FAMILY COURT OF AUSTRALIA

GARRAM & GARRAM ***[2019] FamCAFC 239***

FAMILY LAW – APPEAL – PARENTING – Appeal against interim parenting orders requiring the children's care to change from the mother to the father – Where the children's views were considered – Where the children's views were not the only consideration – Where sufficient weight was given to relevant s 60 CC considerations – Where no miscarriage of justice occurred – Appeal dismissed – Mother to pay the father's costs of the appeal in a fixed sum.

Family Law Act 1975 (Cth) ss 4, 60CC, 65DAA, 117(2A)

Bondelmonte v Bondelmonte (2016) 259 CLR 662; [2017] HCA 8
Conway v The Queen (2002) 209 CLR 203; [2002] HCA 2
Gronow v Gronow (1979) 144 CLR 513; [1979] HCA 63
Lane & Nichols (2016) FLC 93–750; [2016] FamCAFC 234
Metwally v University of Wollongong (1985) 60 ALR 68; [1985] HCA 28
SCVG & KLD (2014) FLC 93-582; [2014] FamCAFC 42
U v U (2002) 211 CLR 238; [2002] HCA 36

APPELLANT:	Ms Garram
RESPONDENT:	Mr Garram
FILE NUMBER:	NCC 414 of 2019
APPEAL NUMBER:	EA 90 of 2019
DATE DELIVERED:	9 December 2019
PLACE DELIVERED:	Sydney
PLACE HEARD:	Sydney
JUDGMENT OF:	Aldridge, Watts & Tree JJ
HEARING DATE:	9 December 2019
LOWER COURT JURISDICTION:	Federal Circuit Court of Australia
LOWER COURT JUDGMENT DATE:	29 August 2019

LOWER COURT MNC:	[2019] FCCA 2386
REPRESENTATION	
COUNSEL FOR THE APPELLANT:	Ms Petrie
SOLICITOR FOR THE APPELLANT:	Court Legal
COUNSEL FOR THE RESPONDENT:	Ms McMahon
SOLICITOR FOR THE RESPONDENT:	Roberts Legal

ORDERS

(1) The appeal be dismissed.

(2) The appellant pay the respondent's costs fixed in the sum of $10,000.

Note: The form of the order is subject to the entry of the order in the Court's records.

IT IS NOTED that publication of this judgment by this Court under the pseudonym *Garram & Garram* has been approved by the Chief Justice pursuant to s 121(9)(g) of the *Family Law Act 1975* (Cth).

Note: This copy of the Court's Reasons for Judgment may be subject to review to remedy minor typographical or grammatical errors (r 17.02A(b) of the Family Law Rules 2004 (Cth)), or to record a variation to the order pursuant to r 17.02 Family Law Rules 2004 (Cth).

THE FULL COURT OF THE FAMILY COURT OF AUSTRALIA AT SYDNEY

Appeal Number: EA 90 of 2019
File Number: NCC 414 of 2019

Ms Garram
Appellant

And

Mr Garram
Respondent

EX TEMPORE REASONS FOR JUDGMENT

ALDRIDGE J

Introduction

1. This is an appeal concerning the orders made for the parenting arrangements of X ("the elder child"), born in 2003 and Y ("the younger child"), born in 2007 (collectively, "the children"). In interim proceedings in the Federal Circuit Court of Australia, Mr Garram ("the father"), sought orders that the children live with him and return to live in Region B in New South Wales, where they had lived until early 2019. Ms Garram ("the mother") proposed that the children remain living with her in Suburb A, in northern Sydney.

2. On 29 August 2019, the primary judge ordered that the children live with the father and attend the schools that they had previously attended in Region B. The children were to spend three weekends a month with the mother and half of the school holidays.

3. The mother appeals against these orders.

4. Although the orders made on 29 August 2019 were to have an immediate effect, they have been stayed pending the determination of this appeal. The hearing of the appeal was expedited on 22 October 2019 because the elder child moves into year 11 at school next year and certainty is required as to which school she will attend.

Background

5. In order to understand the issues in the appeal, some short background is necessary.

6. The parties lived together in the former matrimonial home until they separated in 2018. The mother and father then separately obtained housing in Region B with their homes about 30 minutes driving time apart. At that time, each of the parties, at least for a few days per week, worked in Sydney and they adopted a flexible parenting arrangement suited to their respective commitments. The children continued to attend the same schools as they did prior to separation.

7. In October 2018, the mother commenced employment in a management position in Sydney. In January 2019, the mother accepted a position as an educator in Sydney. The mother and the children moved to Suburb A. The children were enrolled in schools and a dance school in Suburb A. In June 2019, the mother purchased a house there.

8. On 21 March 2019, interim consent orders were made for the children to live with the mother and for the younger child to spend three weekends a month from 2.30 pm on Saturday until 7.30 pm on Sunday with the father. No orders were made in relation to the elder child save for an order which provided for the mother to encourage the elder child to spend time and communicate with the father.

9. The orders appear to have been complied with in so far as they relate to the younger child.

10. The elder child stayed with the father from 22 to 25 April 2019, she then requested to sleepover at a nearby friend's house, while the younger child remained with the father. The father collected the elder child the following morning and drove both children back to the mother in Suburb A, taking them to a theme park on the way. Apparently, the mother had instructed the elder child to return to Suburb A by train directly from her friend's house. When the mother found out that this was not happening, she sent a number of texts to the elder child, who became nervous and upset after receiving them. The father said that, until then, the elder child had enjoyed the day. The mother's case was that she was concerned as to the elder child's whereabouts. The elder child has not spent time with the father since.

11. The Court appointed a single expert clinical psychologist ("the family report writer") to interview the mother, the father and the children and to prepare a Family Report for the assistance of the Court.

12. The mother and the father made it perfectly plain to the family report writer and to the primary judge that neither of them was prepared to move from where they lived. Thus, the issue before her Honour was whether the children should

remain living in Suburb A with the mother or return to Region B to live with the father.

13. After setting out the relevant facts, a discussion of s 60 CC of the *Family Law Act 1975* (Cth) ("the Act") considerations and the reasonable practicality of the children spending time with each parent (s 65DAA(1)(b) of the Act), the primary judge reached the following conclusions:

> 70. The most influential concern for the Court is that of the [family report writer] in relation to the mother's inability or willingness to facilitate a close and continuing relationship between the children and the father; and if therefore the Court acceded to the mother's application and the children remain where they are there is a real risk that the children's relationship with their father will be further eroded and eventually lost.
>
> ...
>
> 73. The Court is therefore of the view that the best interests of the children require that in the interim they be returned to the [Town C] area on the basis that this occur at the conclusion of Term 3, and at a time when the children may commence a new school term at a school in the [Town C] area. This will also give the father time to look for larger and more appropriate accommodation in the [Town D] area.
>
> 74. As I understand the mother's position, it is that if an order was made requiring the children to be returned to the [Town C] area then she would continue to reside in [Suburb A]. In those circumstances, the Court will order that the mother spend alternate weekend time with the children with the parties to share the travelling. I am satisfied that such an arrangement would protect her meaningful relationship with the children.

The Appeal

14. The first ground of the appeal has been abandoned.

Did the primary judge fail to have any or any proper regard to the wishes of the elder child and/or to the wishes of both children to remain together? (Ground 2)

15. Despite the wording of this ground of appeal itself, the challenge, as developed in the mother's submissions, is more of a challenge to the weight given to one aspect of the mandatory considerations, namely s 60CC(3)(a) of the Act. Such a challenge faces a high bar (*Gronow v Gronow* (1979) 144 CLR 513 at 519).

16. The mother's submission was couched in the following manner. First, it was said that as the elder child was nearly 16 years old, there was a greater responsibility on the primary judge to explain why the elder child's wishes

should be rejected (Mother's Summary of Argument filed 12 November 2019, paragraph 9).

17. Secondly, it was submitted by the mother that:

> 13. What was apparently in Her Honour's mind was the need to free [the elder child] from what was seen, at least by the report writer, to be the pressure of choosing to have a relationship with her father. In doing that however Her Honour confused, or perhaps conflated, the significance of [the elder child's] views on two very separate issues:
>
> a. Who [the elder child] would live with; and
>
> b. How [the elder child] could spend time with her father.
>
> 14. The significance of the first issue was probably obscured by the difficulties which had been encountered with the second issue to date.

(Mother's Summary of Argument filed 12 November 2019)

18. In her Honour's consideration overall, and in particular to the children's wishes, the primary judge relied significantly on the Family Report dated 27 May 2019. Neither party criticised this approach.

19. It is useful, therefore, to turn to the Family Report dated 27 May 2019 before there is a discussion of the primary judge's reasons for judgment.

20. The elder child told the family report writer, "I want to live with my mother and see my dad on some weekends and some of the holidays. I don't want to be separated from my sister" (Family Report dated 27 May 2019, paragraph 142).

21. When the family report writer asked the elder child why she had not been going to see the father when the younger child went to stay with him, the elder child reported that she preferred to "hang out with her friends or to spend time with her cousins." The elder child also said "I think he is missing me, but I need to do what I need. Obviously I miss him as well but…" (Family Report dated 27 May 2019, paragraph 147).

22. When the family report writer asked how the elder child would cope if orders were made for her to live with the father, she said "I don't really want to live there, it's not my dad, it is just that there is no public transport and it is hard to get about" (Family Report dated 27 May 2019, paragraph 155).

23. The younger child, on the other hand, said that she would like to live with the father but did not want the mother to get upset with her for choosing him (Family Report dated 27 May 2019, paragraph 161).

24. In the family report writer's conclusion, she returned to the differing wishes of the children and opined that "[t]his poses a significant dilemma for the

[children] in that it is a priority for them to remain living together in one household" (Family report dated 27 May 2019, paragraph 179).

25. The family report writer added:

> If the father's proposal is implemented then there will be some initial disruption to the children's lives; however, they should be able to adjust fairly quickly once they return to their previous schools and re-establish their previous friendships. The father appears both willing and able to facilitate regular time with the mother and is assessed as willing to promote and support the [children's] relationships with the mother. He presents as quite insightful and child-focused.
>
> Should the mother's proposal be implemented, there would be no changes to the [children's] school or dance arrangements (unless the mother is able to book classes that do not interfere with the father's time with the children). The mother is assessed as less than child-focused in regard to promoting the children's relationship with the father and the [family report writer] would have serious concerns about accepting her proposal for the children to spend time with the father in accordance with their wishes - it would seem quite likely that this would evolve into a situation where loyalty demands made by the mother would trump any desire for substantial and significant time with the father. Basically, it would become too hard for the children to manage over time.
>
> (Family report dated 27 May 2019, paragraph 179)

26. It was made quite clear by the family report writer that she considered it most undesirable for the children to be separated.

27. The family report writer also explained her concerns as follows:

> 77. Pseudo-maturity in an intelligent 15-year-old is often mistaken for the capacity to make good choices, after taking into consideration all possible consequences, both short-term and long-term, when in fact the young person is ill-equipped to make decisions that are best left up to the adults in her life who love and care for her. As pointed out by the mother in paragraph 12 of her Affidavit, filed 13 May 2019, [the elder child] is still only 15 years of age and needs guidance.
>
> (Family report dated 27 May 2019)

28. In dealing with the children's views, the primary judge said:

> 38. The Court has the benefit of the [Family Report] which independently captures the views of these children and it is clear that both [children] love their parents. The [family report writer] writes:

> 'Both have suggested that they would cope if the Court ordered them to return to [Region B] to live with the father; however, [the elder child's] preference is to live with the mother [in Northern Sydney] and [the younger child's] preference is to live with the father [in Region B].'

39. The [family report writer] goes on to caution the Court against placing too much weight on the children's expressed wishes particularly the [elder child] who she says is:

> 'far less resilient that [the younger child] and is less able to cope with the loyalty demands that appear to be [sic] being placed upon her by the mother.'

40. Both [children] were clear in their discussion with the [family report writer] that they did not want to be separated and living in different household – but could tolerate some time apart.

…

57. The [family report writer] expressed the view that, given [the elder child's] immaturity and lack of psychological resilience, the Court should be cautious about the weight it attributes to her views. The [family report writer] wrote:

> When deciding how much weight to place on each child's wishes, it will be important to consider the impact that the parental conflict has been having on the emotional and psychological well-being of the children. [The elder child's] decision to limit the amount of time she spends with her father may attributable to her being a teenager; however her presentation and behaviour during the interviews suggest that she is far less resilient than [the younger child] and is less able to cope with the loyalty demands that appear to be being placed upon her by the mother. [The elder child's] alignment with the mother, whilst currently being used as a means of protecting her psychological wellbeing, may well evolve into her rejecting her father over time, should the parental conflict continue. This would have long reaching consequences for her emotional and psychological development and well-being.

(Footnotes omitted) (As per the original)

29. Clearly, the primary judge did not fail to have regard to the children's views because, as the above paragraphs show, they were expressly considered. However, the primary judge was cautious as to the weight to be given to them, especially those of the elder child because of the influence of the mother on her.

30. I do not see, that in doing so, her Honour conflated the elder child's views that she wished to live with the mother and spend time with the father on some weekends and some of the school holidays. It is to be recalled that the elder child's complaint about living in Region B was not because it would mean living with the father, but because of the lack of public transport and friends. Clearly, as her Honour recorded, the elder child's preference was to live with the mother.

31. It is true, as counsel for the mother pointed out, that the family report writer did not express an opinion as to which parent the children should live with, but opined that wherever the children lived, there should be orders in place to ensure that the elder child spends time with the other parent.

32. Thus, it is submitted by the mother, that her Honour should have explored "options more compatible with [the elder child's] views on where she lived but which nonetheless enable her to also spend time with her father" (Mother's Summary of Argument, paragraph 20).

33. In other words, the mother's submission is that the primary judge should have considered making an order that the elder child live with the mother and spend specified time with the father, notwithstanding that no one had sought this order, either as their primary proposal or as a "fall-back" position. At the trial, the mother simply proposed that the children live with her and that the elder child spend time with the father as she wished.

34. Of course, her Honour could have followed such a course, but the primary judge was not obliged to do so (*U v U* (2002) 211 CLR 238 at 260). If her Honour considered, as she did, that the orders proposed by the father met the children's best interests, then there was no need to look for alternatives.

35. In essence, the mother's submissions are that the elder child, as a 16 year old young adult, should be entitled to choose her own parenting arrangements. Whilst there is some force in that proposition, the weight to be given to the child's views depends on the maturity of the child expressing them and the circumstances in which they find themselves. However, as already discussed, the family report writer advised, and the primary judge accepted, that in this matter the elder child's views should be approached with some caution.

36. The mother's submissions, if accepted, would entirely override the younger child's preference to live with the father because there was no suggestion, in this case, that the children live in separate households. That was the children's greatest concern and the family report writer advised strongly against it. Why then, should the elder child's views be accorded determinative weight over the younger child's?

37. As her Honour's reasons for judgment make clear, the children's views were not the only matter taken into consideration by the primary judge. What

particularly weighed in the balance was the primary judge's view that the present arrangement was not working and was leading the children to be stressed and unhappy and that if the children lived with the mother their relationship with the father "will be further eroded and eventually lost" (at [70]). The primary judge was entitled to place significant weight on these considerations. The further analysis proposed by the mother of the elder child's wishes does not bear upon these considerations unless it is suggested that they were simply to be trumped by the elder child's views. As I have said earlier, that is not the position.

38. Finally, the mother submitted that the primary judge did not give "proper, genuine and realistic consideration" (*Bondelmonte v Bondelmonte* (2016) 259 CLR 662 ("*Bondelmonte*") at 675) to the elder child simply refusing to live with the father and returning to live with the mother, which raised the prospect of contravention proceedings and the associated cost of them, the risk that such proceedings would drive the elder child further away from the father, and importantly, the risk of the children being separated.

39. The only submission put to the primary judge at the trial on this aspect of the matter was by counsel for the mother who said "so how… is he going to get the 16 year old to live with him if he can't get her to spend time with him?" (Transcript 1 July 2019, p.12 lines 32–37).

40. There was no mention of contravention applications, therefore, no complaint can now be made that her Honour failed to give consideration to that point (*Metwally v University of Wollongong* (1985) 60 ALR 68 at 71). Further, there was no evidence that the elder child would not act in accordance with the orders made by the primary judge. The evidence of the family report writer was that she expected both children to "adjust fairly quickly" to returning to Region B to live with the father (Family report dated 27 May 2019, paragraph 179).

41. Further, the primary judge accepted at [39], the family report writer's opinion that the elder child is "less able to cope with the loyalty demands that appear to be being placed upon her by the mother" (Family report dated 27 May 2019, paragraph 179). It is also clear that the family report writer's opinion was that orders requiring the elder child to spend time with both parents, wherever she lived, would be beneficial, in that they would remove the pressure of decision making from her.

42. In these circumstances, the primary judge gave necessary consideration to these issues. As s 60CC(3)(a) of the Act and *Bondelmonte* at 675 make clear, the Court may consider any matter it thinks relevant, which bears on the weight to be given to the children's views. This is what the primary judge did.

43. I am of the opinion that Ground 2 has not been made out.

Did the primary judge err by making an order which increases the prospect of further proceedings rather than an order which is less likely to have that effect? (Ground 3)

44. The mother submitted that the orders made by the primary judge required her Honour to "consider the very real possibility that the 16 year old would not acquiesce to the Order and the father would attempt to enforce the Order" (Mother's Summary of Argument filed 12 November 2019, paragraph 34). This, it was submitted by the mother, was a valid consideration under s 60CC(3)(l) of the Act, which requires the Court to direct its attention to "whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings" in the matter.

45. As I have already said, no submissions directly to that effect were made to her Honour. There was no evidence that the elder child would not comply – she merely said that she did not want to live in Region B. She also said that she did not want to be separated from the younger child. As already noted, the family report writer thought that the children would adapt to returning to Region B.

46. The Court, particularly in interim applications, is entitled to focus on the s 60CC considerations which are relevant and which are relied on by the parties (*SCVG & KLD* (2014) FLC 93-582).

47. Nonetheless, it was submitted by the mother that her Honour erred because she said that the consideration under s 60CC(3)(l) of the Act was "not applicable at this stage because this is an interim decision" (at [62]).

48. As accepted by counsel for the father, if her Honour had intended for [62] to have been a statement of broad principle, it would be wrong, because the word "proceedings" is defined by s 4 of the Act to include "an incidental proceeding in the course of or in connexion with a proceeding". However, the better view is that the primary judge simply thought that further interim proceedings were unlikely because the matter was listed again before her on 8 November 2019 for the allocation of a final hearing date.

49. However, to the extent that her Honour erred, if at all, it was an error without consequence because the prospect of contravention proceedings was not a live issue which needed to be taken into account. No miscarriage of justice occurred (*Conway v The Queen* (2002) 209 CLR 203 at 207–208; *Lane & Nichols* (2016) FLC 93-750 at [72]–[81]).

50. No error by the primary judge has been identified.

51. In my opinion, the appeal should be dismissed.

WATTS J

52. I agree with the reasons given by Aldridge J and I agree that the appeal be dismissed.

TREE J

53. I also agree with the proposed orders and the reasons given by Justice Aldridge.

ALDRIDGE J

54. The order of the Court is that the appeal be dismissed.

Costs

55. The father seeks an order for costs in the sum of $20,379.50, which is assessed at scale.

56. The father has an income of between $33,800 and $50,700 gross per annum, he received $135,000 pursuant to the property settlement between the parties and he lives in rented accommodation.

57. The mother's income is $110,000 per annum and she received $210,000 pursuant to the property settlement between the parties, which she has invested in a unit in Suburb A. The mother says that she cannot afford to meet a costs order against her.

58. Neither party is in a strong financial position but the mother receives a significantly higher income than the father.

59. The appeal was wholly unsuccessful (s 117(2A)(e) of the Act).

60. Taking these matters into account, I am of the opinion that there should be a costs order in favour of the father.

61. The schedule for costs handed up by the father today indicates that a significant part of the costs claimed by him is for a stay application that was made to the primary judge. Those costs should not be included as costs of this appeal.

62. Doing the best that we can on the available evidence, I consider that an order that the mother pay the costs of the father, fixed in the sum of $10,000, would be just. I propose an order to that effect.

WATTS J

63. I agree with the costs order proposed by Aldridge J for the reasons given by him.

TREE J

64. I also agree with the reasons given.

ALDRIDGE J

65. The order of the Court, therefore, is that the appellant will pay the respondent's costs fixed in the sum of $10,000.

I certify that the preceding sixty-five (65) paragraphs are a true copy of the ex tempore reasons for judgment of the Honourable Full Court (Aldridge, Watts & Tree JJ) delivered on 9 December 2019.

Associate:

Date: 13 December 2019