HIGH COURT OF AUSTRALIA

1 March 2017

BONDELMONTE v BONDELMONTE & ANOR
[2017] HCA 8

Today the High Court published its reasons for dismissing an appeal with costs on 13 December 2016. The appeal concerned interim parenting orders made for the return of two children to Australia from New York and for their living arrangements upon their return. The High Court unanimously held that the primary judge, Watts J, did not err in exercising his discretion to make such orders.

The appellant and first respondent, respectively the father and mother of two boys and a girl, separated in 2010. Parenting orders were made on 25 June 2014 providing that the parents were to have equal shared parental responsibility for the children and, relevantly, that a parent could take the children on an overseas holiday subject to certain conditions being met. In 2015, further orders were made requiring the children to engage in a Child Responsive Program and the parents to be interviewed by a family consultant. On 14 January 2016, the two boys were flown to New York for a holiday with the father. On 29 January 2016, the father informed the mother that he had decided to live indefinitely in the United States and that the boys would remain with him. As a result, the process established by the 2015 orders was not completed.

The mother filed an application under the *Family Law Act* 1975 (Cth) to secure the boys' return. In deciding whether to make parenting orders, s 60CA requires the court to have regard to "the best interests of the child as the paramount consideration". In determining what is in the child's best interests, s 60CC(2)(a) provides 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" including, in par (a), "any views expressed by the child and any factors ... that the court thinks are relevant to the weight it should give to the child's views".

Watts J ordered the return of the boys to Australia. His Honour considered that determining the "best interests" of the children involved consideration of the children's relationships with their parents and each other, which were matters best dealt with in Australia via the mechanism established by the 2015 orders. Although accepting evidence that the boys wished to remain living with the father in New York, Watts J considered the weight of those views to be "weakened by the circumstances which have been contrived by the father". Watts J also ordered that, if the father did not return to Australia and the boys did not wish to live with the mother, they could live either in accommodation with supervision paid for by the father or separately with the mothers of respective friends of the boys' ("the alternative living arrangements"). The father appealed to the Full Court of the Family Court. The appeal was dismissed (Ryan and Aldridge JJ, Le Poer Trench J dissenting).

By grant of special leave, the father appealed to the High Court. The High Court rejected the father's contention that Watts J erred in discounting the boys' expressed preferences to remain in New York because his Honour formed an adverse view of the father's actions. The extent to which the boys' views had been influenced by the father was relevant to the weight to be given to those views. The High Court also rejected the argument that Watts J was required to ascertain the boys' views as to the alternative living arrangements. Section 60CC(3)(a) only requires that the views which have been "expressed" by a child be considered; ascertaining the boys' views was not statutorily mandated. Further, as s 64C permits parenting orders to be made in favour of a parent of a child "or some other person", the orders for the alternative living arrangements could be made in favour of the mothers of the boys' respective friends.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*

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