HIGH COURT OF AUSTRALIA

KIEFEL, BELL, KEANE, NETTLE AND GORDON JJ

BONDELMONTE APPELLANT

AND

BONDELMONTE & ANOR RESPONDENTS

Bondelmonte v Bondelmonte
[2017] HCA 8
Date of Order: 13 December 2016
Date of Publication of Reasons: 1 March 2017
S247/2016

ORDER

1. *The appeal be dismissed.*

2. *The appellant pay the second respondent's costs of this appeal.*

On appeal from the Family Court of Australia

Representation

B W Walker SC with R M Schonell SC and S J Williams for the appellant (instructed by Karras Partners Lawyers)

Submitting appearance for the first respondent

D F Jackson QC with S M Christie for the second respondent (instructed by Legal Aid NSW)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Bondelmonte v Bondelmonte

Family law – *Family Law Act* 1975 (Cth) – Parenting orders – Where children taken overseas by father – Where children stayed with father overseas in breach of parenting orders – Where mother applied for order for return of children – Where children expressed preference to stay with father overseas – Where primary judge made interim orders for return of children to Australia and for living arrangements upon return – Whether erroneous to discount weight given to views expressed by children – Whether father's breach of parenting orders relevant to children's best interests – Whether necessary to ascertain children's views as to living arrangements – Whether parenting orders could be made in favour of strangers to proceedings.

Words and phrases – "best interests of the child", "judicial discretion", "parenting orders", "views expressed by the child".

Family Law Act 1975 (Cth), ss 60CA, 60CC, 60CD, 60CE, 64C, 65C, 65D, 68L, 68LA.

1 KIEFEL, BELL, KEANE, NETTLE AND GORDON JJ. The appellant and first respondent in this appeal are respectively the father and mother of three children. The second respondent is the Independent Children's Lawyer ("the ICL") who was appointed by the Federal Circuit Court of Australia to represent the three children in proceedings in the Family Court of Australia with respect to parenting orders. On the hearing of this appeal, the mother did not participate in the proceedings. Submissions in response to those of the father were made by the ICL.

2 This appeal concerns orders made for the return of the two eldest children to Australia from New York, where they remained after the conclusion of a holiday with the father, in breach of a parenting order which had been made by the Family Court of Australia; and it concerns interim orders made for the living arrangements of these children on their return to Australia.

3 At the conclusion of the hearing of this appeal the Court made orders dismissing the appeal, with costs. These are our reasons for making those orders.

Background

4 The two eldest children are boys who were aged nearly 17 and nearly 15 at the time the interim orders in question were made by Watts J, on 8 March 2016. The third child is a daughter who was nearly 12 years of age at that time.

5 The mother and father of the children separated in 2010. Parenting orders, made with the agreement of the mother and father on 25 June 2014 ("the 2014 parenting orders"), provided that they were to have equal shared parental responsibility for their children. It was further ordered:

> "2. That the children live with the husband and the wife as agreed between the parties or at the children's own election.
>
> 3. That pursuant to section 65Y(2)(b) of the *Family Law Act 1975* the parties shall be permitted to take the children out of the Commonwealth of Australia for the purposes of a holiday provided that the parent travelling overseas with the children provides to the other parent not less than 14 days prior to their departure the following documents and information …"

6 It was common ground in the Full Court of the Family Court that order 2 did not permit a child to decide, independently of his or her parents, whether or not the child would live in Australia or abroad.

Kiefel J
Bell J
Keane J
Nettle J
Gordon J

7 After the 2014 parenting orders were made the ICL was appointed. On 2 November 2015, orders were also made for the parents and the children to participate in a Child Responsive Program and the parents were ordered to attend an interview with a family consultant in January 2016 ("the 2015 orders"). As a result of the actions of the father in January 2016, that process was not completed and the boys were not interviewed. The family consultant was not therefore in a position to report to the Family Court as to their views.

8 In January 2016, despite the father not providing the period of notice required by order 3 of the 2014 parenting orders, and under some pressure from him, the mother reluctantly agreed to allow the two boys to travel to New York for a holiday with the father. The girl was not included in the holiday.

9 The boys were flown by the father, business and first class, to New York on 14 January 2016. By 25 January 2016 the father had decided that it would be in his financial interests to remain in the United States rather than to return to Australia. On 29 January 2016 his solicitor informed the mother's solicitor that the father had decided to live indefinitely in the United States and that the boys would remain with him.

10 The mother filed an application to secure the return of the boys, in addition to proceedings brought in the United States under the Hague Convention[1] (which did not apply to the elder boy because of his age). The father did not seek any changes to the 2014 parenting orders and sought only to resist the mother's application.

11 The evidence of the father at the hearing of the application was that the boys had each expressed a desire to remain living with him in New York. If the primary judge decided that they should return to Australia, it was necessary for him to consider where the boys were to live on their return. This question was complicated by a number of factors. The father did not say whether he would return to Australia in the event that orders were made for the boys' return. It was therefore not known whether the boys could live with him in the interim. The elder boy had been living with his father for some time after his parents' separation and was effectively estranged from the mother, although she had attempted to maintain contact with him. The younger boy was living with the father, although he divided his time between the mother and father; and the

---

1 The Hague Convention on the Civil Aspects of International Child Abduction (1980).

daughter remained living with the mother but spent weekends with the father. The evidence was unclear as to the amount of time that the two youngest children were spending with each parent.

12 Accepting that one or both of the boys might elect not to live with her, the mother advised the Family Court that she would not oppose the boys living with the father's mother, a course which the ICL appears to have considered acceptable.

13 The matter could not be resolved on the first hearing date and was adjourned. Counsel for the father then filed further evidence of conversations with the father's mother, to the effect that, due to her frailty, she was unable to care for the boys. The father made no submissions as to alternative possible living arrangements for the boys.

14 Two further options were considered by the primary judge to meet the contingency that the father did not return to Australia and the boys chose not to live with the mother. They were reflected in the orders made by his Honour.

15 In addition to ordering the return of the boys to Australia, his Honour ordered that, in the event that the father returned to Australia with the boys, they could continue to live with him. In the event that the father did not return, the boys were to live with the mother if they chose to do so, or they could live in accommodation provided by the father together with paid supervision services, to which the mother consented in writing (order 9.1). Alternatively each of the boys could live separately with the mothers of respective friends of theirs (order 9.2). Collectively, these orders are referred to in these reasons as "the interim parenting orders". The boys' mother had obtained undertakings by the respective mothers, who each agreed to accommodate a boy.

16 His Honour suspended orders 2 and 3 of the 2014 parenting orders and gave the parties liberty to apply in respect of the implementation of the interim parenting orders.

Statutory provisions

17 Section 65D, which is in Pt VII of the *Family Law Act* 1975 (Cth) ("the Family Law Act"), provides that the court may make such parenting order as it thinks proper. By s 64C a parenting order may be made in favour of a parent of the child "or some other person".

Kiefel J
Bell J
Keane J
Nettle J
Gordon J

18 Section 60CA provides that:

> "In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration."

No issue was raised on this appeal about whether the interim parenting orders made by the primary judge are "parenting orders" within the meaning of the Family Law Act[2].

19 Section 60CC(1) requires the court to consider the matters set out in sub-ss (2) and (3), in determining what is in the child's best interests. Section 60CC(2) relevantly provides, in par (a), that a primary consideration is "the benefit to the child of having a meaningful relationship with both of the child's parents". Section 60CC(3) provides for "[a]dditional considerations". They include, relevantly:

> "(a) any views expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's views".

By s 60CD(2) the court may "inform itself of views expressed by a child" by a number of means, including by a report given to the court by a family consultant under s 62G(2) or, subject to applicable Rules of Court, "by such other means as the court thinks appropriate". However, s 60CE provides that nothing in Pt VII permits the court or any person to require a child to express his or her views in relation to any matter.

20 Other additional considerations to be taken into account under s 60CC(3) include the nature of the relationship of the child with each of the parents (sub-s (3)(b)(i)); the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from his or her parents and any other child with whom he or she has been living (sub-s (3)(d)(i) and (ii)); and whether the practical difficulty and expense of spending time with a parent will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis (sub-s (3)(e)).

21 It is a stated principle underlying the objects of Pt VII that children have the right to know and to be cared for by both parents and a right to spend time

---

2 *Family Law Act* 1975 (Cth), s 64B(1).

with both parents on a regular basis (s 60B(2)(a) and (b)). The objects of the Part are to ensure the best interests of children are met by reference to certain criteria, which include ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children (s 60B(1)(d)).

The decision of the primary judge

22 In determining whether to order that the boys be returned to Australia, the primary judge accepted[3] the evidence of the father as to the views which had been expressed by the boys, that they wished to continue to live with him in New York. His Honour also had regard to[4] evidence of text messages from the younger boy to his mother, to the same effect. His Honour inferred[5] from them that "even if the father did not have a direct hand in the authorship of them, there have been extensive conversations between he and [the son] about the father's desire that he be able to relocate with the boys to America". His Honour considered[6] that the actions of the father "have significantly prejudiced and almost certainly coloured any statements the boys may make whilst they are in New York".

23 Senior counsel for the father suggested to his Honour that a "wishes report" be obtained from an expert in the United States in relation to the current views of the boys. His Honour doubted the utility of any report as to the boys' views whilst they were living under the influence of the father in New York[7]. His Honour said[8] he would not expect the boys' views to be any different if expressed to a report writer in New York, but that "[t]he weight that I place upon those expressed views are weakened by the circumstances which have been contrived by the father".

---

3 *Bondelmonte v Bondelmonte* [2016] FamCA 138 at [32].

4 *Bondelmonte v Bondelmonte* [2016] FamCA 138 at [22].

5 *Bondelmonte v Bondelmonte* [2016] FamCA 138 at [24].

6 *Bondelmonte v Bondelmonte* [2016] FamCA 138 at [31].

7 *Bondelmonte v Bondelmonte* [2016] FamCA 138 at [27]-[29].

8 *Bondelmonte v Bondelmonte* [2016] FamCA 138 at [32].

Kiefel J
Bell J
Keane J
Nettle J
Gordon J

24 His Honour also had regard to[9] the evidence from the mother that the daughter had become increasingly upset and was repeatedly asking "[w]hen are the boys coming back?". He observed[10] that, in his text messages, the younger boy appeared to have "dismissed the roots that he had in Australia and his friends at school and other connections that he has left behind in a quite blasé manner. He does not mention his sister's relationship with him."

25 In considering the best interests of the children, his Honour said[11] that not only are the boys' expressed views to be taken into account, but account must be taken of the "relationships that each of the children have with each of their parents and with each other". His Honour considered[12] that a family report, prepared in Australia, would look not just at the boys' views but at the dynamics of those relationships and in particular the future of the relationship between the daughter and her father and the younger son and his mother. His Honour expressed[13] the view that the father had "significantly jeopardised both of those relationships because of what he has done".

26 The primary judge then turned to consider the boys' living arrangements upon their return to Australia and in particular the mother's proposal that they live separately with the families of their respective friends. As to the elder son, his Honour observed[14] that he had been good friends with the friend in question since they were about two years of age. As to the younger son, his Honour noted that the friend in question was the same age as him and they had a longstanding friendship. The father does not dispute these facts.

27 His Honour noted[15] that both the ICL and the father's counsel had pointed out that these were not ideal arrangements because the boys would be separated,

---

9 *Bondelmonte v Bondelmonte* [2016] FamCA 138 at [26].

10 *Bondelmonte v Bondelmonte* [2016] FamCA 138 at [30].

11 *Bondelmonte v Bondelmonte* [2016] FamCA 138 at [33].

12 *Bondelmonte v Bondelmonte* [2016] FamCA 138 at [34].

13 *Bondelmonte v Bondelmonte* [2016] FamCA 138 at [34].

14 *Bondelmonte v Bondelmonte* [2016] FamCA 138 at [58].

15 *Bondelmonte v Bondelmonte* [2016] FamCA 138 at [59].

but said that each was a "possible temporary arrangement" pending a determination by the Court as to whether the boys should be permitted to relocate internationally. In any event, his Honour said[16] "[b]ut it may not come to that", given that "the father is a man of significant means" and "has the ability to provide independent accommodation ... and provide for paid supervision services". The father does not challenge these findings.

28 A majority of the Full Court of the Family Court (Ryan and Aldridge JJ, Le Poer Trench J dissenting) dismissed the father's appeal[17].

The issues

29 The principal contention of the father is that before the primary judge made the orders in question, his Honour was required to give "proper, genuine and realistic consideration"[18] to the views of the boys in relation to the interim parenting orders. It is contended that his Honour was wrong to discount the boys' views about remaining in New York because his Honour formed an adverse view of the father's actions. It is further contended that his Honour was required to put in train a process by which the boys' views as to each of the alternative living arrangements, and in particular their possible accommodation with other families, could be ascertained. Such enquiries were necessary to a determination of their best interests and were mandated by s 60CC of the Family Law Act.

30 The other contention is that the parenting orders could not be made in favour of strangers to the proceedings who had not made an application for those orders themselves.

A judicial discretion

31 The submissions of the father implicitly accept, as they should, that the question for the Full Court of the Family Court was whether the father had identified an error in the reasoning of the primary judge of the kind referred to in *House v The King*[19]. It is only an error of this kind which will permit an

---

16 *Bondelmonte v Bondelmonte* [2016] FamCA 138 at [60].

17 *Bondelmonte v Bondelmonte* (2016) 55 Fam LR 65.

18 *Khan v Minister for Immigration and Ethnic Affairs* unreported, Federal Court of Australia, 11 December 1987 at 11 per Gummow J.

19 (1936) 55 CLR 499 at 504-505; [1936] HCA 40.

Kiefel J
Bell J
Keane J
Nettle J
Gordon J

appellate court to interfere with parenting orders made by a primary judge under s 65D of the Family Law Act. It is well recognised that orders made in the exercise of a judicial discretion under the Family Law Act, including orders as to the alteration of property interests[20], orders as to custody[21] and parenting orders[22], can be set aside only on a strictly limited basis, in accordance with *House v The King*[23].

32 A parenting order made under s 65D involves the exercise of a judicial discretion because it is made by reference to a paramount consideration of a general kind, the best interests of the child, which involves an overall assessment of a number of other considerations, either statutorily prescribed or considered by the court to be relevant[24]. The primary considerations in s 60CC(2) are matters to be borne in mind as consistent with the objects of Pt VII. The additional considerations in s 60CC(3) require assessments of the matters there listed by reference to the circumstances of the case. They involve value judgments in respect of which there may be room for reasonable differences of opinion[25], as does the overall assessment of what is in the best interests of the child.

33 Of the examples of error given in *House v The King*[26], two are relied upon by the father with respect to his principal contention: failure to take into account a material consideration; and taking into account an irrelevant consideration. Whether the primary judge made errors of this kind must be determined by reference to the requirements of Pt VII of the Family Law Act. The other contention involves other provisions of Pt VII, namely s 65C(c) and s 64C.

---

20 *Norbis v Norbis* (1986) 161 CLR 513 at 517-518, 534-535; [1986] HCA 17; *Mallet v Mallet* (1984) 156 CLR 605 at 610, 621-622, 634; [1984] HCA 21.

21 *Gronow v Gronow* (1979) 144 CLR 513 at 534; [1979] HCA 63.

22 *CDJ v VAJ* (1998) 197 CLR 172 at 182 [40]; [1998] HCA 67.

23 (1936) 55 CLR 499 at 504-505.

24 *Family Law Act* 1975 (Cth), s 60CC(3)(m).

25 *Norbis v Norbis* (1986) 161 CLR 513 at 518.

26 (1936) 55 CLR 499 at 504-505.

Error?

34 The focus placed by the father upon the prescribed consideration stated in s 60CC(3)(a) tended to elevate the views expressed by a child to something approaching a decisive status. In some cases, it may be right, in the exercise of a primary judge's discretion, to accord the views expressed by a child such weight, but s 60CC(3)(a) does not require that course to be taken. They are but one consideration of a number to be taken into account in the overall assessment of a child's best interests.

35 The terms of s 60CC(3)(a) itself may be taken to recognise that, whilst a child's views ought to be given proper consideration, their importance in a given case may depend upon factors such as the child's age or maturity and level of understanding of what is involved in the choice they have expressed. Children may not, for example, appreciate the long term implications of separation from one parent or the child's siblings. Section 60CC requires that attention be given by the court to these matters.

36 It is not suggested by the father that the primary judge failed to consider the boys' views as to their return to Australia; nor could it be. His Honour accepted that they had expressed a desire to remain in New York, but considered that there were other matters about which the boys did not appear to have given any thought. Principal amongst them was the effect of their separation from their mother and their sister. The Court was also required to consider the maintenance of the relationship between the father and the daughter. His Honour considered that these matters were best dealt with through the intervention of the family consultant, via the mechanism which had already been established by the 2015 orders. The completion of that process meant that the boys should return to Australia.

37 The primary judge declined to have a "wishes report" undertaken in New York, at the father's request, because his Honour doubted its utility. His Honour was clearly of the view that in conversations that the father had had with the boys and in the lifestyle he was offering them, he was exerting an influence on the boys' choices. It was in that sense that his Honour considered that the views expressed by the boys had been "contrived" by the father[27].

---

27 *Bondelmonte v Bondelmonte* [2016] FamCA 138 at [32].

Kiefel J
Bell J
Keane J
Nettle J
Gordon J

38 The argument advanced for the father seeks to rely upon this, and other adverse comments made by the primary judge about the father, as necessarily detracting from a proper consideration of the boys' views. The opinion held by his Honour as to the father's actions, it is submitted, was irrelevant to the consideration mandated by s 60CC(3)(a) of the boys' views and the paramount consideration of what was in the boys' best interests. In this regard the father adopts what had been said by the dissenting judge in the Full Court[28], namely that the primary judge was required to look past the father's behaviour in order to determine what was in the best interests of the boys.

39 It would have been remarkable if the primary judge had not commented upon the father's conduct. It involved a breach of the 2014 parenting orders and it had the potential to undermine the possible relationships that family members might have in the future, a matter to which the processes put in place by the 2015 orders had been directed. Furthermore, the father's flagrant disregard of the parenting orders was a matter relevant to the child's best interests under s 60CC(3)(i). It evinced an attitude towards the responsibilities of parenthood that, if left unchecked, would likely send a poor message to boys who, on the evidence, were highly impressionable.

40 It is correct to say that the primary judge gave less weight to the preferences the boys had expressed to remain in New York, but his Honour cannot be said to have been motivated to do so by reason of the father's actions. Had that been the case, his Honour would have been taking into account an irrelevant consideration, but that was not his approach. The primary judge's approach provides no basis for a conclusion that he failed to take into account the boys' wishes, a consideration made relevant and therefore necessary by s 60CC(3)(a).

41 Section 60CC(3)(a) requires that the court take into account not only the views expressed by the child, but also "any factors … that the court thinks are relevant to the weight it should give to the child's views". The factors that the provision gives as relevant are the child's maturity or level of understanding, but plainly the court may consider other matters to be relevant. The factor that the primary judge identified as relevant was the extent to which the boys' views had been influenced by the father, clearly a matter going to the weight to be given to their stated preferences.

---

28 *Bondelmonte v Bondelmonte* (2016) 55 Fam LR 65 at 91 [153].

42 The father's other argument concerning the necessary consideration to be given to the boys' views appears to be that s 60CC(3)(a), when read with ss 60CA and 60CD, obliged the primary judge to seek the views of the boys as to the living arrangements which might be the subject of the interim parenting orders on their return to Australia. It is submitted that a dispositive parenting order cannot be made before the views of the child are known concerning the particular parenting order.

43 Section 60CC(3)(a), whether or not read in conjunction with the other provisions in Pt VII, neither expressly nor impliedly requires the court to seek the views of a child. It requires that the views which have been "expressed" by a child be considered. The term "consider" imports an obligation to give proper, genuine and realistic consideration[29] but this cannot affect or alter the terms of the provision so as to require a child's views to be ascertained.

44 Section 60CD(2) provides a mechanism by which the court may inform itself of the views expressed by a child, but it does not do so in terms which would oblige the court to do so in every case. It certainly would not oblige the court to do so in the case of interim, temporary arrangements and in respect of each aspect of a parenting order affecting a child.

45 The difficulties which faced the primary judge in determining appropriate orders for the accommodation of the boys have been referred to earlier in these reasons. The difficulties arose because the father chose not to advise the Court whether he would return to Australia and provide that accommodation or whether he would pay for supervised accommodation. The choices then left to the Court were extremely limited. Neither the father nor the ICL suggested alternative arrangements to the third alternative, where the boys were to reside separately with other families. The orders were, however, interim orders and the arrangements temporary.

46 It is not to be overlooked that the primary judge was dealing with an application of some urgency concerning the return of the boys to Australia, not the least because the boys had been due to return to their schooling in Australia. The processes which had been put in train by the 2015 orders needed to be completed and to deal with the additional problems created by the father. A report from the family consultant would be important for the purposes of future,

---

29 *Khan v Minister for Immigration and Ethnic Affairs* unreported, Federal Court of Australia, 11 December 1987 at 11 per Gummow J.

more permanent, parenting orders. In these circumstances it could hardly be said that it was necessary to seek the views of the boys on every aspect of the interim orders affecting them, which, in any event, were hardly likely to assist the Court. However, the point to be made is not just a practical one. It is that the ascertainment of the boys' views on these matters was not statutorily mandated.

47 The fact that, at the hearing before the primary judge, the ICL expressed dissatisfaction with the third alternative living arrangement does not advance the father's case for error. Under s 68L(2)(a) of the Family Law Act, a child's interests may be represented by an ICL. That person has the general duties set out in s 68LA(2), but as s 68LA(4) makes plain, the ICL is not the child's legal representative, and is not by that provision obliged to act on the child's instructions. It would follow that they need not be sought. It is clear that the ICL appreciated the difficulty of the situation given the proposed imminent return of the boys to Australia, a step which, inferentially, the ICL may be taken to have supported. The ICL did not suggest that the boys' views would assist. In any event, it is evident from the submissions made on this appeal that the position of the ICL has changed.

48 The primary judge did take steps to ascertain the boys' views on all topics, by leaving in place the 2015 orders concerning the family consultant, who might ascertain them after the boys' return to Australia.

Parenting orders – "any other person"

49 The other contention raised by the father is that the Family Court could not make the parenting order 9.2 in favour of strangers to the proceedings where they had not made an application and where there was no evidentiary basis to establish that they came within the list of possible applicants in s 65C.

50 The ICL's response to this contention is that s 65C(c) refers to a person's standing to bring an application for parenting orders. The persons referred to in order 9.2 were not applicants for parenting orders. They were persons in whose favour such orders were made on the application of the mother. Section 64C provides that a parenting order may be made in favour of a parent of the child "or some other person". Those submissions should be accepted.

51 The father submits, apparently in the alternative, that regardless of the eligibility of the persons referred to in order 9.2 to be included in parenting orders, there was simply not enough known about those persons to justify the making of that parenting order. That contention should be rejected. Far from being strangers to the Family Court, the Court had information that the persons

were mothers of longstanding friends of the boys; the Court had undertakings from the mothers to offer "nurturing and care" and to implement arrangements for monitoring homework and transport to and from school respectively; and the Court was aware of the proposed sleeping arrangements of the boys. It may be that more information would be desirable before making a long term parenting order in favour of such third parties. But, as has been emphasised, the present case concerned the making of interim orders in circumstances of some urgency. Plainly, in those circumstances, there was sufficient evidence to ground the making of order 9.2.