

I Claim and Issues

This opinion advises Dan on his likelihood of defeating Tammy's claim that he wrongfully retained Chuck and Emma (the children) under the Care of Children Act 2004 (the Act).

There are two issues for Dan to argue on appeal:

- I. Whether the children were habitually residence of the United States (US) or New Zealand (NZ) at the date of alleged retention under s 105(1)(d)¹.
- II. Whether Chuck's views were given sufficient weight under s 106(1)(d);

II Habitual Residence

A Law

The question of habitual residence must be asked at the time of the alleged retention.² It is decided on the objective factual situation.³

The child's welfare and best interests are paramount.⁴ The courts endeavour to ensure the child's life is consistent, not to remove them from a familiar environment, or separate siblings.⁵ Habitual residence should be customary, constant or continual,⁶ and it is determined largely through a child's connection to the state.⁷ Habitual residence can be indicated by settled purpose, and an appreciable length of residence⁸ but can change even is a stay was originally intended to be of a limited duration.⁹

Parental intention is important but not decisive, it speaks to quality and intended length of the stay, and any intended state/child relationship.¹⁰ Cultural similarities between states will expedite assimilation.¹¹

B Evaluation

¹ Care of Children Act 2004.

² *P v Secretary of Justice* [2007] 1 NZLR 40 (CA) at [4]. (*P*)

³ At [29].

⁴ Care of Children Act 2004, s 4(1).

⁵ *SK v KP* [2005] 3 NZLR 590 (CA) at [65]. (*SK*)

⁶ At [43].

⁷ *Punter v Secretary of Justice as the New Zealand Central Authority* [2004] 2 NZLR 28 (CA) at [21]. (*Punter*)

⁸ At [23].

⁹ *P*, above n 2, at [59].

¹⁰ *SK*, above n 5, at [75].

¹¹ *P*, above n 2, at [203].

It is at the end of the year in NZ that Dan allegedly retained the children; therefore it is at this time habitual residence is assessed. Prior to their move, the children's only possible residence was in the US, thus the question is whether the children have lost residence in the US, and whether it has changed to NZ. The separations between the children's lives in the US and NZ, as well as their connections to each state, must be examined, as well as parental intention.

In *P*, the children's engagement with NZ and their Maori heritage signified a high degree of cultural assimilation, indicating that removal would be detrimental to their wellbeing.¹² Similarly, Dan states the children have a cultural heritage in NZ, and evidence of Chuck's involvement with sport and NZ culture, as well as forming friendships indicate Chuck's engagement. Likewise, after a year in a NZ school, it is equally likely Emma has formed substantial connections of her own. Although the children are not explicitly of Maori heritage, there is a cultural connection to NZ as part of their nationality. This engagement with their heritage is persuasive in arguing that NZ is their habitual residence.

Emma and Chuck spent their first six and ten years in the US. Both attended school, and had friends and their mother's family there. Chuck's school was eager for him to return, suggesting a good relationship between him and the school. However, Chuck is eleven. At this age, in both the US and NZ, transition occurs between elementary/primary school and middle/intermediate school respectively, meaning he would be attending a different school if he returned.¹³ This evidence is thus not persuasive. Chuck has stated he does not have frequent contact with friends in Boston, but does have established friendships in NZ. The children have largely left behind their connections to Boston and have formed new connections in NZ. It is therefore likely the NZ has become their new customary, and therefore habitual, residence.

Punter found Australia and NZ are very culturally similar, as both are English speaking, western nations with similar values and cultural attitudes.¹⁴ The US is also a western, English speaking nation, and would likely also be found to be culturally similar to NZ. Therefore, assimilation between the US and NZ can occur rapidly.¹⁵ Chuck does not often communicate with friends in Boston, and has made new friends in NZ, evidencing rapid assimilation. Additionally, he has become involved in sport and cultural activities. Chuck's expression of preference evidences a strong relationship between Chuck and NZ. There is little evidence of Emma's assimilation and her wishes do not express preference for either state. The courts are reluctant to separate siblings, due to Emma being younger and less emotionally developed than Chuck; it is likely the courts will find Chuck's habitual residence extends to Emma. A reluctance to separate siblings is a matter of policy, and it has been found that policy

¹² *P*, above n 2, at [194].

¹³ "Understanding the American Education System" (21 April 2015) Study in the USA <www.studyusa.com>.

¹⁴ *Punter*, above n 7, at [86].

¹⁵ *Basingstoke v Groot* [2007] NZFLR 363 (CA), at [10].

considerations cannot outweigh the inherently factual nature of the test.¹⁶ Regardless, there is no factual consideration sufficient to justify the children's separation. It is likely Chuck has assimilated into NZ, indicating a return to Boston would take him from a familiar environment to a largely unfamiliar one.

At the time the agreement to move was made, both parents intended to return to Boston after one year, indicating intent for habitual residence to remain in the US. Therefore the settled purpose of the trip was a limited stay abroad. However, during the year Dan's intention changed to wanting the children to remain in NZ, indicating conflicting parental purpose. One of the reasons for the move was to allow to children to connect with their heritage, this evidences both parent's intention for the children to form lasting cultural bonds with NZ. Therefore, to the extent that parental intention affected the child/state relationship, it is likely that both parents supported the children assimilating to some degree into NZ. Conversely, it is unlikely Tammy intended the children to become habitually resident in NZ, losing their habitual residency in the US. Nevertheless, the actions of both parents support a claim that parental intention, implicitly or otherwise, fostered a relationship between the children and NZ.

C Outcome

As Chuck has assimilated into NZ and largely lost contact with the US, it is likely that he, and through him Emma, has lost habitual residence in the US and has become habitually resident in NZ.

III Chuck's View

A Law

The views expressed by a child must be taken into account.¹⁷ There is a four part test to decide the appropriate weight to give an objection:

1. Does the child object to returning?
2. Has the child attained an age and degree of maturity at which it is appropriate to give weight to the child's views?
3. What weight should be given? and
4. How should residual statutory discretion be exercised?¹⁸

¹⁶ *P*, above n 2, at [177].

¹⁷ Care of Children Act 2004 s 6(2)(b).

¹⁸ *White v Northumberland* [2006] NZFLR 1105 (CA) at [44].

The courts also have significant discretion in reaching a decision on this issue.¹⁹ Possible influences on the child could reduce the reliability of an objection.²⁰

B Evaluation

Chuck's statements surrounding his preference for the NZ climate, and that he does not want to return as he has little contact with his friends in Boston but has developed a strong group of friends in NZ indicate Chuck does object to returning to Boston. His views are clearly expressed, and unequivocal, therefore they amount to an objection.

The issue of at what age a child is sufficiently mature for their objection to be given weight is subjective.²¹ In *White*, the child was eleven years old, and the child's views were afforded only some weight, due to his still relatively low level of maturity.²² Chuck is also eleven, and there is no evidence that Chuck, while intelligent as evidenced by his school's comments, is significantly more or less mature than the child in *White*. Therefore it is likely the court will afford Chuck's opinion only a moderate degree of influence.

The residual statutory discretion should therefore be exercised to find Chuck's views would support a finding that the children's habitual residence has become NZ, but are not significant enough to deny an order to return the children to the US if that is deemed to be their habitual residence.

W v N found that parental influence on a child could reduce the validity and weight given to an objection.²³ It is possible to question the validity of Chuck's statement that his return may spark a 'cultural identity crisis' when he grows up, due to the similarity between this quote and Dan's attempts to forward this argument. There is a strong likelihood that Chuck's perspective on this issue has been strongly influenced by his father, as the forethought and nuance needed to perceive issues of identity crisis would be unknown to all but the most exceptional eleven year olds. Nevertheless, given the more age appropriate objections relating to friends and extra-curricular activities, potential influence over the cultural heritage objection likely invalidates only a small aspect of Chuck's objection.

Emma does not express a preference for either NZ or the US, and due to her younger age, her comments would likely be given significantly less weight. Therefore the courts would likely utilise their discretion to render Emma's comments largely inconsequential.

¹⁹ At [47].

²⁰ *W v N* [2006] NZFLR 793 (HC), at [34].

²¹ *Clarke v Carson* [1996] 1 NZLR 349 (HC), at 354.

²² *White v Northumberland*, above n 18, at [43].

²³ *W v N*, above n 20, at [34].

C Outcome

Chuck's objection will support a finding of habitual residence in NZ. However, due to Chuck's age, his objection has only moderate weighting, and therefore will not be a critically decisive issue.

III Overall Outcome

As habitual residence has likely been lost in the US and gained in NZ, and Chuck's statement supports this decision, it is likely the High Court will overturn the Family Court's decision and Dan's claim will succeed.