IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S247 of 2016

BETWEEN:

BONDELMONTE
Applicant

and

BONDELMONTE
Respondent

and

INDEPENDENT CHILDREN'S LAWYER
Second Respondent

APPELLANT'S REPLY

Part I: Certification

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

Part II: Reply

2. The emphasis placed by the second respondent on the interim nature of the hearing and the making of parenting orders that were "explicitly temporary in nature" (second respondent's submissions dated 25 November 2016 (**2RS**), [31] - [33]) terminate in the proposition that it was not statutorily mandated for the primary Judge to have considered the boys' views (2RS, [53]). That emphasis is misplaced.

3. First, that construction of sec 60CC(3)(c) is not supported by either the text or context of sec 60CC, which is statutorily mandatory by its terms and which does not delineate between the disposition of an interim or final application. Rather, as a matter of orthodox statutory construction it requires conscious reference to the statutory requirements on the "particular parenting order" (sec 60CA).

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4. Second, the contention that there were "advantages" to a report being prepared in the boys' usual place of residence, and the matters it could canvass (2RS, [45] - [46]) should be rejected. The submissions are disavowed by recognition that a report canvassing matters such as family relationships, if necessary, could readily be satisfied by a report in the boys' locality and it was unnecessary for that to occur in Australia. However, the second respondent's submission eschews the relevant enquiry, namely, the views (if any) of the boys in relation to the particular parenting order proposed to be made, and which was more practically obtained in he first instance in the boys' locality, and was permitted by sec 60CD(2)(c). Further, and as developed below, the appointment of the second respondent to independently represent the boys was a mechanism already in place for the court to inform itself of the boys' views on the particular parenting order proposed to be made (sec 60CD(2)(b)).

5. Third, parenting orders had been made on a final basis on 25 June 2014 for the boys to live with the appellant and respondent as agreed between them or at the boys' own election. There was no finding of fact by the primary Judge that there was any immediate risk of violence or harm posed to the boys remaining in New York that required the court to act urgently. Indeed, the primary Judge accepted the views of the boys that they wished to remain residing with the appellant in New York.

6. Fourth, recognition of the boys' ages, the indeterminate period for which the orders were to operate, the notorious delays in the Family Court, and that the orders made may carry one or both boys to the age of majority, is sufficient to demonstrate that the ill-described "explicitly temporary" orders may have the effect of being rendered permanent in nature.

7. It is no answer to the appellant's construction of sec 60CC(3)(a) to contend that a court is not obliged to obtain the child's views or require that they be obtained, but instead only to "consider" such views (2RS, [52], [54], [55]). It is tolerably clear from the terms of sec 60CC that a court is obliged to "consider" a child's views on the particular parenting order. But it is no answer to contend that it may disregard that mandated consideration by not seeking evidence of those views. The second respondent's emphasis on "may" in sec 60CD as connoting a discretion of the court whether to inform itself of the views should not be accepted.

8. Further, the second respondent's focus in that construction disregards that, having been appointed to independently represent the boys' interests in the proceedings, the second respondent was statutorily obliged pursuant to "ensure" that the boys views in relation to the particular parenting order were "fully put before the court" (secs 60CD(2)(b) and 68LA(5)(b)), being one means already in place for the court to inform itself of views expressed by the boys.

9. The second respondent's construction of sec 64C as permitting a parenting order to be made in favour of some other person, but who otherwise would not have standing to apply for a

parenting order because of a failure to establish the statutory threshold as not evidencing concern with the care, welfare or development of the child (sec 65C) should be rejected and is erroneous at a number of levels.

10. First, the second respondent's contentions ignore the clear distinction between Division 5 of Part VII of the *Family Law Act* 1975 (Cth) entitled "*Parenting Orders – What they Are*" (within which sec 64C falls and which provides generally that a parenting order may be made in favour of parents or other persons), and sec 65C within subdivision B of Div 5 entitled "*Applying for and making parenting orders*" and controls those persons in favour of whom a parenting order conferred. To read sec 64C in isolation and divorced from subdivision B of Div 5 is contrary to orthodox principles of statutory construction and promotes a misconception of the effect of sec 64C.

11. Second, an illogical outcome is produced in terms that a person could be conferred with a parenting order despite the absence of sufficient evidentiary facts to establish their standing to apply for a parenting order. The second respondent's reliance on *Faulkner v Rugendyke* (1995) 19 Fam LR 507 is misplaced. Regardless of whether the person conferred with an order is a party to the proceeding, although it was emphasised that in the normal course of events such person "will and should" be a party to the proceeding, *Faulkner v Rugendyke* does not answer the question posited, namely, whether the person must be concerned with the care, welfare or development of the child. The second respondent's submissions should be rejected.

1st December 2016

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