IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S247 of 2016

BETWEEN:

BONDELMONTE
Appellant

and

BONDELMONTE
Respondent

and

INDEPENDENT CHILDREN'S LAWYER
Second Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

1 These submissions are in a form suitable for publication on the internet.

Part II: Issues

2 Did the failure to enquire as to the views of the affected children concerning the alternative option for residence in the households of friends, before making orders providing for that option, constitute non-compliance with sec 60CC of the *Family Law Act 1975* (Cth)?

3 Was it an irrelevant consideration in assessing the children's best interests for the court to diminish the weight of their preferences because of the appellant's disapproved conduct?

Part III: Section 78B of the *Judiciary Act 1903*

4 Consideration has been given to the question whether notice pursuant to sec 78B of the *Judiciary Act 1903* (Cth) should be given with the conclusion that this is not necessary.

Part IV: Citations

5 The judgment of the Full Court is not reported. Its medium neutral citation is *Bondelmonte & Bondelmonte* [2016] FamCAFC 48.

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Part V: Facts

6 The appellant was born in 1963. The respondent was born in 1966. There are three children of their marriage, R (born 1999) and J (born 2001) (**the boys**), and N (born 2004). On 2nd March 2016 at the time of the hearing before the primary Judge, Watts J, R was nearly 17 years of age, and J was nearly 15 years of age.

7 In 2010 the parties separated. The respondent subsequently commenced a proceeding in the Family Court of Australia in which she sought, inter alia, parenting orders in respect of the children. On 25th June 2014 that proceeding was resolved by orders made by consent pursuant to which, relevantly, the parties were ordered to have shared parental responsibility for the children, and for the children to live with the parties as agreed between them or at the children's own election: Reasons for Judgment 8th April 2016 (**FC**) [18].

8 Preceding the making of those orders, from about August 2013 the child R had lived with the appellant and was estranged from the respondent: FC [20]. By 8th March 2016 when the primary Judge determined an interim application in the subsequent proceeding instituted by the respondent, R had not had any contact with the respondent since September 2013. The child J primarily lived with the appellant, and N lived with the respondent and spent time with the appellant: FC [21].

9 On 11th December 2014 the respondent commenced a proceeding in the Federal Circuit Court of Australia which was subsequently transferred to the Family Court of Australia. Each of the respondent and appellant sought interim and final parenting orders in relation to the children: FC [25].

10 On 1st January 2016 the appellant advised the respondent by email that he contemplated taking the boys on a holiday in the second half of the January 2016 school holidays. On 10th January 2016 the appellant sent a further email to the respondent in which he advised of his intention to take the boys to New York and attached copies of airline tickets that provided for the boys departure on 14th January 2016 and for their return to Australia on 30th January 2016: FC [28], [29]. On 13th January 2016 the respondent through her solicitor agreed to the boys travel to the United States: FC [31].

11 On 14th January 2016 the boys departed Australia for the United States. By 25th January 2016 the appellant had decided to remain living in the United States due to his financial interests: FC [34]. On 29th January 2016 the respondent was informed of that fact, and that the boys would remain with the appellant in the United States: FC [35].

12 On 30th January 2016 the appellant made a proposal to the respondent regarding the boys' residence and for their future arrangements to spend time with the respondent. The respondent

rejected the appellant's proposals. On 1st February 2016 she informed the appellant that she required the boys to be immediately returned to Australia: FC [36], [37].

13 On 10th February 2016 the respondent filed an application in the Family Court seeking the boys' return to Australia. On 29th February 2016 the respondent's application was returned before the primary Judge and was adjourned part-heard to 2nd March 2016. Despite filing an affidavit in support of his response that sought dismissal of the respondent's application, the appellant did not adduce evidence, if orders were made for the boys to return to Australia, whether he too would return to Australia: FC [39], [40]. During the course of that resumed hearing, the respondent tendered emails from two persons, each of whom were known to the respondent and who each had a son that was a friend of each of the boys respectively (**the volunteers**), who separately offered to accommodate one of the boys in their residences respectively: FC [167], [168].

14 The second respondent was legally represented and participated in the hearing before the primary Judge and on appeal. In each instance, the second respondent maintained a neutral stance, and did not proffer any form of order or recommendation: FC [9], [52].

15 The appellant sought that a "wishes" report be obtained of the (then) views of the boys: FC [52].

16 On 8th March 2016 the primary Judge determined the respondent's application and ordered the appellant to return the boys to Australia and for the boys to live with the respondent if the appellant did not return to Australia. In the event the boys did not live with the respondent, each boy could elect to either live in accommodation provided by the appellant with paid supervised services, or to be separated and live with that volunteer prepared to house that particular boy: FC [46].

17 In that determination, the primary Judge accepted the appellant's evidence that neither boy wanted to return to Australia or to live with the respondent. His Honour was satisfied that if the boys were interviewed in New York that their views would be the same. However, the primary Judge reasoned that the weight attaching to the boys' views was weakened by the circumstances that had been "contrived" by the appellant: FC [57].

18 The appellant's appeal to the Full Court challenged the primary Judge's application of sec 60CC of the *Family Law Act 1975* (Cth) (**the Act**) including the failure to enquire as to the views of the boys as to a return to Australia to live with paid supervisors or to live separately with the volunteers, the making of orders that required the boys to live with persons who were not parties to the proceedings and where there was insufficient evidence to enable a finding that such an order would be in the boys' best interests, and the making of findings as to the appellant's conduct in the determination of the issue of what was in the boys' best interests.

19 On 8th April 2016 the appeal was dismissed by a majority of the Full Court of the Family Court of Australia (Ryan and Aldridge JJ; Le Poer Trench J dissenting). Ryan and Aldridge JJ determined that the primary Judge had taken into account and balanced the relevant considerations in sec 60CC and, insofar as the primary Judge made orders for the boys to reside separately and with strangers to the proceeding, such orders were "facilitative" only: FC [86], [87], [89]. The majority expressly approved the primary Judge's approach of lessening the weight attaching to the boys' views by the conduct of the appellant: FC [103] – [106], [115].

20 In dissent, Le Poer Trench J enunciated that a court is required to look past the parent's conduct in the determination of a child's best interests (FC [153]), and is burdened with a positive obligation to know of the circumstances in which children might be living with benevolent volunteers (FC [174]) and to obtain the views of the children in relation to that proposal: FC [211].

21 On 14th October 2016 this Court granted to the appellant special leave to appeal from the orders of the Full Court made 8th April 2016. As at the date special leave was granted, R was 17 years of age, and J was aged 15 years.

Part VI: Argument

22 Order 9.2 of 8th March 2016 was a "parenting order" within the meaning of sec 60CB of the Act, including in relation to the volunteers, as demonstrated by the phraseology that the boys "*may live with*" the person or persons: sec 64B. Those orders contemplated the boys separately living with the volunteers, neither of whom was a party to the proceeding and who did not, on the evidence, engage sec 65C of the Act to warrant conferral of a parenting order in each of their favour.

23 Sec 60CC prescribes mandatory considerations for the determination of what is in a child's "best interests". That determination is the "paramount" consideration (identified in sec 60CC) in the exercise of discretion whether to make a particular parenting order: sec 60CA. Relevantly, the statute mandates consideration of *"any view 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"*: subsec 60CC(3)(a).

24 The central concept on which the satisfaction of sec 60CC depends is that the court must "consider" each of the primary and additional considerations, a term that imports a positive obligation on the court to give *"appropriate and careful consideration and not simply treat as a factor"* (*R v R* (2000) 25 Fam LR 712 per Nicholson CJ, Finn and Guest JJ at 725), or to give

"proper, genuine and realistic consideration": *Re Khan v Minister for Immigration and Ethnic Affairs* [1987] FCA 457 per Gummow J at [43].

25 What is required is a conscious reference to the statutory requirements and, in this instance, to enquire of the views (if any) of the boys in relation to the particular parenting order that was proposed to be made. The approach endorsed by the majority constitutes a sanctioning of a principle, incorrect at law, that a dispositive order may be made as being in a child's best interests before the views of the affected child are known concerning the particular parenting order sought or proposed to be made. As a matter of construction, given the interrelationship between secs 60CB and 60CC, the approach of the majority was in error.

26 The notion that ordering the boys to live with paid supervisors or the volunteers as an expedient in the circumstances that presented required the boys views to be obtained on that particular parenting order. The statutory command by subsec 60CC(1) and (3)(a) is only able to be satisfied if those considerations are assessed concerning that order which the court proposes and decides. To conclude otherwise is to deny subsec 60CC(3)(a) any practical operation.

27 The primary Judge accepted the views of the boys that they wish to remain residing with the appellant in New York, but determined that the weight attaching to those views was weakened by the circumstances "contrived" by the appellant: FC [57]. The majority endorsed the primary Judge's approach: FC [102] – [106]. Ryan and Aldridge JJ rejected the proposition that the fact the primary Judge did not make orders consistent with the boys' views in favour of remaining in New York with the appellant, meant that those views did not carry considerable weight, and held that it was explicit in his Honour's reasons that the boys' views were taken into account in a very real way: FC [102]. The majority identified those factors that resulted in the primary Judge's determination to reduce the weight that he would otherwise have afforded to the boys' views in favour of remaining in New York with the appellant, including the conversations between the appellant and the boys about the appellant's desire to relocate the boys to the United States (FC [103]), the boys' preference for New York reflecting their "bedazzlement" with "a recent development in their lives", but the primary Judge's concern was that the boys had failed to reflect of important aspects of their lives in Australia (FC [104]) and that the actions of the appellant had prejudiced and almost certainly coloured the boys' statements in favour of New York: FC [105]. The majority concluded that the approach by the trial judge to make orders for the boys' return to Australia without first obtaining a "wishes report" from New York was not likely to enhance the primary Judge's understanding of that issue given the absence of any doubt about the result that the boys wanted and did not want, or of the other issues that were better investigated with the boys in Australia: FC [107], [108].

28 However, those conclusions as to their ultimate effect in the sec 60CB determination were erroneous. The majority's conclusion that the primary Judge satisfied consideration of sec

60CC(3)(a) by taking into account the boys' expressed views to remain living in New York eschewed the proper mandated enquiry the court was obliged to make, once the interrelationship between secs 60CA and 60CC is properly understood, as to the views expressed by the child as against the "particular parenting order": sec 60CB. Where the court did not doubt the validity of the views expressed by the boys in relation to living with the respondent, even with the appellant's involvement in creating the circumstances that presented and his conversations with the boys, it was statutorily mandated and most important that the boys' respective views be obtained on the particular parenting order to be made, and that was not done.

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29 That is more so recognising the involvement and function of the second respondent in the proceeding, the function of which requires the second respondent *"to inform the court by proper means of the children's wishes in relation to any matter in the proceedings"* (*In the Matter of P and P* (1995) 19 Fam LR 1), and the desirability for the second respondent to arrange for evidence to be before the court as to how the child would feel if the court did not reach a conclusion that accorded with the child's wishes: *R v R* 225 Fam LR at 725.

30 Critically, having recognised and accepted the boys' preferences to live with the appellant, and not the respondent, it became paramount to obtain the boys' views in relation to living with paid
20 supervised services or the separate households of the volunteers. Directions could and should have been given to the second respondent to effect that process, or by the obtaining of a "wishes report" on the particular parenting order. Absent any immediate risk of violence or harm to either boy, the views of the boys ought as a matter of principle have been sought before the particular parenting order was made.

31 The second error of the majority is grounded in infecting the assessment of a child's views with the conduct of a parent. Having recognised the primary Judge's findings as to the genuineness of the boys' views of not wanting to live with the respondent in Australia (FC [99]), and in the context of their approaching adulthood, the majority's sanctioning of the primary Judge's
30 approach to erode the weight of those views by the conduct of the appellant (FC [105], [115]) constituted a distortion of the statutory considerations, and propounds an incorrect principle by impermissibly inviting a kind of transferred culpability of a parent onto a child. There is no warrant in the text of sec 60CC permitting such an approach, and it is quite wrong to construe the determination of the child's best interests by a distortion involving the conduct of a parent without enquiry.

32 The third error lies in the majority having misconstrued the statutory threshold imposed by sec 65C as to the eligibility of persons in favour of whom a parenting order may be conferred.

33 Whilst the term "*any other person*" in sec 65C is undeniably a term of great breadth, the application of orthodox principles of statutory construction renders it tolerably clear that a person in favour of whom a parenting order may be made must be "*concerned with the care, welfare or development of the child*": *Acts Interpretation Act 1901 (Cth)*, sec 15AA; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46-47 [47] per Hayne, Heydon, Crennan and Kiefel JJ. As such, there must be evidence beyond that here where each person expressed by email little more than a preparedness to accommodate either child (FC [167], [168]): see *K.A.M. v M.J.R.; J.I.G. (Intervener)* [1999] FLC 92-847.

34 In this instance, the evidence was devoid of relevant considerations such as the nature of the relationship of each person to the parties and especially the subject children; each of those person's individual (and family) circumstances; the views of the applicant and respondent as to the suitability or otherwise of each person as to each individual's concern as to the care, welfare or development of the particular child; those persons individual capacities to parent each child; or the views of the boys on the possibility of living with the volunteers. There was no consideration of the matters mandated by sec 60CC in relation to the volunteers. Absent evidence that established the statutory threshold to warrant conferral of a parenting order pursuant to sec 65C, the court could not validly make a parenting order in that person's favour. In this way, the approach of the majority elided consideration of the statutory requirements.

35 Absent evidence of such matters, which in evidentiary terms were necessary to permit a finding of fact as to the suitability of the orders proposed to meet a child's best interests, the assessment of the orders as being the boys' best interests was undertaken in a deficiency of material considerations. That conclusion is fortified by recognition of the ages of the boys when the orders were made and the indeterminate period for which the orders were to operate, the notorious delays in the Family Court, and which may carry one or both of the boys to the age of majority recognising that R is now 17 years of age, and J is 15 years. To describe the orders as "facilitative" and not requiring the children to be separated or live with the volunteers or paid carers as the majority did is plainly wrong in fact: FC [89]. Indeed, to separate the boys, absent an evidentiary basis being established that it was warranted to preserve a child's welfare, was an approach not reasonably open on the evidence, nor reasoned to be in the boys' respective best interests.

36 In circumstances where the primary Judge found the boys' wishes were genuinely held, it was an error to pronounce orders on an alternative late proposal unsupported by any cogent evidentiary basis and upon which the boys were not afforded the opportunity to express a view, and where the implementation of the orders was likely (given, clearly, one of the boys was estranged from the respondent).

Part VII: Legislation

37 Secs 60B, 60CA, 60CC, 64B and 65C of the *Family Law Act 1975* (Cth) are relevant to the argument in this case. They appear as the annexure in the form they took at the time of the hearing and decision below. They have not been materially amended since that time.

Part VIII: Orders sought

38 The appellant seeks the following orders:

(a) the appeal be allowed;

(b) the orders of the Full Court of the Family Court of Australia made on 8th April 2016 in proceedings number EA28/2016 be discharged;

(c) the orders of the Family Court of Australia at Sydney made on 8th March 2016 be discharged as to paragraphs 1, 3, 6, 7, 8 and 9 of such orders;

(d) that the second respondent Independent Children's Lawyer do all acts and things to cause there to be prepared in New York a report by a psychologist agreed upon by the parties, and failing agreement as nominated by the court, as to the views of R and J, their maturity and level of understanding of the issue on their continued residence in New York, their return to Australia to live with their mother and paid supervisors, in the alternative, their return to Australia to live with Batsheva Abrahams and Laura Meltzer, respectively;

(e) that the respondent's application filed 10th February 2016 (as amended) be adjourned to a date after the release of the report referred to in the preceding order;

(f) the respondent pay the costs of the application for special leave to appeal and the appeal.

Part IX: Time estimate

39 The appellant would seek no more than 1.5 hours for the presentation of the appellant's oral argument.

11th November 2016

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