

Children's wishes

Martha Barnett reports on *Bondelmonte v Bondelmonte* [2017] HCA 8

This case arose out of what is known as an international parental child abduction of two teenage boys who had been living in Australia but who were taken to the United States of America by their father. The High Court of Australia dismissed a challenge by the father to an interim parenting order made by Watts J which required the return of the two boys, aged nearly 17 and 15 at the time of the interim hearing, from New York to Sydney pursuant to the *Family Law Act 1975* (Cth) ('Act').

Factual background

The mother and father of three children, two boys and a younger girl, had agreed to interim parenting orders on 25 June 2014 which provided, *inter alia*, that the parents would have equal shared parental responsibility and that the children would live with the parents as agreed between the parties or at the children's own election. The orders also provided for each of the parents to be able to take the children overseas for holidays so long as particular conditions were met.

Orders had been made on 2 November 2016 for the progression of the parenting dispute including for the children to participate in a Child Responsive Program, which required the children to attend upon a family consultant for interview for the provision of a family report.

In January 2016 the father took the boys overseas where they remained as at the date of the interim hearing, 8 March 2016, in breach of the June 2014 Orders.

The mother sought the return of the children, whereas the father resisted the application.

The proceedings below

Justice Watts of the Family Court made interim orders to the effect that notwithstanding that the boys had indicated they wished to remain overseas with the father, the boys should return and in the event the father returned with them, the boys would live with him. The interim orders further provided that in the alternative and in the event the father did not return, the boys could elect to live with the mother, or in accommodation provided by the father with appropriate supervision services, or to live with the mothers of two close friends of the boys ('the fourth option').

His Honour was minded to make the interim orders because his Honour considered that the actions of the father had impacted the views of the boys and therefore placed lesser weight upon those views. His Honour was troubled that the stated wishes of the boys did not appear to consider their connection to their sister, their mother, their friends and school in Australia. Justice Watts determined that a family report in Australia would be able to look at all these factors and that a 'wishes report' conducted

overseas would have little utility as the boys were under the influence of their father.

The majority of Full Court of the Family Court of Australia (Ryan and Aldridge JJ) upheld the determination of Watts J. Justice Le Poer Trench dissented and determined that the first instance decision was erroneous due to a lack of evidence regarding the views of the children and the lack of particulars of the living arrangements in the fourth option in the event the father elected not to return with the boys.¹

The High Court's decision

The father's challenge to the Family Court's orders rested on two alleged errors of the kind referred to in *House v The King*², namely:

- failure to take into account a material consideration, being the views of the children; and
- taking into account an irrelevant consideration, namely the availability of the fourth option when the persons involved were strangers to the proceedings.

In a joint judgment delivered by Kiefel, Bell, Keane, Nettle and Gordon JJ, the High Court determined that there was no error at law and dismissed the appeal.

With respect to the first challenge, the High Court noted that the focus placed by the father upon consideration of the children's wishes 'elevated the views expressed by a child to something approaching decisive status.'³ The court noted that the views of the children were taken into account, but that they are but one consideration amongst a number of statutorily prescribed considerations in s 60CC of the Act. The High Court considered that his Honour had identified as the relevant factor the extent to which the boys' views had been influenced by the father as a matter which affected the weight to be given to their stated preferences.⁴

Furthermore, the High Court clearly stated that it was not incumbent on the court at first instance to ascertain the views of the boys with respect to the alternate proposals: 'The term "consider" imports an obligation to give proper, genuine and realistic consideration but this cannot affect or alter the terms of the provision so as to require a child's views to be ascertained.'⁵

With respect to the fourth option, the High Court accepted the submissions of the independent children's lawyer that the Act provided the court with power to make parenting orders in favour of a parent of a child 'or some other person' and the mothers of friends of the boys were persons who were therefore able to be subject to parenting orders upon the application of the mother.⁶ The High Court rejected the submission that there was not enough known regarding these persons in circumstances of the making of interim orders in a situation of some urgency.⁷

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Conclusions:

There are at least three messages to be taken from this decision:

1. Children's views, like any other subsection 60CC(3) factor, must be considered but no one factor is decisive in determining the child's best interests;
2. Parenting orders can be made with respect to non-parties, and even persons not related to children, so long as the application is brought by a person contemplated in section 65C of the Act; and
3. A person's flagrant disregard for parenting orders can be a relevant matter as it was in this case as it 'evinced an attitude towards the responsibilities of parenthood that, if left unchecked, would likely send a poor message' to the children.

Endnotes

- 1 *Bondelmonte v Bondelmonte* [2016] FamCAFC 48 at [209].
- 2 (1936) 55 CLR 499 at 504-505.
- 3 *Bondelmonte v Bondelmonte* [2017] HCA 8 at [34].
- 4 *Bondelmonte v Bondelmonte* [2017] HCA 8 at [41].
- 5 *Bondelmonte v Bondelmonte* [2017] HCA 8 at [43].
- 6 *Bondelmonte v Bondelmonte* [2017] HCA 8 at [50].
- 7 *Bondelmonte v Bondelmonte* [2017] HCA 8 at [51].

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