A note on the decision in Radecki & Radecki [2024] FedCFamC1A 246

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Since the commencement of the Family Law Amendment Act 2023 on 06 May 2024, controversy has arisen about the correct interpretation of the new Family Law Act 1975 (Cth) provision, s65DAAA, which Parliament introduced for the purpose of codifying the rule in *Rice v Asplund* [1978] FamCAFC 128; (1979) FLC 90-725 (*Rice and Asplund*).The controversy related to whether s65DAAA did or did mandatorily require a change of circumstances before final parenting orders could be reconsidered. In a recent decision of the Full Court of the Federal Circuit and Family Court of Australia, Austin, Carew and Williams JJ settled the controversy that has arisen in relation to the correct application of s65DAAA in the Full Court decision of *Radecki & Radecki* [2024] FedCFamC1A 246.

In short, the rule in *Rice v Asplund* concerns the circumstances in which the Court will permit a party to seek fresh parenting orders where final parenting orders are in place. In effect the rule in *Rice and Asplund* is an exception to the rule of finality in proceedings.

In *Rice and Asplund,* Evatt J stated the rule in the following terms (at 78,905):

> "[The court] should not lightly entertain an application to reverse an earlier custody order. To do so would be to invite endless litigation for change is an ever-present factor in human affairs. Therefore, the court would need to be satisfied by the applicant that ... there is some changed circumstance which will justify such a series step, some new factor arising or, at any rate, some factor which was not disclosed at the previous hearing which would have been material...". There are good public policy reasons for the Court to adopt this position, historically and now, because endless litigation is well recognised as being contrary to the best interests of the child: see for example, Baisman & Cartmill [2022] FedCFamC1A 36 at [10]-[11] per Tree J.

The new provision s65DAAA, in seeking to codify *Rice and Asplund*, s65DAAA(1) states:

> "(1) If a final parenting order is in force in relation to a child, a court must not reconsider the final parenting order unless:
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> (a) the court has considered whether there has been a significant change of circumstances since the final parenting order was made; and
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> (b) the court is satisfied that, in all the circumstances (and taking into account whether there has been a significant change of circumstances since the final parenting order was made), it is in the best interests of the child for the final parenting order to be reconsidered"

Essentially, the controversy that arose in surrounded the use of the words "the court has considered" and whether that phrase should be read literally, or whether it was appropriate to interpret the provision in accordance with the purpose and context of the provision.

If the literal approach was preferred, this would mean a change of circumstances would be but one factor for the court to consider in an application for fresh parenting orders, a context and purpose approach would make a change of significant circumstances a mandatory precondition before the court could consider making fresh parenting orders.

The literal approach to interpretation was adopted in several recent decisions, namely Altobelli J in *Rasheem & Rasheem* [2024] FedCFamC1F 595, *Melounis & Melounis* (No 4) [2024] FedCFamC1F 778, and Judge O'Shannessy in *Whitehill & Talaska* [2024] FedCFamC2F 768. These decisions meant that there was no requirement that an applicant demonstrate a significant change of circumstances needed to have occurred before the Court proceeded to consider new parenting orders, so long as new parenting orders were in the child's best interests.

Conversely in *Sciacchitano & Zhukov* [2024] FedCFamC1A 224, Aldridge J criticised the literal approach, opining that the literal approach made the requirement for a change of circumstances otiose, making s65DAAA a pointless section and amendment.

Ultimately, in *Radecki & Radecki* [2024] FedCFamC1A 246 the Full Court concluded that the literal approach to interpretation should be rejected in favour of the purposive or contextual approach to interpretation, Austin and Williams JJ stated at [73] and [74]:

> "[73] There is no ambiguity to be found in the Explanatory Memorandum, which specifically refers to both the intention to codify the common law rule established by Rice & Asplund and the first stage of application of the rule, requiring an applicant to establish that there has been a significant change in circumstances since the making of anterior parenting orders, before those orders can be reconsidered. A literal interpretation of the wording of s 65DAAA, as adopted in *Rasheem, Whitehill & Talaska, and Melounis*, is at odds with and conflicts with the context and purpose of the statute, as stated in the Explanatory Memorandum.
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> [74] Having regard to the authorities cited in in the footnotes to the Explanatory Memorandum, in both Rice and Asplund and Marsden & Winch, the Full Court articulated the requirement for a prima facie case of changed circumstances to have been established. Neither authority refers to or even contemplates divergence from the Court's obligation to embark on a fact-finding exercise as to changed circumstances and instead engage in consideration of whether or not there has been a change of circumstances, without reaching a definitive conclusion."

Their Honours then proceeded to categorically reject the literal approach to interpretation of s65DAAA, stating at [78] and [79]:

> "[78] The decisive factor in rejecting the literal interpretation of "consider" is because to do so results in an operation of s 65DAAA which, adopting the terminology of relevant authorities, is absurd, irrational, and capricious, contrary to Parliamentary intention and may result in unintended undesirable consequences, as observed above. In other words, s 65DAAA would not rectify the mischief, being unfettered applications to revisit parenting orders, to which it is directed.
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> [79] We therefore conclude, for the purposes of s 65DAAA(1) of the Act, and having regard to the principles espoused in Rice and Asplund and subsequent authority, the proper interpretation of "consider" should not be a literal one. The word "consider" in s 65DAAA should be construed to mean the Court is required to contemplate the evidence and to make findings of fact as to what changes in circumstances (if any) there have been since the making of the anterior parenting orders. If there is no positive finding of changed circumstances, that is the end of the matter. If there is a positive finding as to changed circumstances, the second stage of the process requires the Court to make its determination, subject to the overarching best interests principle, as prescribed by s 65DAAA(1)(b) and otherwise having regard to relevant s 60CC considerations and the matters referred to in s 65DAAA(2)."

Carew J, agreeing with Austin and Williams JJ stated at [128]-[129]:

> "[128] The use of the term "consider" in s 65DAAA(1) should be understood in the context of the Court being asked to accept the applicant's evidence taken at its highest but only for the purposes of the application. The suggestion that a court would consider whether there has been a significant change in circumstances without it having any consequence is an interpretation which would give no effect to s 65DAAA(1). Further, it has always been the case that applying the rule in Rice and Asplund is but a manifestation of the best interest principles and s 65DAAA(1)(b) and (2) merely reflect that part of the rule.
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> [129] The drafting of s 65DAAA manages to achieve the subtleties of the rule in Rice and Asplund as expressed in the various permutations over the decades"

Thus the issue is now settled, and a party seeking fresh parenting orders is required to demonstrate a 'significant change of circumstances since the final parenting order was made' consistent with the previously governing rule in *Rice and Asplund*, before the Court can proceed to make fresh parenting orders.

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