



Précis Paper

Issues in Parenting Orders when Children are taken Overseas

This is an interesting presentation about a recent High Court decision discussing considerations for the Family Court when children are taken overseas by one parent.

Discussion Includes

- Material facts and arguments on appeal
- The weight given to the views of the children
- Considerations in making parenting orders and best interests of the child
- The importance of a relationship with parents and siblings
- When is an interim application appropriate?
- Granting parenting orders in favour of third parties
- Lessons for practitioners

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Issues in Parenting Orders when Children are taken Overseas

1. In this edition of BenchTV, Suzanne Christie (Barrister, Culwulla Chambers, Sydney) and Jaimee Burke (Solicitor, AR Conolly and Company) discuss the recent decision of the High Court in *Bondelmonte v Bondelmonte* [2017] HCA 8.

Background and Material Facts

2. After the separation of the husband and wife who were the parties to the proceedings, there was an informal arrangement in place regarding the care of their three children, two older boys and a young girl. In 2014, the parents entered into consent orders, providing for equally shared parental responsibility and that the children would live with each parent in accordance with their wishes. Another consent order provided that in order for the children to be taken on an overseas holiday, the other parent had to provide their consent.
3. In January 2016, despite the father not providing the period of notice required by the orders, and under some pressure from him, the mother reluctantly agreed to allow the two boys to travel to New York for a holiday with the father. The girl was not included in the holiday.
4. While in the US, the father had decided that it would be in his financial interests to remain there rather than to return to Australia. On 29 January 2016, his solicitor informed the mother's solicitor that the father had decided to live indefinitely in the United States and that the boys would remain with him. The boys also indicated a desire to remain in New York.
5. The mother filed an interim application to secure the return of the boys. The mother proposed alternative arrangements for the boys if they returned to Australia. The father did not seek any changes to the 2014 parenting orders and sought only to resist the mother's application.
6. At first instance, the trial judge made a cascading order, ordering that the boys be returned to Australia and that one of the following orders apply:
 - If the father returned to live in Australia, the boys would live with him.
 - If the father did not return to live in Australia, the boys would live with their mother.
 - If the boys declined to live with their mother, they could live in paid supervised accommodation, paid for by the father.

- If the boys declined this arrangement, the boys could live with one of two individuals (the parents of the boys' friends) who had offered their homes to the children.
7. The matter was appealed to the Full Court of the Family Court, who dismissed the appeal. The dissenting judge raised an issue of whether the trial judge had taken the views of the teenage boys seriously when ordering that they return to Australia.
 8. The father then sought special leave to appeal to the High Court, which was granted. The principal contention of the father on appeal was that before the primary judge made the orders in question, his Honour was required to give "proper, genuine and realistic consideration" to the views of the boys in relation to the interim parenting orders. It was contended that his Honour was wrong to discount the boys' views about remaining in New York because his Honour formed an adverse view of the father's actions. It is further contended that his Honour was required to put in train a process by which the boys' views as to each of the alternative living arrangements, and in particular their possible accommodation with other families, could be ascertained. The other argument was that the parenting orders could not be made in favour of strangers to the proceedings who had not made an application for those orders themselves.

Considerations in Making Parenting Orders

9. At first instance, the father's barrister had asked the court to adjourn the matter for the purpose of a "wishes report" being undertaken in New York. The trial judge declined the adjournment because he did not consider that the wishes of the children were in dispute. On appeal, it was argued that the trial judge should have made sure he was aware of the views of the children in relation to each of the specific proposals, particularly in relation to staying with the third parties.
10. The High Court held that it was a matter for the trial judge's discretion as to whether or not to obtain a report, and that while a report from the family consultant would be important for the purposes of future, more permanent, parenting orders, the judge was dealing with urgent interim orders.
11. In terms of the exercise of the trial judge's discretion, the Court can make whatever parenting order would be proper, guided by the principle that the order is in the best interests of the child. The Court must consider two primary considerations: first, the need to have a meaningful relationship with both of the parents; and second, the protection of the children from harm. There was no indication of any harm to the children in this case, and so the key issue was the capacity of the children to have a meaningful relationship with both

of their parents. If the children were to remain in the USA, it was uncertain whether they would continue to have a meaningful relationship with their mother. In this case, the relationship with the child who had been left behind in Australia was also important.

12. Here, the Court had to consider whether the children really understood what it was that they were giving up. Although the children's views were important, the trial judge ultimately found that the children did not appreciate fully what giving effect to their expressed views might mean, including not seeing their mother or sister, or giving up their school and friends in Australia. The High Court did not find any error in this approach.

Granting Parenting Orders in Favour of Third Parties

13. Under s 65C of the *Family Law Act*, a parenting order may be granted to a parent; a grandparent; or any other person concerned with the care, welfare or development of the child.
14. In this case, the mother had put in place arrangements whereby the children could live with third parties if they did not wish to live with her on their return to Australia. The third parties were not applicants or parties to the court proceedings.
15. Ordinarily, if a parenting order is to be made in favour of a third party, it is best that that person is a party to the orders. However, this is not required by the statute, and the High Court dismissed the father's concerns that the third parties were "strangers" and not parties to the proceeding, recognising that the Family Court had information that the persons were mothers of longstanding friends of the boys and was aware of the proposed sleeping arrangements of the boys. In those circumstances, it was appropriate to make interim orders on the basis of the evidence that was before the Court, although more evidence may have been required before permanent orders were made.

Lessons for Practitioners

16. Ms Christie raised a number of takeaway lessons for practitioners, specifically:
 - Pay particular attention to how an application or response is drafted. Here, the father's response asked for the mother's application to be dismissed, which would have had the practical effect of leaving in place the previous consent orders that required the children to be retained in Australia. The High Court was critical of the fact that the father did not apply for orders himself, seeking to change the existing consent orders. The father was also silent as to what his proposal was if the children were to be returned to Australia.

- It is not open for people to act contrary to orders to which they know they are bound, but then expect the court to sanction the breach.

BIOGRAPHY

Suzanne Christie

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Suzanne Christie was admitted into the profession in 1999 and called to the NSW Bar in 2004. Suzanne specialises in family law and related matters in state and federal jurisdictions. Suzanne is one of the authors of Lexis Nexis's Annotated Family Law Legislation and a contributing author to the Financial Agreements chapter in Halsbury's Laws of Australia. Suzanne regularly lectures for the profession and at universities and makes contributions to law journals and conferences.

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BIBLIOGRAPHY

Focus Case

Bondelmonte v Bondelmonte [2017] HCA 8

Benchmark Link

https://benchmarkinc.com.au/benchmark/weekly_construction/benchmark_03-03-2017_weekly_construction_law_review.pdf

Judgment Link

<http://www.austlii.edu.au/au/cases/cth/HCA/2017/8.html>

Legislation

Family Law Act 1975 (Cth)