

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

IN THE MATTER of the Care of Children Act 2004

BETWEEN **DAN**
 Appellant

AND **TAMMY**
 Respondent

**SYNOPSIS OF SUBMISSIONS OF COUNSEL
FOR THE APPELLANT
ON ISSUE TWO**

Dated this 30th day of July 2015

Counsel Instructed:

John Doe

John.doe@gmail.com

MAY IT PLEASE THE COURT, THE APPELLANT BY HIS COUNSEL SUBMITS:

1 Issue

- 1.1 The issue is whether Judge Brown was wrong in his treatment of Chuck's objection to returning to Boston pursuant to s 106(1)(d) of the Care of Children Act 2004 (the Act).
- 1.2 The sub-issue is whether Judge Brown correctly applied the four part test of *White v Northumberland*, namely;
 1. Whether the Chuck objects to returning;
 2. Whether the Chuck attained an age and degree of maturity at which it is appropriate to give weight to his views;
 3. What weight should be given to Chuck's objection, and;
 4. How should the residual judicial discretion be exercised?¹

2 Facts

- 2.1 The facts are as stated in the statement of agreed facts.

3 Counsel submits the following in support of the Appellant:

3.1 Chuck's Objection

- 3.1.1 *Bruno v Bruno* defines objection as being a 'strong, clear preference'.² Judge Boshier stated the objection must be more than an indication of preference between two alternatives; 'a mere wish may fall short'.³
- 3.1.2 Chuck is clear that he likes New Zealand, and refers to his engagement with school, the formation of strong new friendships, and a preference for the New Zealand climate. He also indicated a wish to engage with his New Zealand cultural heritage.
- 3.1.3 Counsel submits these factors culminate into a clear objection to returning to Boston, satisfying this element.

3.2 Age and Maturity

¹ *White v Northumberland* [2006] NZFLR 1105 (CA) at [44].

² *Bruno v Bruno* FAM-2006-088-613, 22 April 2013 at [25].

³ *Bayer v Bayer* [2012] NZFLR 567 (FC) at 63.

- 3.2.1 *Clarke v Carson* indicates that the age of 11 is sufficient for an objection to be given some weight, the specific weighting is dependent on the individual maturity of the child.⁴
- 3.2.2 Chuck's school in Boston indicated he is highly intelligent and a good student, indicating a high level of maturity.

3.3 Weighting of the Objection

- 3.3.1 Judge Binns found that maturity is a subjective concept, and that 'there is no hard and fast rule that the objection of a child will be determinative when it reaches a particular age or stage of maturity'.⁵
- 3.3.2 Children under the age of 10 have little weight given to their objections, as it is deemed likely they are saying what they believe the adults around them wish to hear.⁶
- 3.3.3 Children of around 11 years of age have a moderate to high level of weight attached to their objections.⁷
- 3.3.4 In Chuck's case, Counsel submits that his objections should be weighted at the higher end of the spectrum.
- 3.3.5 Chuck's capacity to conceptualise his future, such as realising his relationships with his friends in Boston have diminished over the year he lived in New Zealand, in addition to his strong relationships with his friends made over that year, evidence an ability to perceive life holistically, which evidences high maturity for his age.
- 3.3.6 Chuck's high intelligence and maturity indicate he is capable of making an informed decision as to his preferred country of residence, and that his decision should be seriously considered.
- 3.3.7 Counsel therefore submits that Chuck's objection should carry a moderate to high amount of weight.

3.4 Residual Judicial Discretion

- 3.4.1 It is an accepted element of the law on children's objection that the final decision as to the determinativeness of an objection is at the Court's discretion.⁸

⁴ *Clarke v Carson* [1996] 1 NZLR 349 (HC) at 354.

⁵ *Bruno v Bruno*, above n 2, at [28].

⁶ *TB v JPB [Child abduction]* [2012] NZFLR 97 (HC) at [65].

⁷ *Clarke v Carson*, above n 4, at 354; *Coates v Bowden* CIV 2006-404-7028, 30 May 2007 at [99] and; *M v M* [2012] NZFLR 429 (HC) at [44].

⁸ *White v Northumberland*, above n 1, at [44].

- 3.4.2 The Court takes into account an unwillingness to separate siblings, potential parental persuasion, or parental influence affecting a child's judgment, and other 'general welfare' arguments.⁹
- 3.4.3 Historically, the courts utilised this discretion to include factors such as a judge's feelings from an interview with the child, perceived, or evidence of abuse.¹⁰
- 3.4.4 The discretion has also been used to view an objection in conjunction with a parent's claim of habitual residence.¹¹
- 3.4.5 There is no evidence of abuse, nor any evidence that either parent is unfit in this case.
- 3.4.6 Emma has expressed no objection to either returning to Boston or remaining in New Zealand. Therefore Counsel submits that the Court should exercise its discretion such as to ensure the two children remain together in New Zealand.
- 3.4.7 Chuck's objection supports a finding that Chuck is habitually resident in New Zealand.
- 3.4.8 If the Court finds Chuck is not habitually resident in New Zealand, Counsel submits that Chuck's objection should be given sufficient weight as to indicate that he has formed a lasting and substantial connection to New Zealand, and that his connection to Boston has diminished significantly. Therefore the Court should exercise its discretion in deciding that Chuck's objection is sufficiently significant as to find that it is in Chuck and Emma's best interest to remain in New Zealand with their father.

4 Conclusion

- 4.1 Counsel for the appellant respectfully submits that Chuck's objection should be found to be sufficiently weighted for the Court to rule that he and his sister should remain in New Zealand.

⁹ At [55].

¹⁰ *W v N [Child Abduction]* [2006] NZFLR 793 (HC) at [52].

¹¹ *Coates v Bowden*, above n 7, at [93].

List of Authorities for the Appellant

Bayer v Bayer [2012] NZFLR 567 (FC).

Bruno v Bruno FAM-2006-088-613, 22 April 2013.

Clarke v Carson [1996] 1 NZLR 349 (HC).

Coates v Bowden CIV 2006-404-7028, 30 May 2007.

M v M [2012] NZFLR 429 (HC).

TB v JPB [Child abduction] [2012] NZFLR 97 (HC).

W v N [Child Abduction] [2006] NZFLR 793 (HC).

White v Northumberland [2006] NZFLR 1105 (CA).