BONDELMONTE v BONDELMONTE & ANOR (S247/2016)

Court appealed from: Full Court of the Family Court of Australia

Date of judgment: 8 April 2016

Special leave granted: 14 October 2016

This matter concerns the living arrangements of two teenage sons ("the Boys") of the Appellant Father ("the Father") and the Respondent Mother ("the Mother"). The Boys currently live with the Father in New York. Until mid-January 2016 however they lived with the Father in Australia, while their sister lived with the Mother in Australia. The elder of the Boys is completely estranged from the Mother, while the younger remains in regular contact. All of the children of the former marriage however are the subject of parenting orders dated 25 June 2014 ("the parenting orders"), Order 2 of which enables each child to decide with whom they would like to live.

With the consent of the Mother, the Father arranged for the Boys to join him on a two week holiday to New York in mid-January 2016. On 29 January 2016 however the Father's solicitor informed the Mother that the Father had decided to remain in the USA indefinitely and, as the Boys had elected to remain with him, they would not be returning to Australia in accordance with the parties' agreement. Shortly thereafter the Mother filed an urgent application in the Family Court for orders to have the Boys returned to Australia and that pending further order, they live with her.

On 8 March 2016 Justice Watts made orders that required, inter alia, that the Boys be returned to Australia. Those orders also envisaged a scenario whereby the Boys would be accommodated with family friends ("the benevolent volunteers option"). This would be in circumstances whereby either or neither of the Boys wished to live with the Mother upon their return, and, whereby the Father decided to stay in New York. The benevolent volunteers option was first raised by the Mother at the hearing before Justice Watts.

On 8 April 2016 the Full Court of the Family Court of Australia (Ryan & Aldridge JJ, Le Poer Trench J dissenting) dismissed the Father's appeal against Justice Watts' orders. The majority rejected the Father's submission that his Honour had failed to give sufficient weight to the Boys' opinions concerning their potential living arrangements in Australia. It also rejected the submission that Justice Watts had erred in making orders giving effect to the benevolent volunteers option.

Justice Le Poer Trench however found that Justice Watts should not have made any return orders concerning the Boys on 8 March 2016. What Justice Watts should have done was to have required further evidence to be obtained, sufficient for him to have a clearer understanding of the Boys' views on each of the respective accommodation proposals. Justice Le Poer Trench noted, for instance, that the Court did not even have the address(es) at which the Boys would be living under the benevolent volunteers option. Furthermore, the failure to have regard to their views on this proposal was a failure to fulfil the mandatory requirement of s 60CC(3)(a) of the *Family Law Act* 1975 (Cth) ("the Act").

Justice Le Poer Trench acknowledged that Justice Watts was entitled to form an adverse view of the Father's actions in failing to return the Boys to Australia. The Boys should not however be effectively blamed for the circumstance in which they found themselves. The Boys were the subject of, not parties to, the existing parenting orders. It was the Father, not they, who was in breach.

The grounds of appeal include:

- The Full Court of the Family Court of Australia erred in finding that despite an order already devolving to children the right to decide where to live, it was acceptable to make a parenting order contrary to that right without first determining the views of the children on orders that the children live with persons other than their parents and where such persons had not made application for parenting orders;

- The Full Court of the Family Court of Australia erred in principle in determining that it was acceptable to make a parenting order in favour of strangers to the proceedings where such persons had not made such application and where there was no evidentiary basis to establish that those persons engaged section 65CA of the Act.