

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Kung v. Tang*,
2020 BCSC 2155

Date: 20201120
Docket: E201035
Registry: Vancouver

Between:

Shiu Cheung Kung

Petitioner

And

Catherine Shuk Wah Tang

Respondent

Before: The Honourable Madam Justice Fleming

Oral Reasons for Judgment

(In Chambers)

Counsel for the Petitioner
appearing by teleconference:

S. Mah

Counsel for the Respondent
appearing by teleconference:

J.M. Stein

Place and Date of Trial/Hearing:

Vancouver, B.C.
August 18, September 9, and
November 2, 2020

Place and Date of Judgment:

Vancouver, B.C.
November 20, 2020

[1] **THE COURT:** The petitioner, Mr. Kung, and the respondent, Ms. Tang, are the parents of three children, Karissa, Kadin, and Karina, who are now 12, 10, and seven years old respectively.

[2] The parties separated on June 19, 2019, when Ms. Tang and the children left Mr. Kung and their home in Hong Kong for British Columbia, without his knowledge or consent. They have remained here since that time.

[3] In this proceeding, Mr. Kung applies for an order that the children be returned to Hong Kong pursuant to the *Convention on the Civil Aspects of Child Abduction* ("*Hague Convention*").

[4] In March 2020, Ms. Tang commenced a divorce proceeding in the Hong Kong District Court, seeking interim and final custody of the children and other relief including, most significantly, leave for the children to "stay out of the jurisdiction" pending trial and permanently.

[5] On June 1, 2020, Judge Lo of the Hong Kong District Court made an order by consent granting Mr. Kung interim access, which provides for daily visits with the children through WhatsApp. Along with procedural orders, Judge Lo also ordered a social investigation report and an international social investigation report, and adjourned the case to December 18, 2020.

[6] Mr. Kung filed his *Hague Convention* application on June 16, 2020, within three days of the less than one year period required for a mandatory return. There being no dispute the children's habitual residence remains Hong Kong, he takes the position their return must be ordered, because Ms. Tang has failed to establish an exception to the mandatory return requirement.

[7] Ms. Tang argues *Hague Convention* should not be invoked because not only has she submitted to the jurisdiction of the Hong Kong District Court, she has asked the court to determine custody of the children and their relocation, both on an interim and a final basis.

[8] Her interim relocation application, part of a summons for interim and final relocation, before the Hong Kong District Court on September 28, 2020, is now scheduled for hearing on December 18, 2020.

[9] She argues the Hong Kong District Court has essentially sanctioned the children's retention in this jurisdiction and no purpose would be served by ordering them returned pending the determination of that application.

[10] In the alternative, Ms. Tang argues Mr. Kung's return application should be dismissed because after she removed the children from Hong Kong, he acquiesced in them remaining in British Columbia. The two older children have expressed a strong desire to remain here and the long flight back to Hong Kong would expose them to a significant risk of contracting COVID-19.

[11] For the reasons that follow, I am dismissing Mr. Kung's return application.

The Overview

[12] The hearing of the return application began but did not complete on August 18, 2020.

[13] The parties' evidence includes two affidavits from Mr. Kung filed June 16 and August 13, 2020, and two affidavits from Ms. Tang, both filed July 31, 2020 and a third affidavit filed August 17, 2020. Her second affidavit attaches as an exhibit a lengthy affidavit that she filed in the Hong Kong proceeding on July 16, 2020, in support of her summons seeking interim and final orders related to the children's relocation.

[14] Mr. Kung objected to the admission of Ms. Tang's third affidavit. Made August 14, 2020, it responds to Mr. Kung's second affidavit and contains, most significantly, evidence about Ms. Tang's communications with the children's schools in Hong Kong in early July 2019. The evidence is relevant and probative of a key factual issue in this case, that being what Mr. Kung knew or ought to have known about the whereabouts of the children following their removal from Hong Kong on

June 19, 2019. I see no prejudice to Mr. Kung in admitting the affidavit, given he has had ample opportunity since the first hearing date to provide further evidence.

[15] During the initial hearing date, I determined there was a need for interjudicial communication with Judge Lo of the Hong Kong District Court regarding the Ms. Tang's interim relocation application scheduled at that point for September 28, 2020. Communication was arranged via email and occurred in both of our respective courts linked by video technology on September 9, 2020. Counsel for the parties in Hong Kong and here attended. Judge Lo clarified the hearing on September 28, 2020, would be brief and the application was expected to be adjourned to December 18, 2020.

[16] I later learned that on September 28, 2020, Judge Lo ordered Ms. Tang's summons adjourned to that date to be heard together with the first appointment and the children's appointment hearing. He also ordered that in the event the *Hague Convention* application was undecided by December 4, 2020, Mr. Kung "shall take out an application for a stay if so advised". In the event, Mr. Kung brought a stay application, the order further provided it, too, would be heard on December 18, 2020.

[17] The continuation of the hearing of Mr. Kung's return application, was originally scheduled for October 2020. It was adjourned consent to allow for Karissa and Kadin to be assessed by psychologist, Laura Mills. Her report filed October 27, 2020, based on interviews with both parties, Karissa and Kadin, addresses three questions posed by counsel:

1. Is each child of a maturity level sufficient to assert a view about his or her residence?
2. How does each child feel about staying in B.C. or returning to Hong Kong?
3. Is each child's views authentically his or her own?

[18] Dr. Mills expressed the opinion that Karissa has the maturity level expected of an intelligent 12-year-old child. Regarding Kadin, she wrote:

Kadin presented as having age appropriate interests in school and sports which would suggest age appropriate maturity to have his own opinions. He has been reported to show superior intellectual skills which would also support his capacity to reflect and think about his residence and family situation.

[19] Also writing that both children understand that staying in Canada means not living in Hong Kong or receiving day-to-day care by their father. Dr. Mills observed that each expressed a strong desire to remain in Canada and no concern about their mother's decision to bring them to B.C. instead of remaining in Hong Kong. Based on their comments and her assessment, Dr. Mills concluded that Karissa and Kadin views were authentically their own.

[20] The return application completed on November 2, 2020.

[21] I turn now to summarize the relevant evidence and the significant conflicts in that evidence.

[22] Born in Hong Kong, Ms. Tang is a Canadian citizen. One of nine children, her family immigrated to Canada in 1993 and obtained citizenship in 1997. Her parents live in Burnaby, B.C., and three of her siblings in the Lower Mainland, along with many nieces, nephews, and cousins.

[23] Ms. Tang and Mr. Kung met in the Philippines in August 2006. They married in February 2008 at Ms. Tang's parents' home. All three children were born in Hong Kong. According to Mr. Kung, each has been issued a Chinese passport for travelling outside Hong Kong, and a travel permit for travel to and from Mainland China, but they are Canadian citizens.

[24] Until they left Hong Kong, Ms. Tang states the children attended international schools and speak English. Mr. Kung deposes they attended "ordinary schools" where they learned in Cantonese. He also deposes that by the time they left Hong

Kong, they spoke only simple English and only when communicating with a particular domestic helper in the home.

[25] A report card for Karissa's 2018-2019 academic year in both English and what I presume is Cantonese shows Karissa received an A-plus in all of her courses, which included English reading, writing, listening, and speaking. The comments on the report card are in English only.

[26] Similarly, Kadin's report card for that same year records "a full mark of 100" in general English, English composition, oral and listening English, and English dictation. Again the comments are only in English. Furthermore, the name of this school is Po Leung Kuk Lam Man Chow English Primary School.

[27] Karissa's B.C. report cards for the 2019-2020 academic year indicate she did receive ESL support and the C plus grade she received English was lower than the A grades she received in all other courses, most of which I infer, however, require English proficiency.

[28] In 2014, the parties discussed educating the children in Canada in the care of Ms. Tang and Mr. Kung signed a consent letter to that effect. The plan was not pursued but Ms. Tang and the children spent the summer of 2016 in B.C. visiting with her family, and again the summer of 2017, joined this time by Mr. Kung. According to Ms. Tang, she and Mr. Kung also agreed she would take the children to B.C. in 2019 or 2020 so Karissa could attend high school here. In June 2019, before the separation, says Ms. Tang, Mr. Kung initiated a discussion about the whole family relocating to B.C. in July 2020, telling her he would apply for Canadian citizenship, sell their Hong Kong properties, and look for a home in B.C. in the winter of 2019-2020.

[29] Mr. Kung denies suggesting a move in 2019. Instead, he deposes at that time Ms. Tang proposed a fake divorce in Hong Kong so she could apply for welfare and low-cost housing in B.C. to reduce the financial burden on the family. He also deposes that because her parents and some of her siblings were here, he could

understand why she was "so eager" to bring the children to Canada and stay with her parents. Mr. Kung states that believing this would be illegal, he did not agree to the plan.

[30] Regarding the children's removal from Hong Kong, Mr. Kung deposes that Ms. Tang and the children "suddenly disappeared without any sign" on June 19, 2019. When he could not find them "by all means", he reported their disappearance to the police. Ms. Tang indicates he filed a missing persons report that day, a copy of which her lawyers attempted to obtain, but the police declined to release the information based on privacy.

[31] According to Mr. Kung, he was not sure whether the children were still in Hong Kong until November 19, 2019, when he learned from the police that Ms. Tang had removed them. He also deposes that after she and the children left, he kept trying to contact her parents and relatives in B.C., but no one answered his calls. When he asked her relatives in Hong Kong about the children's whereabouts, they all said they had no idea.

[32] Mr. Kung further deposes that although Ms. Tang's divorce petition discloses she had removed the children to B.C., she refused to disclose their address. Because of COVID-19, Mr. Kung states he was unable to fly to B.C. and locate the children immediately, and he had hoped to discuss the matter with Ms. Tang when she attended the court hearing in Hong Kong on June 1, 2020, but "she did not show up".

[33] Both parties allege ongoing family violence against the other. Mr. Kung also alleges that Ms. Tang suffers from mental illness, including depression and bipolar disorder, which caused her to punish the children physically over trivial things, all of which Ms. Tang adamantly denies.

[34] Ms. Tang details escalating conflict between the parties in 2019 and in the days leading up to the separation, and contacting a specific shelter in Hong Kong on June 18 and June 19, 2019, as well as a case officer or social worker at the social

welfare department who she told about her family support in Canada. The case worker also spoke with the children.

[35] Ms. Tang said she decided to leave Hong Kong with the children and stay at her parents' home in Burnaby because the shelter could only offer temporary housing. She specifies that on June 19, 2019, she told Mr. Kung, through WhatsApp, that she and the children would be staying at a shelter. She also specifies that in response to the missing persons report, Hong Kong police contacted her by WhatsApp that same day. She had further communications with them on June 20, 2019, again through WhatsApp. The Hong Kong police asking if she and the children had arrived in Vancouver, which she confirmed, in addition to sending a video of herself and the children.

[36] Ms. Tang deposes to sending a further WhatsApp message to Mr. Kung on June 22, 2019, advising him that she and the children had left Hong Kong. Screenshots of her messages to Mr. Kung on June 19 and 22, 2019, and her conversations with police on June 19 and 20, 2019, are attached as exhibits to her affidavit filed in the Hong Kong proceeding which is attached, as I have said, as an exhibit to her second affidavit filed in this proceeding.

[37] Though the messages are in the Chinese language, the dates and times are in English and a police emblem and a photo of her and the children are depicted, consistent with her evidence about her communications with police. The same is true with respect to the screenshots of exchanges between the parties. The dates and times are in English, the name "A. Kung" appears on each page, and there are references to some missed calls on June 19 and June 20, 2019.

[38] Mr. Kung's second affidavit includes limited further detail about what occurred from September 19, 2019, onward. He deposes to calling the Hong Kong police that day after Ms. Tang refused to reply to his messages and phone calls. He states that he received her message that she and the children were staying at a shelter after his call to police. He also deposes to being really worried because Ms. Tang had threatened suicide with the children many times, stating further:

... However, she did not explain the reason for such sudden disappearance and did not disclose their whereabouts.

... When I informed the police of all these backgrounds and the said WhatsApp message, the police decided to open file and conducted investigation because it involved not only the safety of the Respondent but also the safety of the three children.

... Therefore, at no point in any communication between myself and the Respondent did the Respondent inform me that she had taken the children to Canada.

[39] Acknowledging he received Ms. Tang's June 22, 2019 WhatsApp message, Mr. Kung says that since then, her phone has been switched off and since June 23, 2019, when he has tried to send WhatsApp messages, it has been disabled. Again, he deposes to calling her parents "several times in Canada", but says this time he states they hung up immediately and her siblings in Hong Kong ignored him.

[40] The only document he attaches in support of his evidence about trying to contact and locate Ms. Tang and the children is what he describes as a WhatsApp message he sent to Karina on June 23, 2019. What is attached, however, appears to be a series of messages in Chinese and many photographs, mostly of the children, that date well into August 2019.

[41] Ms. Tang denies that Mr. Kung ever attempted to contact her after she sent the message on June 22, 2019 that she and the children had left Hong Kong. She deposes he tried to contact Karissa's cellphone on June 20, 2019, but Karissa "immediately blocked him" because she was afraid of being blamed and recorded. The reference to being recorded relates to Ms. Tang's allegations that, prior to separation, Mr. Kung was forcing the children to say things to a camera which he would record and send to her and they found distressing, screenshots of the recordings are exhibited to her affidavit in the Hong Kong proceeding.

[42] At the same time, Ms. Tang makes it clear she did not want Mr. Kung to know where she and the children were living specifically. She deposes to staying with her parents for two months before moving to a local transition house because she was afraid Mr. Kung would follow them to Canada and "cause harm".

[43] Further, after she and the children moved into rental accommodation close to her parents' home in September 2019, she did not disclose their rental address to Mr. Kung, afraid he would show up. For this reason, she deposes she used her parents' address as her own on court documents in the Hong Kong proceeding and other paperwork. She denies her parents received any phone calls from Mr. Kung, but this is hearsay evidence. She also deposes that he never attempted to find her or the children in person by attending her parents' home, which he does not deny.

[44] In her third affidavit, Ms. Tang details her written communications with the children's schools in Hong Kong in early July 2019, attaching letters and emails to principals and other school officials she sent to advise that each child would not be enrolling for the coming school year and would be continuing their studies in Canada. In response to correspondence from Ms. Tang authorizing a family member to obtain Karissa's report card and school documents, a school social worker wrote that Mr. Kung had already requested the same documents and, given that both parents are guardians, the school had provided him and would provide her and him with certified copies. Mr. Kung says nothing about contacting or receiving information from the childrens' schools.

[45] In his second affidavit, Mr. Kung deposes to feeling so depressed after Ms. Tang and the children left that he could not work or go out to visit friends. In response to Ms. Tang's evidence that in October 2019, he packed up all of their belongings and put them in the back garden, Mr. Kung describes doing so because it was too painful to be reminded of their absence each day.

[46] Mr. Kung both generally denies and admits to other evidence of Ms. Tang that his Facebook posts show him vacationing in China in November and December 2019, and in Thailand in January and February 2020 screenshots of which are attached, for boxing training and a scuba diving holiday, stating he took the trips to relieve his sadness and pain. He also states that had he known Ms. Tang and the children were in Canada, he would have concentrated his travel plans on visiting here and not elsewhere.

[47] In her divorce petition filed on March 17, 2020, Ms. Tang seeks a divorce, sole custody of the children, spousal support, child support, division of property, and costs. Her petition specifies that she is residing at her parents' address in Burnaby, B.C., and she is not disclosing the children's address, which is a rented apartment, for safety reasons. She alleges that Mr. Kung physically and verbally abused her, starting around 2012, providing a number of particulars.

[48] That same day, she filed a notice of first appointment scheduled for June 1, 2020, in the Hong Kong District Court.

[49] On March 27, 2020, Mr. Kung filed an acknowledgment of service, written in Chinese, disputing the orders sought by Ms. Tang.

[50] On May 13, 2020, he filed a "bundle of documents" that includes a list of the orders and directions he is seeking, a concise statement of the apparent issues between the parties, and a chronology. The proposed orders and directions are entirely procedural. They include, for example, that the parties be directed to attend mediation and that he be required to file and serve an answer and cross-petition within seven days of the order made herein, and a direction that the first appointment be adjourned to a date to be fixed with both parties attending in person.

[51] Mr. Kung's list of apparent issues between the parties includes seven items. Regarding the children, he lists as item 3, custody of the children and claims by the petitioner, Ms. Tang, and at item 5, custody of and/or reasonable access to the children claimed by him as the respondent.

[52] His chronology of events includes nothing between October 2013 and March 2020.

[53] On May 13, 2020, through her counsel Ms. Tang wrote to the Registrar of the Hong Kong District Court asking for an order excusing her attendance in person on June 1, 2020. The letter set out that she was residing in Canada with the children and was not able to attend because she is solely responsible for them and cannot afford the time or expense of the 14-day quarantine required in Hong Kong. That

same day, Ms. Tang's counsel informed Mr. Kung's counsel of her request to be excused. A letter dated May 14, 2020, from Judge Lo's clerk advised that he had granted the order excusing her personal attendance.

[54] A few days later in a letter to Mr. Kung's counsel dated May 18, 2020, Ms. Tang's counsel requested interim maintenance starting June 1, 2020, enclosing a current monthly expense form. They responded on May 22, 2020. In addition to disputing the expense form, they alleged Ms. Tang had hidden the children's whereabouts, and contact number and requested that she return them to Hong Kong immediately. The letter further specified that unless she informed him or the court of the return exact date within seven days, Mr. Kung would "take all possible legal actions, including but not limited to seeking assistance from network judges appointed by the Chief Justice of Hong Kong", referring to Practice Direction SL7.

[55] In a letter dated May 29, 2020, Ms. Tang's counsel advised she would be applying to relocate with the children. Neither the reply letter nor the practice direction are included in Mr. Kung's evidence.

[56] Ms. Tang filed her bundle of documents the day before on May 28, 2020. Her proposed orders and directions document include both substantive interim relief and procedural orders. The interim relief includes interim custody of the children pending final determination and leave for the children to stay out of the jurisdiction until final order.

[57] Similarly, her statement of apparent issues specifies that she seeks custody of the children with reasonable access to Mr. Kung and leave for the children to permanently stay out of the jurisdiction of Hong Kong. Her chronology includes the key events relating to her departure with the children from Hong Kong, including informing the Hong Kong police that she and the children were safe in Canada between June 19 and 22, 2019.

[58] The first appointment hearing proceeded on June 1, 2020, before Judge Lo. As indicated, by consent Judge Lo granted Mr. Kung interim daily video access to

the children and also ordered the first appointment hearing and the children's appointment hearing adjourned to December 18, 2020, along with filing deadlines and the requirement to obtain a social investigation report and an international social investigation report.

[59] After the hearing on June 1, 2020, in his answer to Ms. Tang's petition, Mr. Kung denied her allegations of abuse and alleged that she has suffered from bipolar disorder since the birth of Karissa. Other than the divorce order, however, he did not, however, address the relief set out in her petition. To date, he has not filed a counterpetition.

[60] In his second affidavit, Mr. Kung deposes that he had planned to speak to Ms. Tang at the June 1, 2019 hearing and did not know she would not be attending. After he realized she would not be returning the children, he deposes to seeking legal advice from a Hong Kong lawyer, who advised him to apply in the Canadian court for the return of the children under the *Hague Convention*.

[61] Ms. Tang's summons seeking interim and final leave for the children to remain in Canada, filed in or about July 14, 2020, specified a hearing date of September 28, 2020 that is now adjourned to December 18, 2020. She deposes to being interviewing on three separate dates by a social worker as part of the social investigation report ordered by Judge Lo and providing the social worker with a copy of her relocation application. Judge Lo has since granted an order excusing Ms. Tang from attending the December 18 hearing in person.

Legal Framework

[62] The *Hague Convention* has the force of law in B.C. pursuant to s. 80 of the *Family Law Act*, S.B.C. 2011, c. 25. The objects of the *Hague Convention*, found in Article 1, are to secure the prompt return of children wrongfully removed or retained in any contracting state, and to ensure the rights of custody and of access under the law of one contracting state are effectively respected in the other contracting states.

[63] *Office of the Children's Lawyer v. Balev*, 2018 SCC 16, explains that prompt return serves three related purposes: one, it protects from the harmful effects of wrongful removal and retention; two, it deters parents from abducting the child in the hope they will be able to establish links in a new country that might ultimately award them custody; and three, it facilitates speedy adjudication on the merits of the custody dispute, in the forum of the child's habitual residence.

[64] In E. Pérez-Vera's, "Explanatory Report", in *Acts and Documents of the Fourteenth Session (1980)*, t. III, *Child Abduction (1981)*, she writes:

The *Convention* rests implicitly upon the principle that any debate on the merits of the question, *i.e.* of custody rights, should take place before the competent authorities in the State where the child had its habitual residence.

[65] An order for the return of a child under the *Hague Convention* is not an custody order (Article 19). Instead, it is an order that custody issues should be dealt with by the country of the child's habitual residence.

[66] Article 3 of the *Hague Convention* provides that the removal or retention of a child is considered wrongful if it is in breach of the rights of custody attributed to a person in the state where the child was habitually resident at the time of the removal or retention, so long as those rights were actually being exercised.

[67] Article 5 defines rights of custody broadly and inclusively. Rights of custody 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.

[68] Article 12 makes it mandatory to order the return of a child forthwith where they have been wrongfully removed or detained, and less than one year has elapsed from the date of the wrongful removal or retention to the date of the commencement of the proceeding.

[69] Exceptions to a mandatory return are set out in Articles 13 and 20. All of the exceptions in Article 13 are relied on in this case which reads:

Article 13

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State which opposes its return establishes that

- (a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention;
- (b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

Discussion

Credibility

[70] Given the conflict in the evidence with respect to a number of issues, it is necessary to assess as best I can the credibility and reliability of the parties' affidavit evidence.

[71] Ms. Tang urges me to find Mr. Kung's evidence not credible because he makes several statements that are contradicted by the "evidentiary record". She points to a number of examples including, most significantly, Mr. Kung's evidence that he was not sure whether the children were still in Hong Kong until the police told him they had left in or about November 19, 2019, which is undermined by her partially corroborated evidence regarding her undisputed communication with him on June 22, 2019 and with police on June 19 and 20, 2019. Further, she points to the letters and emails to the children's school in July 2019 advising them they would be continuing their studies in Canada in September 2019 including the message from a social worker at Karissa's school regarding contact with Mr. Kung. Hearsay if admitted for its truth, I consider the content of the social worker's message reliable

and necessary, and admissible, therefore, under the principled exception. However, the only inference I draw from this evidence is that in early July 2019, Mr. Kung contacted Karissa's school to request information and by then all of the schools had been notified the children would be continuing their studies in B.C.

[72] Based on my consideration of the evidence as a whole, I agree with Ms. Tang that much of Mr. Kung's disputed evidence is not credible. There are several reasons for my view, in addition to the inconsistencies between his evidence and objective or corroborated evidence.

[73] A significant flaw in my view is that Mr. Kung's evidence is often vague and or brief on key issues. His brief evidence regarding his attempts to contact Ms. Tang and to locate her and the children particularly in light of his police report and the serious allegations he makes about Ms. Tang's mental health is perhaps the most important example.

[74] Related to this I find Mr. Kung's assertion that he did not know that Ms. Tang and the children had left Hong Kong until November 2019, or where they had gone until she commenced the divorce proceeding, frankly unbelievable.

[75] To be clear, given the background evidence, Mr. Kung's vague and uncorroborated evidence and Ms. Tang's evidence, I am entirely satisfied he would have concluded early on that Ms. Tang and the children had departed Hong Kong for the Lower Mainland of BC. Not only had the parties discussed plans to move the children here temporarily in the past, all four and Ms. Tang are Canadian citizens, her parents and several extended family members reside here and the family spent some summers here visiting with Ms. Tang's family. Furthermore, each party deposes to the other proposing a move to B.C. in 2019.

[76] The day Ms. Tang and the children left, Mr. Kung reported them missing to police. The absence of any evidence of further communication with them until November 2019 makes little sense, given his allegations about Ms. Tang and the distress and worry he describes. Nor does he address Ms. Tang's message to him

on June 22, 2019, that she and the children had left Hong Kong. He also fails to particularize or corroborate attempts to reach Ms. Tang directly, phone calls to her parents, attempts to obtain information from her family members here and in Hong Kong, or any other efforts to find her and the children such as through the children's schools.

[77] The evidence of Mr. Kung's four holidays starting in November 2019 also affects my assessment of his evidence. Although a parent upset over the absence of their children might well vacation, a parent distraught over the disappearance of their children to parts unknown and at risk with a parent who is mentally ill would not.

[78] I conclude, therefore, that where the evidence of the parties' conflicts, I should accept Ms. Tang's, unless Mr. Kung's is confirmed by objective evidence.

Issues

[79] Turning now to the substantive issues, Ms. Tang does not dispute that Mr. Kung was exercising rights of custody when she removed the children from Hong Kong and brought them to B.C. without his knowledge or consent. Nor does she dispute that the removal was therefore wrongful.

[80] Instead Ms. Tang argues the *Hague Convention* should not be invoked, relying on *Hu v. Hu*, 2010 BCSC 1144. In similar circumstances, the Court of Appeal upheld the decision of the chambers judge dismissing the father's application for the return of the children to the United States under the *Hague Convention* in similar circumstances.

[81] The children's habitual residence was Washington State. The parties had agreed that Ms. Hu and the children would visit her parents in B.C. Shortly after she failed to return to Washington with the children, she started a divorce proceeding in Washington State. After the Washington court granted her interim custody and a restraining order against Mr. Wu prohibiting him from having contact with Ms. Hu or the children, he filed his application under the *Hague Convention*, as well as a motion in the divorce proceeding seeking an order that the children be returned to

Washington pending the trial. Ms. Hu was ordered to bring the children to Washington for interviews with the guardian *ad litem*, but the balance of Mr. Hu's application was dismissed.

[82] Recognizing that Ms. Hu may have "at one point in time" wrongfully retained the children in B.C., the chambers judge concluded this was no longer the case by the time of the hearing, given the orders of the Washington court, and a court's rights of custody as discussed in *Thomson v. Thomson*, [1994] 3 S.C.R. 551. At para. 35 and following, the chambers judge reasoned:

[35] To ignore the Washington orders, as Mr. Hu would like this Court to do, would effectively allow [him] to obtain indirectly what he was unsuccessful at obtaining directly. The issues of custody and access must be determined by the Washington court and according to Washington law. The Washington court does not suggest that Ms. Hu is wrongfully retaining the children in British Columbia. To the contrary: the Washington court expressly permits Ms. Hu and the children to remain in British Columbia.

[36] Article 12 must not be read in isolation from the remainder of the Articles in the *Convention*. Although one of the objects of the *Convention* is to secure the prompt return of children wrongfully retained, the remaining object of the *Convention* is to ensure that the rights of custody and of access under Washington law are effectively respected in British Columbia.

[83] Ms. Tang suggests the same reasoning applies in this case, emphasising that instead of seeking parenting orders in B.C., she initiated a proceeding in Hong Kong. Further, she not Mr. Kung, asked that court to determine the issues of custody and access, as well as relocation. Just like the Washington court in *Hu*, the Hong Kong court has been aware from the outset of the divorce proceeding that the children are residing in B.C. with Ms. Tang. She argues, rather than restrain her from doing so, the Hong Kong court has sanctioned their retention here, ordering daily video access for Mr. Kung and twice excusing her from attending hearing dates in person, including the upcoming hearing of her interim relocation application. In addition, rather than schedule an urgent hearing of interim application for relocation, on September 28, 2020, the court adjourned it to December 18, 2020.

[84] Arguably, all this points to an implicit acceptance by the Hong Kong District Court of the children's retention in B.C., but unlike in *Hu*, the court has yet to make orders about either interim custody or interim relocation.

[85] Although it is true that after wrongfully removing the children, Ms. Tang did not engage in forum shopping and I accept she has and will comply with any orders of the Hong Kong court, unlike Ms. Hu, she waited many months to commence the divorce proceeding all the while depriving him of the opportunity to exercise his rights to custody.

[86] Protecting against the harmful effects of wrongful removal and retention of children is one of the purposes of the *Hague Convention* recognized in *Balev*. Based on the facts of this case, and most significantly, absent an order interim custody, I am not prepared to conclude that an implicit acceptance by the Hong Kong District Court of the children's presence allows me to conclude they are not being wrongfully retained.

[87] I have determined this case is properly resolved on the basis of Ms. Tang's alternative argument that Mr. Kung acquiesced in them remaining in B.C., the Article 13(a) exception to the mandatory return required by Article 12.

[88] The exception was considered in *Katsigiannis v. Kottick-Katsigiannis*, [2001] O.J. No. 1598 (Ont. C.A.), where the Ontario Court of Appeal determined that both consent and acquiescence under Article 13(a) should be given their ordinary meaning, specifying:

... To "acquiesce" is to agree tacitly, silently or passively to something such as the children remaining in a jurisdiction which is not their habitual residence.

[89] The Court also reasoned that acquiescence involves, "subjective consent determined by words and conduct, including silence, which establishes the acceptance of, or acquiescence in, a child's removal or retention." But the left-behind parent's subjective intention will be disregarded if they have said or done something which is "clearly and unequivocally inconsistent with the children's summary

return"(paras. 41 and 48). To establish acquiescence then, the taking parent must show some conduct on the part of the left-behind parent that is inconsistent with the summary return of the children to their habitual residence. At the same time, *Katsigiannis* emphasized there must be clear and cogent evidence of unequivocal consent or acquiescence (at para. 49).

[90] *Ibrahim v. Girgis*, 2008 ONCA 23 and *Muense v. Muense*, 2020 MBQB 105, clarified that a delay in initiating a request for the return of a child, is evidence of acquiescence but in and of itself does not constitute acquiescence. This was the conclusion reached in *Muense* where Justice MacPhail found, based on a number of actions and inactions on the part of the left behind father, which included not filing his return application for eight months, he had acquiesced to the children's retention in Canada.

[91] My conclusion is much the same. Again, it was not until after the first appointment in the Hong Kong court on June 1, 2020, and three days short of one year from the children's removal from Hong Kong that Mr. Kung brought the return application. This is one circumstance among several. The others include: Mr. Kung was aware Ms. Tang and the children had left Hong Kong for BC, by the time he received Ms. Tang's message on June 22, 2019 advising him they had left Hong Kong, and likely further information from the police. However, he made very little effort to contact her or the children directly. If he made any phone calls to her parents and other family members, there were few and they were not persistent. Rather than taking concrete steps to pursue the children's return, he took several holidays starting in November 2019. After Ms. Tang commenced the Hong Kong proceeding, aside from a single letter requesting their immediate return and threatening prompt legal action, his lack of action persisted, although the petition provided him with formal notice of the children's presence in B.C. and the assistance of counsel. For example, Mr. Kung did not seek orders of custody or an order for the return of the children to B.C., nor did he mention their wrongful removal in his chronology. Although he refers to custody and access in another document, he has yet to bring a counterpetition. Further, while Mr. Kung suggests not having the

children's address was a barrier, it is not uncommon for left behind parents to initiate often return applications without that information. The role of the central authority is to organize attempts to locate and contact the taking parent within the jurisdiction.

[92] Taken together, Mr. Kung's actions and inactions clearly establish he acquiesced in the children remaining here. In other words, I am entirely satisfied that Ms. Tang has met her burden to establish his acquiescence.

[93] Notwithstanding this conclusion, I have the discretion to order the return of the children to Hong Kong. In the circumstances, I am not prepared to do so. As I have said, the question of the children's interim and final custody and relocation is properly and squarely before the Hong Kong District Court. The interim relocation application will be heard soon on December 18, 2020. Along with perhaps exposing the children and Ms. Tang to some risk of Covid-19 during a long international flight, ordering the children returned at this stage would be, more importantly, highly disruptive in the event her application is granted. Finally, there is also the Hong Kong court's implicit acceptance of the children's presence here.

[94] Mr. Kung's application for the return of the children to Hong Kong pursuant to the *Hague Convention* is therefore dismissed.

[95] [Discussion below edited.]

[96] Are there any questions, counsel?

[97] MS. STEIN: No questions, My Lady, although [indiscernible/teleconference] costs award.

[98] THE COURT: Right. I do not think we can deal with that today, given the time, but certainly Ms. Tang is entitled to costs.

[99] MS. STEIN: All right, thank you.

[100] THE COURT: Costs in these cases are essentially like special costs. I would suggest you and your friend discuss it, and if you cannot agree, then you have leave to appear back before me to deal with the issue of costs.

[101] ...

[102] MS. STEIN: Thank you.

[103] THE COURT: Thank you.

[104] MR. MAH: Thank you, My Lady.

[105] THE COURT: All right, thank you, Mr. Mah.

“Fleming J.”