Children of Divorced Parents Do Not Have Right to Decide Which Parent They Live With Day to Day

High Court of Australia clarifies weight to be given to children's wishes in family law parenting proceedings

INTRODUCTION

In the case of *Bondelmonte v Bondelmonte* [2017] HCA 8, the High Court heard an appeal from the father against the orders of the Full Court of Australia regarding the wishes of his two children. The issue in dispute was whether the trial judge erred in ascertaining the boys' preference to live in New York with their father.

BANKGROUND

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

SEPARATION

In 2010, when the parents separated, the Family Court ordered to give equal parenting responsibility, with living arrangements to be decided by the parties and the children. The boys lived with their father, and their sister (12) lived with their mother. The parenting order permitted the parents to take the boys overseas on holidays, 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. The conflict arose when the father decided to take the boys to New York for vacation on 14 January 2016. 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 a relocation application under the *Family Law Act 1975* for the boys to be returned to Australia.

THE TRIAL JUDGE'S DECISION

Justice Watts ordered the return of the boys to Australia. His Honour considered that determining the "best interests" of the child involved consideration of the children's relationship with both parents and each other. Justice Watts accepted the evidence that the boys wished to remain living with their father in New York. His Honour held, however, that the weight of the evidence was weakened by the circumstances contrived by the father.

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.

Justice Watts 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 FULL COURT's DECISION

The Federal Circuit of Australia appointed an Independent Children's Lawyer ("the ICL") to represent the three children in proceedings in the Family Court of Australia (Ryan and Aldridge JJ (Le Poer Trench J dissenting) in relation 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.

The Full Court of the Family Court agreed that the parenting orders did not permit a child to decide, independently of his or her parents, whether or not the child would live in Australia or abroad.

The appeal was dismissed.

By grant of special leave, the father appealed to the High Court. The mother did not take part in the High Court process, so an independent children's lawyer opposed the father's appeal.

THE HIGH COURT's DECISION

The High Court rejected the argument of the father that Justice Watts erred in ascertaining the boys' preference to live in New York with their father because his Honour formed an adverse view of the father's actions. The High Court also rejected the argument that Justice Watts was required to ascertain the boys' views as to the alternative living arrangement. Pursuant to section 60CC(3)(a) of the *Family Law Act 1975* (Cth), family law courts are required to consider the views expressed by the child; however, according to the Court, ascertaining the boys' views was not statutorily mandated.

Further, it was held that pursuant to s 64C of the *Family Law Act*, parenting orders to be made in favour of a parent of a child or "some other person", could be made in favour of the mothers of the boys' respective friends.

CONCLUSION

The Court held that the mother's respective friends were known to the Family Court, and had made undertaking to the Court as to the boys' care and accommodation. This was considered to be sufficient, particularly because these were interim orders made in circumstances of urgency.

ORDERS

1) The High Court unanimously dismissed the appeal.
2) The appellant was ordered to pay the second respondent's cost of the appeal.

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