the Hague Convention is on the prompt return of children who have been wrongfully removed or retained from the jurisdiction of their habitual residence. The rationale is that the jurisdiction of habitual residence is the appropriate forum for determining custody and access issues. The question of habitual residence is thus logically prior to that of whether there has been wrongful retention. As recognised by the parties, if the children are no longer habitually resident in Australia, then the Hague Convention application on behalf of Mr P. must fail.

[63] As indicated above, there is no substantive definition of habitual residence, either in the Hague Convention or in the Amendment Act. This was deliberate as the drafters of the Convention wished the inquiry to be a factual one, free from the artificial rules governing the concept of domicile. The words must therefore be given their ordinary meaning. As is

said in Dicey & Morris The Conflict of Laws (London, 2000), vol 1, 149-150: No definition of habitual residence has ever been included in a Hague Convention; this has been a matter of deliberate policy, the aim being to leave the notion free from technical rules which can produce rigidity and inconsistencies as between different legal systems. In those contexts, the expression is not to be treated as a term of art but according to the ordinary and natural meaning of the two words it contains.

[64] The courts (and indeed commentators) have not, however, been able to resist articulating principles. This is not necessarily a bad thing as it may serve the aim of promoting international consistency. It also gives parents and other custodians some ability to predict the outcome of actions they may be contemplating. As was said in Mozes v Mozes (2001) 239 F 3d 1067 (9th Cir) at 1072-3;

Imagine, for example, a parent trying to decide whether to travel with a child to attempt reconciliation with an estranged spouse in another country, or whether to consent to a child's trip abroad to stay with in-laws. Such parents would be vitally interested in knowing under what circumstances a child's habitual residence is likely to be altered, and it is cold comfort to be told only that this is "a question of fact to be decided by reference to all the circumstances of any particular case". C v S, [1990] 2 All ER at 965. Parents faced with this response would likely regard the introduction of a few judicial "presuppositions and presumptions", Dicey & Morris, ... with more relief than alarm.

[65] It must, however, be remembered that the inquiry as to habitual residence remains a factual one and that any principles cannot be applied rigidly in the manner of rules, although some would of course argue that there is little difference between principles and rules as they tend to converge (see, for example Professor Fred Schauer "The Convergence of Rules and Standards" in Dr Rick Bigwood (ed) The Statute: Making and Meaning (LexisNexis, forthcoming January 2004).

Principles

[66] In terms of the principles that have been articulated, an important concept has been that of settled purpose. It has thus been said that, if a person has a settled purpose to leave the place of his or her habitual residence and does so in accordance with that purpose, then the former habitual residence is lost immediately. The new place will only become an habitual residence, however, if there is both a settled purpose to take up that habitual residence and residence for an appreciable period. I refer in this regard to the oft-quoted dicta of Lord Brandon in In re J (A Minor) (Abduction: Custody Rights) [1990] 2 AC 562, 578-9 He said: In considering this issue it seems to me to be helpful to deal first with a number of preliminary points. The first point is that the expression 'habitually resident', as used in article 3 of the Convention, is nowhere defined. It follows, I think, that the expression is not to be treated as a term of art with some special meaning, but is rather to be understood according to the ordinary and natural meaning of the two words which it contains. The second point is that the question whether a person is or is not habitually resident in a specified country is a question of fact to be decided by reference to all the circumstances of any particular case. The third point is that there is a significant difference between a person ceasing to be habitually resident in country A, and his subsequently becoming habitually resident in country B. A person may cease to be habitually resident in country A in a single day if he or she leaves it with a settled intention not to return to it but to take up long-term residence in country B instead. Such a person cannot, however, become habitually resident in country B in a single day. An appreciable period of time and a settled intention will be necessary to enable him or her to become so. During that appreciable

period of time the person will have ceased to be habitually resident in country A but not yet have become habitually resident in country B.

[67] The settled purpose does not have to be a settled purpose to reside in a place forever but can be a settled purpose to reside in a place for a limited period. Although in another context and interpreting the words "ordinarily resident", the words of Lord Scarman in R v Barnet LBC Ex p Shah [1983] 2 AC 309, 343 have often been quoted in Hague Convention cases – for example (although not attributed) by Waite J in Re B (Minors) (Abduction) (No 2) (1993) 1 FLR 993, 995 (and Waite J's comments were quoted in the Full Court of the Australian Family Court decision of De Lewinski v Departmentof Community Services (1997) FLC 92-737), by the court in Cameron v Cameron [1996] SC 17, 20, in Mozes v Mozes (2001) 239 F 3d 1067, 1073 (9th Cir) and in Dickson v Dickson [1990] SCLR 692, 703.Lord Scarman said: I unhesitatingly subscribe to the view that "ordinarily resident" refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or of long duration. [68] Lord Scarman went on to articulate the reasons a person may have for settling on a place as a regular abode. He said (at 344):

And 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. This 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. And there may well be many others. 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.

[69] While these words of Lord Scarman have been widely used in Hague Convention cases and this use has not been criticised, I note that it cannot be assumed that in all cases where a person would be deemed ordinarily resident that person would also be held to be habitually resident. At the margin, there may be a difference in quality between the two concepts – see the comments in the leading text, Beaumont & McEleavy The Hague Convention on International Child Abduction (Oxford, 1999), at 101 footnote 81.

[70] It has been recognised that the concept of settled purpose is a difficult one where young children are involved in that, even if they were old enough to have a settled purpose, they would not be in a position independently of their caregivers to carry that purpose into effect. It has thus been held that the settled purpose of a young child is necessarily that of the parents or the person or persons able to exercise the right to decide where a child will reside – see for example In re J (A Minor) (Abduction: Custody Rights) [1990] 2 AC 562at 504 and Dickson v Dickson [1990] SCLR 692 at 703.

[71] Ascertaining purpose requires an examination of the subjective intent of the parents but it is necessary, as the court put it in Armilleato v Zuric-Armilleato US DC SDNY 01 Civ 0135, 3 May 2001, para 47 to look at the "objective manifestations of the intent". This is especially so as Hague Convention cases should be conducted in a manner that will secure a prompt return of the children. Oral evidence and cross-examination are thus usually limited to what is absolutely necessary – see eg the comments in Re F (A Minor) Child Abduction) [1992] 1 FLR 545, 552 (CA). This approach is also taken in New Zealand - see, for example, Marsden v Marsden (1995) 13 FRNZ 27, 30; Ryding v Turvey [1998] NZFLR 313, 321 and Fisher v Fisher FP 011/60/99FC WHA, 15 February 2000.

[72] Where both parents have rights of custody, the decision of one parent unilaterally to change his or her habitual residence does not change the habitual residence of the child, even if that parent is the parent having the day to day care of that child. This appears as much as anything a principle that arises out of the policy of the Hague Convention. One of the aims of the Convention is to deter international abductions. To allow the habitual residence of the child to be changed unilaterally by the abducting parent would be counter to this – see in this regard for example Re B (Minors) (Abduction) (No 2) [1993] 1 FLR 993, 995 per Waite J and Re A [1995] 1 FLR 767, 771 per Hale J. She said: It stands to reason that [the] Convention could not operate were one parent to be able, unilaterally, to change the habitual residence of the child because the whole purpose of the Convention is to stop parents doing just that.

[73] In terms of what is an "appreciable period of time", Morritt LJ in Nessa v Chief Adjudication Officer [1998] 2 All ER 728, 743 said (again in another context) that what is an appreciable period of time will depend on the facts of each case. All that is required is "what is necessary to give to the fact of residence the quality of being habitual in accordance with the normal meaning of that word".

[74] A period of as little as one month has been said to be sufficient where there was a settled intention to emigrate – see re F (A Minor) (Child Abduction) [1992] 1 FLR 548, 555-6 (CA). In that case, the family left England for Australia in April 1991 and the father took the child back to England in July 1991 after the break up of the marriage. The judge below had found that the family's purpose had been to emigrate and that it had acquired habitual residence one month after arrival in Australia (although by the time of the removal the child had actually been resident for nearly three months). The judgment was upheld in the Court of Appeal.

Butler-Sloss LJ said that:

The judge was entitled to make the finding that the family did intend to emigrate from the UK and settle in Australia. With that settled intention, a month can be, as I believe it to be in this case, an appreciable period of time. Looking realistically at the position of A, by the time he left Sydney on 10 July 1991, he had been resident in Australia for the substantial period of nearly 3 months...[I]t is important for the successful operation of the Convention that a child should have, where possible, an habitual residence, otherwise he cannot be protected from abduction by a parent from the country where he was last residing...[Courts] should not strain to find a lack of habitual residence where, on a broad canvas, the child has settled in a particular country.

[75] It has also been held that while a person can have no habitual residence, it is not possible for Hague Convention purposes to have more than one – see Cameron v Cameron [1996] SC 17, 19 and In the Marriage of Hanbury-Brown [1996] FLC 92-671. It has, however, been held possible to have serial habitual residences. For example, in the case of Re V (Abduction: Habitual Residence)[1995] 2 FLR 992 it was held that a family who had lived in Greece for the summer and London for the winter for at least four years were habitually resident in London for part of the year and in Greece for the rest. Beaumont & McEleavy at 110-111, recognise that the Convention could not properly operate if there were the possibility of a child having concurrent habitual residency but question whether, in a shared custody arrangement where part of the week is spent in one jurisdiction and part in another, a conclusion of other than that of concurrency could be properly arrived at. This situation, because of the distances involved, would not of course currently arise in New Zealand.

[76] The above principles have not been without their critics. The requirement that the settled purpose be that of the parents has been criticised as both detracting from the factual nature of the concept of habitual residence and as taking a parent-centred as against child-centred approach – see Rhona Schuz, "Habitual residence of children under the Hague Child Abduction Convention – theory and practice" (2001) 13 Child and Family Law Quarterly, 1- 23. See also the comments of Greig J in H v H (1995) 12 FRNZ 498, 502.

[77] Schuz is particularly critical of an approach that concentrates only on parental intentions without considering the quality of the child's residence (at 20). She considers that, ideally, parental intentions should only be relevant to the extent they impact on the child's daily life. For example, if the family is living in temporary accommodation that would be a factor against children having acquired habitual residence. She also recognises (at 16) that, if children are old enough to understand, information as to the purpose of the stay communicated to them by the parents will also be relevant because this will affect the way in which the children behave and the quality of the connections formed with people and institutions around them, as well, presumably, as the quality of any connection to the previous habitual residence. The Court in Mozes v Mozes (2001) 239 F 3d 1067 (9th Cir) made a similar point (at 1080) where it was stated: It ...makes sense to regard the intentions of the parents as affecting the length of time necessary for a child to become habitually resident, because the child's knowledge of these intentions is likely to color its attitude toward the contacts it is making.

[78] As a related point, the view that a child's former habitual residence can be lost immediately through the settled purpose of his or her parents has been criticised as importing technical notions of domicile into the concept of habitual residence – see Carol S Bruch, "International Child Abduction Cases: Experience under the Hague Convention" in J Eekelaar & P Sarcevic (eds) Parenthood in Modern Society:Legal and Social Issues for the Twenty- First Century (Martinus Nijhoff, 1993). It has also been criticised as creating a lacuna at the very time that the child may be in most need of the protection of the Convention. One commentator has suggested that, to avoid this situation, an existing habitual residence should persist until replaced – see E Crawford, "Habitual residence of the Child as the Connecting factor in Child Abduction Cases" (1992) Juridical Review 177 at 187.

[79] Beaumont & McEleavy, however, consider that ordinarily such an approach should not be entertained for it could create an artificial jurisdictional tie to a State with which a child had lost all contact and, in the Convention context, if a child has severed all links with a particular jurisdiction, there would not appear to be any valid reason for him or her to be returned there (at 100 and footnote 75). They also ask (at 99) why, if it is clear that an individual will acquire a new habitual residence during a stay in a particular State, should the existing habitual residence be allowed to persist beyond the date of departure.

[80] Doubt has also been thrown on the proposition that, for a residence to be habitual, it must be acquired voluntarily. This is on the basis that residence for a sufficient period must acquire the quality of being habitual, whether voluntarily or involuntarily. As said by the Inner House in Cameron v Cameron [1996] SC 17, 20:

Even though Robinson Crusoe had no opportunity to escape, we are inclined to think that he had his habitual residence on the desert island.

[81] Even the proposition that a change in habitual residence cannot be effected through the unilateral action of one of the parents has been criticised as "having all the marks of the kind of technical legal rule which should not be imported into the law on habitual residence"

– see Dr E M Clive, "The Concept of Habitual Residence" (1997) The Juridical Review 137 at 145. Dr Clive went on to say (at 145-146) that, where both parents have the right to fix the child's place of residence and where they are not in agreement on that question, habitual residence may not be changed quickly but "[e]ventually, however, brute facts will prevail".

[82] While that might be correct (eventually as Dr Clive says), in order to ensure the policy of the Convention is met, it is likely that the courts would hold that any such period of residence must be very lengthy indeed. I note in any event that the Convention (and s13(1)(a) of the Amendment Act) recognises that the lapse of one year after the removal of the child may oust the Convention if the child has become settled in his or her new environment (although that requirement is not lightly satisfied).

[83] The stipulation that there has to be residence for an appreciable period before the acquisition of habitual residence has also been strongly criticised. Clive (supra) calls the Lord Brandon dictum in this regard "unwise and unnecessary". He continues (at 143-144): It was unwise because, with the increasing importance of habitual residence as a connecting factor, it is not sensible to have a situation in which people are routinely without a habitual residence. It was unnecessary because it is not at variance with ordinary usage to say that a person who is living at a place other than for short-term temporary purposes who has a settled disposition to continue living there for an appreciable period, is habitually resident there even if he or she has only just arrived.

[84] There has been some judicial support for this view. Hoffman LJ in Re M (Minors) (Residence order: jurisdiction) [1993] 1 FLR 495, 503 suggested that it was possible to acquire an habitual residence immediately if a child came into a home which is undoubtedly the habitual residence of the parent to be responsible for his or her care and the intention is that the child's stay should not be merely transient or temporary. This was, however, a minority view. See also Thorpe LJ's dissenting view in Nessa v Chief Adjudication Officer [1998] 2 All ER 728;[1998] 1 FLR 879 and the comments of Judge Brown in Smith v O'Dwyer [1995] NZFLR 151, 154.

[85] The weight of authority does, however, require some period of actual residence and Beaumont & McEleavy even suggest that there should be a strengthening of the requirement for an appreciable period of residence and that the minimum period should usually be six months, although with flexibility to allow a shorter period. The requisite length would be the time necessary to develop ties and to show signs of integration into the new environment. They see this as strengthening the factual content of the concept and necessary to ensure that, if the law of a place is to become a child's personal law, there is a real connection between the place and the child. They say at 108:

Nevertheless in the case of children, particularly in the context of the Child Abduction Convention, one should not seek to dispense with the factual element of habitual residence, rather it should be increased. This is to recognise that if children are to be linked to a State, and sent back there after a wrongful removal or retention, they should have a real and active connection with that place. This further serves to distinguish the concept of habitual residence from that of domicile, which can be acquired immediately.

[86] In my view, the differences in approach set out above emphasise that the inquiry is a factual one. Any principles therefore cannot be applied rigidly. While the weight of authority would require both a settled purpose (that of the parents where young children are involved) and actual residence, a long period of actual residence may in some cases suffice where there is no such settled purpose or an equivocal one. What suffices for an appreciable period of actual residence will also depend on the circumstances. It may, for example, take a

longer period of actual residence to acquire an habitual residence in a country which has an unfamiliar culture and language than it would in one where a child has resided before or where the culture and language are familiar. A very strong settled purpose may require less time of actual residence in either case. It may take longer for a child to acquire an habitual residence if the parents are separated and a child moves to be with a parent who has not to date been the main custodial parent than if the child moves with both parents or with the custodial parent where, depending on the circumstances, the time to acquire an habitual residence may be relatively short.

Case law where residence to be for a defined period

[87] There is not much difficulty in making a finding on habitual residence in cases where there is a settled purpose to emigrate to another jurisdiction and all ties are severed in the old jurisdiction. If the Crawford position (discussed at para [78]) is not accepted, then such a purpose would automatically mean an immediate loss of the previous habitual residence, even if the stay in the new jurisdiction is not long enough to have acquired a new one. The difficult cases arise where the stay in a jurisdiction is intended to be for a defined period and a return to the existing habitual residence agreed or at least contemplated.

[88] Some defined periods may be so long that it would be unrealistic to argue that there is not intended to be a change in habitual residence - see the comment in Mozes v Mozes (2001) 239 F 3d 1067 (9th Cir), at 1077 footnote 27 on the case of Toren v Toren (1998)26 F Supp 2d 240 (D Mass) where the agreement was that the children were to live and study in the United States for four years, after which they were to return to Israel. Equally some periods of absence from an existing habitual residence would clearly be too short for there to be a tenable argument that there is intended to be a change in habitual residence.

[89] In other cases, the answer may not be quite so obvious. It is worth therefore examining a selection of cases where residence has been intended to be for a defined period, followed by a return to the jurisdiction of existing habitual residence, to see if any further principles can be discerned. I examine first a selection of cases where residence in the new jurisdiction was to be for a defined one-off period and where the courts have held that the habitual residence of the children remained in the former jurisdiction.

[90] As Goddard J relied heavily on the case of Mozes v Mozes I begin there. The agreement in that case was that the wife could take the children to the United States from Israel for a period of fifteen months. There was disagreement between the parents as to what had been agreed would happen after that period but the possibility of the children staying beyond the fifteen months had been mooted. The court clearly accepted that it was possible to be habitually resident where the intent was to remain in a jurisdiction for a limited period only and in this regard the remarks of Lord Scarman in R v Barnet LBC Ex p Shah were referred to with approval. It said at 1074:

Being habitually resident in a place must mean that you are, in some sense, "settled" there – but it need not mean that's where you plan to leave your bones. Nor could we justify limiting habitual residence to persons who settle in an area for some particular motive. All of this is true. None of it is very useful, however, when attempting to decide a borderline case. Even the child who goes off to summer camp arguably has a "settled purpose" to live there continuously "for a limited period."...No one would seriously contend that the summer camp is the child's habitual residence, but the notion of "settled purpose" alone is powerless to tell us why not.

[91] The court went on to say that the obvious reason why campers are not regarded as habitually resident is that they already have an established habitual residence elsewhere and

absence from it – even for an entire summer – is no indication that they mean to abandon it. The appropriate inquiry thus focuses on whether there has been an abandonment of the former habitual residence.

[92] Where children already have a well-established habitual residence, the court said that simple consent to the children's presence in another forum is not usually enough to shift it to that other forum, especially where the consent was to a move for a specific, delimited period. The appropriate inquiry under the Convention was whether the United States had supplanted Israel as the locus of the children's family and social development. In the circumstances of the case that question was answered in the negative. There were no ties with the United States, no relatives there and the centre of economic support remained in Israel.

[93] Mr Pidgeon QC also referred to a number of other cases, including the Australian case of De Lewinski v Department of Community Services (1997) FLC 92-737. In that case the husband and wife had met in 1980 when the Australian wife was holidaying in the United States. They married in 1983 and there were two children of the marriage, aged 10 and 12 at the date of the hearing. In January 1996 the couple had lived in Australia for a period of four months. The younger child was born during that period. They returned to the United States where they stayed until the wife and children went to Australia in December 1991 with the consent of the father and spent approximately eight months there. They then returned to the United States, coming back to Australia in July 1994 and staying there until January 1995.

[94] The relationship had deteriorated and, about one month after the return to the United States, the wife took the children back to Australia. A Hague Convention application was made on behalf of the husband. At first instance the children were held to be habitually resident in the United States. On appeal this finding was upheld on the basis that it was clearly open to the trial judge to find that the time in Australia was not for any settled purpose but only to visit the wife's family and that there was no agreement between the parents that the children's habitual residence would change from the United States.

[95] The next case referred to was the New Zealand High Court decision in S v M [1999] NZFLR 337. That case concerned a 10 year old child, S. The child went to live with the father in Australia under what the mother maintained was a temporary arrangement of about a year while she sorted out her relationship problems with her new partner. The father claimed that it was a permanent arrangement. After some thirteen months S came to New Zealand for a holiday visit. He had a return ticket but two days before the return flight the mother telephoned the father to say that S would not be on that flight. Attempts at resolution of the situation failed and a Hague Convention application on behalf of the father was successful in the Family Court.

[96] On appeal to the High Court that finding was overturned. This was on the basis that the father had failed to show that the move was a permanent one or at least indefinite in terms of its duration (at 344). If this was meant to suggest that, to effect a change in habitual residence, a move must be intended to be permanent or indefinite then, with respect, it is clearly wrong. All that is needed is for there to be a settled purpose to adopt an abode "voluntarily and for settled purposes as part of the regular order of [his or her] life for the time being, whether of short or of long duration" – Re B (Minors) (Abduction) (No2) [1993] 1 FLR 993, 995 per Waite J.Panckhurst went on to say, however, that the question was which period should be emphasised, that of nine years (in which time the child had lived in New Zealand in the custody of the mother) as against the most recent thirteen months before the events that triggered the application. He may therefore not have been stating a rule but

merely examining the actual purpose in the factual context, which of course is the correct approach. If this was what he was doing, however, a more in depth examination of the facts would have been desirable.

[97] A further decision referred to by Mr Pidgeon was that of Brennan v Cibault (1996) AD 2d 965. In that case, the parties lived in France until June 1995 when the father came with the child to the United States for a six week holiday. The marriage broke up during that period and the father said he would remain in the United States. The finding was that the mother agreed to a six month stay (extending the six week holiday) but that the child's habitual residence remained in France. This was because the child's parents were married there, had established professions and a home there, the child was born there and lived there for the first sixteen months of her life before leaving with her father for what was to be a six-week visit with her grandmother in New York. It was held that these facts showed a common intention that the child be habitually resident in France which the extension of the holiday agreed to by the mother could not change.

[98] Mr Pidgeon also referred to the decision of re S and another [1994] 1 All ER 237 as that had been referred to with approval in S v M [1999] NZFLR 337. The re S decision, insofar as it relates to habitual residence, is, however, said to be "an even more troubling decision than Brennan v Cibault" by Beaumont and McEleavy (at 100 footnote 74).

[99] In re S, the parents were Israeli and came to England with the children for a one-year sabbatical, although it was accepted by the father that it was not beyond the realm of possibility that they would have stayed longer. Both were scientists and both secured research grants, a condition of which was that they were to return to Israel at the end of their research in England. The father returned to Israel after some seven months and filed for divorce. The mother said that she did not intend to return the children to Israel, either immediately or at the end of the agreed period of one year.

[100] It was held that Israel remained the country of habitual residence but there was no analysis as to why that was the case. The judge merely said that he had been referred to a number of the cases on the topic but he was satisfied it could be resolved shortly. Wall J said (at 249):

I am in no doubt at all that the habitual residence of the children remains that of Israel. 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.

[101] Finally, Mr Pidgeon referred to the case of Paz v Paz (2001)169 F Supp 2d 254 (SDNY). In that case, the mother and father were both Peruvian. Shortly after marrying the couple moved to New Zealand where the child was born in 1988. Two years later they separated and the mother was granted primary custody. At the end of 1992 the mother and child went to Peru and the father joined them in an attempt to reconcile. They lived there until early 1998 when the mother and child moved back to New Zealand and the father joined them. Unable to find employment the mother returned alone to Peru in mid 1998 where the father and child joined her two months later, although the parents did not live together. They shared custody of the child week and week about until December 1998 when the mother and child moved to New York. The child could not enrol in a New York school in the middle of a school year and she returned to Peru with her grandmother to attend school for the year. She returned to live in New York in August 1999. In late February 2000 the

mother sent the child to Peru with the understanding that she would travel to New Zealand to be with her father. The mother asserted that the child was to be returned to New York in July 2000 but, in the event, she was kept in New Zealand until December 2000 despite repeated requests that she be returned to New York. When she was finally returned to New York (according to the father for a holiday only) the mother refused to allow the father to take her back to New Zealand.

[102] The judge accepted the mother's evidence (disputed by the father) that the child was sent to New Zealand during the year 2000 on a temporary basis only. The Court noted that, after the parents' last attempt at reconciliation in March 1998, the child had moved nine times, most of the time with the mother with whom the child was accustomed to live. Evidence was presented that the child had acclimatised to New Zealand during her nine or ten months there and the submission made that therefore she had become habitually resident here but the judge held that this evidence had to be viewed in light of her frequent relocation. Before her stay in New Zealand she had not resided for an uninterrupted period in one place for longer than approximately six months. She had necessarily been obliged to be adaptable to her surroundings. In the light of all the above, the court concluded that the child had not been habitually resident in New Zealand at the time of the alleged wrongful retention.

[103] I next examine cases where the move could be seen as being for a limited period but where habitual residence was held to have changed. The first of these is the case of Re S (A Minor)(Abduction) [1991] 2 FLR 224. In that case, the child had been in the custody of the mother since the parents' separation in 1982. In June 1988, while the mother was living in Calgary, she suggested that the father have the child for the following school year. He was living in Minnesota. That arrangement was put in place but, on 5 October 1988, the mother took the child via Calgary to England without the father's knowledge. It was held that the child was clearly habitually resident in Minnesota pursuant to the arrangement that she should spend a year there in her father's care.

[104] Next we have the case of Moran v Moran(1997) SLT 541. In that case, the parties were married in Scotland and emigrated to California in 1982. In July 1994 the wife returned to Scotland with the children. The husband sought an order for their return. He contended the mother and children had come to Scotland for a holiday. The wife agreed but said that, after her arrival in Scotland, it had been decided she and the children would remain for a year while the husband sorted out his financial difficulties, at the end of which period they would reassess their future. The court preferred the wife's evidence and held that the children were habitually resident in Scotland. After referring to the comments of Lord Scarman in R v Barnet LBC Ex p Shah [1983] 2 AC 309, Lord Prosser said (at 543):

There is of course a whole spectrum of possibilities from what is little more than a holiday, to what is seen as irrevocable emigration. In the present case, there is no doubt that the children were and had long been habitually resident in California before they left in July 1994. There is no doubt that a return there was at the very least a possibility, after the agreed year or so in Scotland. There was however also a clear possibility, in the minds of the parties when agreeing to the stay in Scotland, that such a return would not be the answer. Discussion, not return, was to be the next chapter. And it would be wrong in my view to construe the agreed stay in Scotland as a mere temporary absence from California, or a mere intermission, as a sort of suspension of ordinary life in California. Ordinary life, for the next year at least, was to be in Scotland, precisely because ordinary life in California was not satisfactory. One can of course say that it is a matter of impression and degree. But having regard to the origins of and reasons for the decision that the respondent and the children should come to Scotland for a year, and noting that this decision was for a full

school year, and that even thereafter it was left entirely open whether they would re-establish family life with the petitioner, or if so, whether they would do so in California, I have come to the very clear view that the family established habitual residence in Scotland. I am even more clearly of the view that the departure for Scotland, for a year and perhaps for longer, in all the circumstances I have described, must be seen as a termination of habitual residence in California at the date of departure, even if that habitual residence might at a later date be resumed. Stopping living in California was of the essence – even more than coming to Scotland rather than anywhere else.

[105] The case of Cameron v Cameron [1996] SC 17 is also relevant. In that case, the separated parents agreed that the children were to reside in France with their father but that, if they became unhappy, they were to be returned to Scotland. The arrangement was to be reviewed after six months. Between January and April 1995 the children lived with their father but were not returned by their mother after a visit to Scotland. Delivering the opinion of the Inner House, Lord Justice-Clerk Ross held that, contrary to the finding of the court below, the agreement was not tentative or temporary and that it was intended to be a permanent arrangement. The fact that it was to be reviewed at the end of six months was not material. The view was expressed that, even if the agreement was construed as meaning that the parties had agreed that the children should be taken to France for a period that might not be more than six months, that agreement, combined with the period of residence, was enough to make the children habitually resident in France.

[106] Beaumont and McEleavy (at 104) criticise this decision as inappropriately interpreting the words of the parents' agreement from a strict literal perspective, an analysis they say is more suited to the sale of property than an attempt to provide for the future of two young and vulnerable children on the break-up of their parents' marriage. In the authors' view, the court should have taken more account of underlying circumstances. In any case, they say, more emphasis should have been placed on the facts, for at the time of retention the children had only spent three months in France. The authors earlier (at 99-100), however, also refer to this case for the proposition that a parental purpose of a fixed term six month stay in another jurisdiction may be sufficient for a child to lose his or her existing habitual residence immediately – see para [119] below.

[107] Finally I mention the case of Zuker v Andrews (1998) 2 Fed Supp 2d 134 (D Mass) which was affirmed on appeal by 1st Circuit Court of Appeals. In that case, the child had been born in New York. Thereafter the mother and child had moved between Argentina and New York. From November 1994 until May 1995 they were in Argentina and from May 1995 to November 1995 in Massachusetts residing in the grandmother's home. From November 1995 to June 1996 they were in Argentina. They left Argentina in June 1996 and went again to the grandmother's house from whence the child was not returned. The purpose of the trips to Argentina was to be with the father who was there working on the production and marketing of a compact disc. The court held that the child's habitual residence in June 1996 was in Argentina. The court said (at 138):

Applying this law to the facts of this case, I find that for three periods (November, 1994 to May, 1995; May, 1995 to November, 1995; and November, 1995 to June, 1996), [S] was a habitual resident of the country in which he was actually situated. This is certainly true from the point of view of [S]. It is also true from the point of view of the shared intentions of the parents. Both parents intended that Andrews and [S] would live in Argentina while Zuker finished the CD, both parents agreed to Andrews and [S] returning to the United States for six months in 1995, and both parents agreed to Andrews' return with [S] to Argentina in November, 1995. While I find that the expectation of both parents differed as to how long they and [S] would stay in Argentina on each occasion, each of the trips back and forth was

essentially the product of an agreement between the parents, at least to the extent that the trips would take place. In fact, Andrews' return to the United States in June 1996 with [S] was agreed to between the parents, but there was no agreement at that time on the length of stay in the United States.

While I credit Andrews' testimony that she never intended that she and [S] would live in Argentina forever and that when she moved to Argentina in November 1994, she intended to come back to the United States when Zuker's work in Argentina was finished, that does not establish that [S]'s habitual residence was not in Argentina during the months-long periods he and Andrews lived there. Thus, I find that in June 1996, after seven months in Argentina, Argentina was [S]'s habitual residence even though Andrews wanted desperately to return to the United States with him months before the actual return.

[108] Next, I examine the cases of shuttle custody arrangements of the type at issue here. First the case of Johnson v Johnson Case no 7505-1995 Supreme Administrative Court, 9 May 1996, (Sweden). In that case, the mother was Swedish and the father from the United States. The parties separated and, before the wife returned to Sweden, they came to an agreement that the child would spend one year in three with her father. This was modified slightly in that, for the first two periods, the child was to live with each parent for two years. The agreed schedule provided for eight years with the mother and four with the father. The agreement was endorsed by the court and provided for exclusive jurisdiction of the Virginia court. The child then left with her mother for the first two-year period in Sweden.

[109] At the end of that period the mother failed to return the child. The court at first instance as well as the first level of appeal had held that the child should be returned to the United States. On the further appeal it was held that, in all the circumstances, the child's habitual residence was in Sweden and not Virginia. The fact that the child was scheduled to spend eight years in Sweden was a factor taken into account. The court said: The term 'habitual residence', which corresponds to 'hemvist' is not defined in the Hague Convention either. In general, it may be said that consideration of the question of habitual residence under the Convention is primarily a matter of making an overall assessment of circumstances which may be observed objectively such as the length of sojourn, existing social ties, and other [matters] ... which may indicate a more permanent attachment to one country or the other. In the case of a small child, the habitual residence of person who has custody, and other family and social aspects, must be the decisive factors.

[110] This case had an interesting aftermath. The United States Central Authority had placed a submission before the court regarding what it said were issues of general relevance. The concern was that, if shuttle custody arrangements of this type were not enforced, this could have a detrimental effect on children in that parents would not be minded to agree to such arrangements as they could allow forum shopping. Parents therefore would insist on sole custody (see US Department of State Note from US Central Authority to Swedish Central Authority [USA 1996] 30 January 1996 at http://www.hiltonhouse.com/cases/Johnson_001_USCA.txt). It said:

[T]he United States believes that, when a custody order entered in a child's country of habitual residence permits the child temporarily to live in another country, but clearly evidences an intent that the child will return to the country in which the order is entered, it should be understood that the child's habitual residence, for purposes of the Hague Convention, remains in the original country and does not shift to the country of permitted temporary residence. This should be particularly true when one of the parents remains in the place of habitual residence, and when the parents have themselves agreed that the country of the original custody order shall always be the jurisdiction of habitual residence.

Adherence to these basic principles will best further the overall goals of the Hague Convention, and will be particularly important in cases of joint custody.

As suggested above, any other approach would result in a continual shifting of jurisdiction over custody issues, with all of the uncertainty and instability that such shifting would necessarily engender. It would also create incentives for child abduction and forum shopping and ultimately would encourage consensual custody settlements that seek to ensure that the dual-national child maintains strong ties to both parents and to both countries of its nationality.

[111] The United States then followed this up after the decision by a diplomatic note, suggesting that Sweden was in breach of its obligations under the Hague Convention because of the decision (see United States Note No. 64 of 30 June 1996 athttp://www.hiltonhouse.com/cases/Johnson_003_USNote.txt). It reiterated the points that it had made in the submission to the court and criticised the concept of 'hemvist' as being contrary to the Convention. It said:

Focusing on the Swedish law of 'hemvist', the Regeringsratten based its decision on the grounds that Amanda had been living in Sweden for a little over two years, that she had adapted to life in Sweden, and that the 1993 Virginia custody order accorded her mother a greater number of years of primary custody than her father. Such reasoning turns the Convention on its head by rewarding the very type of conduct that it is designed to deter. This decision permits a parent wrongfully to retain a child for the purpose of re-opening a custody proceeding in a more sympathetic jurisdiction, whereas the Convention requires parents to resolve custody disputes in the child's place of habitual residence or the country of original jurisdiction.

[112] It warned that it intended to recommend that the agenda of the 1997 Special Commission of the Permanent Hague Conference include a discussion of habitual residence and joint custody under the Hague Convention for the purpose of reaching an agreement among Contracting States not to support Sweden's interpretation of these terms. In the meantime, the United States strongly urged the Swedish government to change the law to remedy what it saw as the inconsistency between the Swedish concept of 'hemvist' and that of habitual residence.

[113] The United States' note was politely rejected by Sweden. Sweden indicated that it considered that the concept of "hemvist" did in fact correspond to the Hague Convention concept of habitual residence. It expressed the view that in any event it would be contrary to the constitution of Sweden for the Government to correct the decision, saying "Like in many other countries, courts in Sweden are independent of the Government." It also pointed out that the judgment was not a decision on the merits of the custody claim but merely a decision on whether the child should be returned under the Hague Convention.

[114] The point does seem to have been discussed at the 1997 Special Commission, although neither the US/Sweden exchange as set out above nor Johnson v Johnson was specifically referred to. The United States' position that courts should respect agreements as to the appropriate forum in custody disputes was, however, rejected as detracting from the factual nature of the concept of habitual residence. The report said (see Permanent Bureau of the Hague Conference Report of the Third Special Commission meeting to review the operation of the Hague Convention on the Civil Aspects of International Child Abduction (17-21 March 1997) at para 16:

Alternating custody agreements, or 'shuttle agreements' might give rise to problems in determining the habitual residence of the child. The question arises whether such

agreements may determine habitual residence in a way that would be binding on courts requested to order the return of the child, e.g. by including an additional clause that non-return of the child on the date agreed upon constitutes unlawful retention under the Convention or other kinds of choice of court clauses. Such choice of court clauses do not fall to be recognised under the Convention, however, and parties to such an agreement should not have the power to create a habitual residence that does not match with the factual habitual residence of the child. This is, firstly, because the concept of 'habitual residence' under the Convention is regarded as a purely factual matter and, secondly, because the Convention provides for a very specific remedy applicable in cases of emergency and is not meant to solve parental disputes on the merits of custody rights.

[115] The second case referring to shuttle custody arrangement is that of Watson (AP) v Jamieson (1998) SLT 180. In that case, the arrangement (entered into in 1992) was that the children would reside alternately for two-year periods with each of the parents who were then residing in Scotland and New Zealand respectively. In accordance with that arrangement they spent 1993 and 1994 in New Zealand with their mother and then 1995 and 1996 in Scotland but with a long holiday with their mother in September 1995. There had been a similar shuttle custody arrangement for a number of years while both parents were living in New Zealand. In August 1996 the father said that he would not return the children to New Zealand at the end of the year. Lord Prosser said that, in such a case, he was satisfied that there was a settled purpose that the children would be habitually resident in Scotland in 1995 and 1996, notwithstanding that they would go back to New Zealand at the end of that period. He said (at 182-183):

But where residence with the two parents is divided equally, it strikes me as unreal, in the absence of other differentiating factors, to see residence with one parent as primary, and the stays with the other parent as interruptions. Moreover, where as in the present case the periods with each parent are so long, it seems to me that the parents have (very commendably) chosen long periods precisely so that the girls would not feel that they were constantly being swapped to and fro, but would have long enough, whichever parent they were with, to feel that there was a firm and lasting basis for their presence with the parent in question. When the children left New Zealand, to come to Scotland for a two year period, I am satisfied that 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.

[116] I note here the case of Bickerton v Bickerton Contra Costa County Superior Court (California) 91-06694, 17 July 1991, as that is an early shuttle custody case which came to a different result. In that case, the children were born in Canada and lived there until the parents entered into a written separation agreement, which was never made an order of any court. The children then spent year and year about in California and Canada for the next five years. The mother brought an action for exclusive custody in the California court eleven months into her latest year of custody. Without setting out any reasoning the court held that, based on the evidence presented by the father (but without being more explicit about what that evidence was), Canada was the habitual residence of the children. Discussion of defined period cases

[117] Mr Pidgeon QC submitted that the Watson v Jamieson decision appears to have been ignored in the cases that have dealt with habitual residence since. He submitted that it is something of a rogue decision out of keeping with most English, Australian, New Zealand and the bulk of the United States decisions and that it should not be followed.

[118] The cases he referred to, however, in order to establish this proposition are, as Blanchard J points out at para [32], not shuttle custody cases but cases where there was agreement only for one limited period in another country. They are not cases where the settled purpose is for long periods of residence in each jurisdiction. In such cases, the most reasonable inference is a settled purpose that there be serial habitual residences. This is likely, absent unusual circumstances, to mean immediate loss of the previous habitual residence at the beginning of each agreed period in the new jurisdiction, even if the period in the new one has not been long enough for it to have become a new habitual residence.

[119] I note, as Blanchard J does at para [36] and Mr Pidgeon acknowledged, that Beaumont and McEleavy (at 99-100) refer to both Johnson v Johnson and Watson v Jamieson with approval. Of the latter they say:

This interpretation is entirely in keeping with the ordinary meaning of the words; each time the girls would have moved under the terms of the two-year cycle their habitual residence would have changed accordingly. Would it not be appropriate therefore to state that they would have lost their existing habitual residence upon leaving? If it is clear that an individual will acquire a new habitual residence during a stay in a particular State, why should the existing habitual residence be allowed to persist beyond the date of departure? There is nevertheless no precise answer as to the length of residence required in a new country if a child is to immediately lose his or her existing habitual residence. Obiter comments of Lord Justice Clerk Ross in Cameron v Cameron would indicate that an agreement to spend six months in a different State would be sufficient time for a habitual residence to be acquired. Reasoning from this therefore one might assume that in such a situation the children's existing habitual residence would be lost immediately. On a theoretical level there would not appear to be any reasons against such a position; moreover, in the Convention context, if a child has severed all links with a particular jurisdiction there would not appear to be any valid reason for him or her to be returned there.

[120] It is clear in any event from the cases discussed above that, even where residence is intended to be for a one-off limited defined period followed by a return to an existing habitual residence, this does not automatically lead to a finding that habitual residence has not moved to the new jurisdiction. That depends on all the circumstances of the particular case, as is appropriate where the inquiry is a factual one. On the one hand, there are the cases where the stay in another jurisdiction was not only for one defined limited period but also for what can be seen as a temporary purpose. This, combined with a finding of strong ties to a former habitual residence and a weak connection to the new one, led to a conclusion that there had not been a change in habitual residence.

[121] If the period is to be long enough, however, even a temporary purpose can cause a change in habitual residence after a period of actual residence long enough for it to be said, as the court in Mozes v Mozes (2001) 239 F 3d 1067 (9th Cir) put it (at 1081): with confidence that the child's relative attachments to the two countries have changed to the point where requiring return to the original forum would now be tantamount to taking the child 'out of the family and social environment in which its life has developed'. Perez-Vera Report.

[122] Examples from the cases of what have been seen as temporary purposes are holidays, visiting relatives or (in some circumstances) time out for a limited period for the usual custodial parent. It is certainly important that parents not be inhibited in consenting to children visiting relatives in another jurisdiction by fears that habitual residence will be held to have changed. This was pointed out by Hale J in Re HB (Abduction: Children's Objections) [1997] 1 FLR 392 at 399:

The policy of the Convention is, in my view, particularly important in cases where children come to another country for visits. It is obviously in the best interests of children whose parents live in separate countries that the parent with whom they live should feel able to send them on visits secure in the knowledge that the children will be returned at the end without difficulty. Otherwise parents may be tempted not to allow the children to come, and that will be detrimental to the children.

[123] On the other hand, where it is not so clear that the purpose of a stay was temporary, such as where the move was for educational purposes or for a relatively long period of fixed term employment or where there was no defined purpose, then the courts have been much quicker to find a change in habitual residence once a sufficient period of actual residence has passed, especially if the ties to the former jurisdiction are weak. Indeed, where the ties are weak or severed, an immediate loss of the previous habitual residence has been held to have occurred, even if a new one has not been acquired. It must be remembered that, unlike for a change of domicile, all that is required in this regard is a settled purpose to adopt an abode as part of the regular order of life for the time being, whether of short or long duration – see R v Barnet LBC Ex p Shah [1983] 2 AC 309 at 343.

[124] Finally, I reiterate that in all cases (including shuttle custody cases) the whole of the circumstances should be examined and not merely the parents' purpose for a stay in a jurisdiction. Any other approach would not be in keeping with the factual nature of the concept. In addition, merely examining parental purpose would be an inappropriately parent- centred approach – see comments at para [76]. Discussion of Goddard J's decision on habitual residence

[125] This appeal is restricted to questions of law under s31B(1)(b) of the Guardianship Act 1968. Whether a child is habitually resident is a question of fact. Therefore, unless there has been an error of law in Goddard J's assessment, the decision cannot be overturned on appeal. In this regard, treating any of the principles set out above as rigid rules or ignoring clearly relevant facts or misunderstanding the nature of the concept of habitual residence would be errors of law.

[126] Goddard J began her discussion of this topic by setting out (at para [40]) Mrs P.'s contention that the case should be decided in line with the decision in Watson v Jamieson (1998) SLT 180. She rejected this submission (at para [42]) and said that she saw the situation as one where joint custodial parents have ceased to agree on the question of the child's residence as the result of one of them seeking to resile from the shuttle custody arrangement. With respect, the first focus of the inquiry should have been on the parents' settled purpose at the time of entry into that agreement and not on later events – see Moran v Moran (1997) SLT 541, 543.

[127] The judge did go on to consider the position at the time the agreement was made. She said (at para [42]) that, in her view, the situation was not one where by agreeing to the joint custodial arrangement Mr P. conceded jurisdiction to the New Zealand Family Court for Hague Convention purposes. She said that, by filing proceedings in the Australian courts before the mother's departure and registering the agreement with that court, Mr P. clearly showed that he was not conceding jurisdiction to New Zealand. In fact, on the evidence this is by no means clear, in that Mr P. deposed that he was unaware of his Hague Convention rights at the time of entering into the agreement. He appears to have thought he would have difficulty in enforcing the agreement once the mother left Australia which is why he inserted the penalty clause.

[128] All this is, however, beside the point. It is not what Mr P. may have thought about jurisdiction that counts. That would even be the case had the agreement contained a choice of jurisdiction clause or been registered with the Australian Courts (as indicated above, the judge was mistaken on the latter point). That it is not for the parents to specify jurisdiction was made clear by the report of the Special Commission in 1997, discussed above at para [114]. The question that should have been asked with regard to the parental purpose was whether, in agreeing to the shuttle custody arrangement, Mr P. intended that New Zealand would be, for the periods the children were to spend here, their habitual residence.

[129] Goddard J went on (at para [43]) to examine the decision in Mozes v Mozes (2001) 239 F 3d 1067 (9th Cir),which she saw as directly applicable. In particular, she quoted (at para [45]) the passage from that case where the court (at 1076-1078) divided the types of cases as follows:

On one side are cases where the court finds that the family as a unit has manifested a settled purpose to change habitual residence, despite the fact that one parent may have had qualms about the move. Most commonly, this occurs when both parents and the child translocate together under circumstances suggesting that they intend to make their home in the new country. When courts find that a family has jointly taken all the steps associated with abandoning habitual residence in one country to take it up in another, they are generally unwilling to let one parent's alleged reservations about the move stand in the way of finding a shared and settled purpose.

On the other side are cases where the child's initial translocation from an established habitual residence was clearly intended to be of a specific, delimited period. In these cases, courts have generally refused to find that the changed intentions of one parent led to an alteration in the child's habitual residence.

In between are cases where the petitioning parent had earlier consented to let the child stay abroad for some period of ambiguous duration. Sometimes the circumstances surrounding the child's stay are such that, despite the lack of perfect consensus, the court finds the parents to have shared a settled mutual intent that the stay last indefinitely. When this is the case, we can reasonably infer a mutual abandonment of the child's prior habitual residence. Other times, however, circumstances are such that, even though the exact length of the stay was left open to negotiation, the court is able to find no settled mutual intent from which such abandonment can be inferred. Clearly, this is one of those questions of 'historical and narrative facts' in which the findings of the district court are entitled to great deference.

[130] The judge went on to say (at para [46]) that she saw the second category identified above as of direct application to this case. I leave aside for a moment the fact that, while the quoted passage appears to require any settled intention to be for a unlimited or indeterminate period before there can be a shift in habitual residence, the court in Mozes v Mozes had earlier in the judgment (at 1074) specifically recognised that this was not so. As discussed above, at para [90], all is required is that there be a sufficient degree of continuity for the purpose to be properly described as settled. It was even recognised later in the Mozes v Mozes judgment that a child can lose its habitual residence without a parent's consent (at 1081). The Court stated (at 1082) that an agreement that a child was to remain indefinitely in a new forum was not a necessary condition to establishing the habitual residence of a child, although it did say that, where a child had a clearly established residence in a jurisdiction, then the objective facts must point unequivocally in that direction before it can be changed to a jurisdiction where the stay was intended to be for a defined period.

[131] The important point for present purposes is that the conclusion as to habitual residence in Mozes v Mozes was not reached in isolation from a full factual inquiry, including an assessment of the strong links the children and their mother retained with Israel, an assessment of the undoubted temporary purpose of, in all likelihood, both parents with regard to the stay in the United States and the extent of acclimatisation in the United States. Thus it was not enough for Goddard J to place this case into the second category without an examination of the full factual circumstances.

[132] Goddard J did go on (at para [48]) to quote the passage from Mozes v Mozes which states that the appropriate inquiry was whether the United States had supplanted Israel as the locus in that case of the children's family and social development. She then concluded (at para [49]) that it is impossible in this case to say that the locus of the P. childrens' family and social development is now New Zealand, simply because they have resided here for five months and because their mother wishes to resile from her agreement with their father as to their joint custodial arrangements. With respect this appears to be merely an assertion made without a consideration of the factual matrix.

[133] The assertion must also have been influenced by the Judge's view that an habitual residence cannot change unless the parental purpose is for that residence to be other than one of limited duration which, as indicated earlier and as recognised in Mozes v Mozes itself, is not the case. Habitual residence is a factual concept and one distinct from that domicile where of course, for an adult, the purpose would have to be to sever ties with the old jurisdiction and for there to be an indefinite stay in a new jurisdiction.

[134] In addition, Goddard J failed to consider the very different terms of the agreement in this case from that in Mozes v Mozes.In that regard, she can be said to have failed to take into consideration what is clearly a relevant fact.In Mozes v Mozes, the agreement was for a stay of a defined delimited period. Here the agreement was for a shuttle custody arrangement to last until the children were 18 years of age. In such a situation, as indicated earlier, the conclusion is likely to be that the purpose of such an arrangement must have been for the children to have serial habitual residences.

[135] Whether a new habitual residence had been acquired would of course depend on whether the stay in New Zealand had been long enough to become habitual. In this regard, the fact that the children moved to New Zealand with their mother, who had been the main custodial parent for some time before the move to New Zealand, would be of relevance, as would the presence of relatives in this country.

[136] The facts of the case (including of course the terms of the agreement) would also have to be examined to see if the previous habitual residence of Australia had been lost immediately on the change in jurisdiction or whether it may have persisted for some time after the move to New Zealand. If habitual residence in Australia had been lost immediately, then of course it would not matter whether or not the children had become habitually resident in New Zealand. If the children are no longer habitually resident in Australia, then the Hague Convention application must fail.

[137] Goddard J, in her conclusion (at para [51]), said that habitual residence must be construed to mean the contracting state in which the P. children were residing at the time their parents reached the agreement which permitted the children's lawful removal from Australia. She also said that the Australian Family Court was the court of competent jurisdiction. If this signals a return to her earlier view that habitual residence is determined by intent as to jurisdiction then of course it is incorrect, for the reasons already set out.

[138] With respect, Goddard J has proceeded on a mistaken view of the principles and has failed to take into account the whole of the relevant factual matrix of the case. These are errors of law.

Conclusion on habitual residence

[139] I would allow the appeal on the basis that Goddard J made errors of law in her assessment of the habitual residence of the children and would remit the case to the Family Court in order for this question to be determined on the facts of the case in accordance with the principles outlined above.

Retention

[140] I have had the opportunity of reading in draft the judgment of Blanchard J on the issue of whether there has been a wrongful retention. I agree that the appeal should be allowed in this regard for the reasons he gives.
