FEDERAL MAGISTRATES COURT OF AUSTRALIA

SPS & PLS *[2007] FMCAfam 907*

FAMILY LAW – Parenting orders – previous orders between same parties – Rice and Asplund rule – no material change in circumstances warranting variation of previous orders.

Family Law Act 1975 (Cth), s.69ZU
Family Law (Shared Parental Responsibility) Act 2006 (Cth), Schedule 1, part 2, clause 44

Burton and Burton (1979) FLC 90-622
D & M [2005] FMCAfam 89
F and N (1987) FLC 91-813
Freeman and Freeman (1986) 11 Fam LR 293
Houston and Sedorkin (1979) FLC 90-699
In the Marriage of Paskandy (2005) 33 Fam LR 509; [2005] FamCA 755
In the Marriage of Rice and Asplund (1978) 6 Fam LR 570; (1979) FLC 90-725
McEnearney and McEnearney (1980) FLC 90-866
McL and McL (1991) 15 Fam LR 1; (1991) FLC 92-238
N & M [2003] FMCAfam 29
S & S [2003] FMCAfam 547

Applicant:	SPS
Respondent:	PLS
File Number:	DNM 2236 of 2001
Judgment of:	Lucev FM
Hearing date:	25 June 2007
Date of Last Submission:	25 June 2007
Delivered at:	Darwin
Delivered on:	2 November 2007

REPRESENTATION

Applicant:	SPS in person
Counsel for the Respondent:	Ms J. Truman
Solicitors for the Respondent:	North Australian Aboriginal Justice Agency

ORDERS

(1) The application be dismissed.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT DARWIN

DNM 2236 of 2001

SPS
Applicant

And

PLS
Respondent

REASONS FOR JUDGMENT

Introduction

1. On 12 December 2003 this Court made parenting orders concerning the parties to this application: SPS[1] and PLS[2], and the children: BMS, born October 1994,[3] and SRS, born July 1997[4], publishing its reasons for judgment in *S & S*[5]. The reasons for judgment are voluminous[6] and deal comprehensively with the issues then raised.

2. Put shortly, the Court determined in 2003 that:

    a) the Children live with the Mother in the Darwin area;[7]

    b) there be joint parental responsibility for the long term care, welfare and development of the Children; and

[1] "Father".
[2] "Mother".
[3] "Oldest Child".
[4] "Youngest Child", together the "Children".
[5] [2003] FMCAfam 547 ("*S & S*").
[6] 66 pages and 163 paragraphs.
[7] The Mother had sought to relocate to Alice Springs.

c) the Father spend time with the Children for four days a fortnight, and for half of the school holidays.

3. On 3 November 2006 the Father made an application to the Court seeking to discharge the orders that the Children live with the Mother, and that they spend four days a fortnight with the Father,[8] and for orders that each parent have equal time with the Children.

4. Additionally, the Father sought an order that the Oldest Child attend College in Darwin from the commencement of the 2007 school year. Orders were made concerning that issue on 22 January 2007 and it is not necessary to give it further consideration.

5. The Mother seeks that the Father's application for equal time be dismissed.

First issue

6. The first issue which arises in this case, and one potentially fatal to the Father's application if successful, is whether the Father can show a material change in circumstances since the making of the orders in 2003.[9]

Rice and Asplund Rule – A material change in circumstances

7. An application for variation of previous orders[10] must pass the threshold under the Rice and Asplund Rule, that is, demonstrate that there is a material change in circumstances. The continuation of the Rice and Asplund Rule in relation to orders pre-dating the *Family Law (Shared Parental Responsibility) Act 2006* (Cth)[11] is expressly provided for by the *FL SPR Act.*[12]

[8] Being Orders 2, 6(a)(i) and 6(a)(ii) of the Orders made by the Court on 12 December 2003.
[9] *In the Marriage of Rice and Asplund* (1978) 6 Fam LR 570; (1979) FLC 90-725. This threshold requirement is known as the Rice and Asplund Rule.
[10] In this case there is an application for discharge and further orders, but the effect is to vary the previous order.
[11] "*FL SPR Act*".
[12] *FL SPR Act*, Schedule 1, part 2, clause 44.

8. The Rice and Asplund Rule operates to prevent renewed or ongoing litigation concerning children's issues where no new circumstances are to be brought before the Court.[13]

9. In *McEnearney*, Nygh J put it in language all might understand:

> *"… that the principle that there be an end to litigation has equal force in custodial disputes and in some respects may have even greater force in custodial disputes. The last thing, of course, that this court would wish to see would be a perennial football match between parents who because the strict principles of res judicata are not applicable might seek to canvass again and again the question of custody of a child with the enormous psychological harm which they would be inflicting not only upon each other but especially upon the child.*
>
> *One comes back to the fundamental principle that the interests of the child are paramount and that consideration alone should lead a court to discourage a parent from coming back before the court too soon after the court has had an opportunity to consider fully the situation of the child and there is really no startling new circumstances that can be brought before the court."*[14]

10. What constitutes a material change in circumstances is dependent upon the facts of individual cases, but usual examples include:

    a) marked adverse behavioural changes in a child;[15]

    b) re-marriage and recovery from illness of a non-live with parent;[16]

    c) re-marriage and stabilisation of accommodation of the non-live with parent and commencement of school by a child;[17]

    d) re-marriage of the non-live with parent enabling that parent to provide a proper family environment;[18]

    e) child sex abuse;[19]

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[13] *Freeman and Freeman* (1986) 11 Fam LR 293 at 297 per Strauss J; *McEnearney and McEnearney* (1980) FLC 90-866 at 75, 499 per Nygh J ("*McEnearney*").
[14] *McEnearney* at 75,499 per Nygh J.
[15] *Burton and Burton* (1979) FLC 90-622 at 78,217 per Evatt CJ, Ellis SJ and Smithers J.
[16] *Houston and Sedorkin* (1979) FLC 90-699 at 78,732 per Marshall SJ.
[17] *Rice and Asplund*.
[18] *F and N* (1987) FLC 91-813 at 76, 136 per Nygh J.
[19] *McL and McL* (1991) 15 Fam LR 1; (1991) FLC 92-238; compare *N & M* [2003] FMCAfam 29.

f) relocation;[20] and

g) contravention of orders.[21]

Material change in circumstances

11. This case does not readily fit any of the usual cases cited above.

12. To determine if there has been any sufficiently startling material change in circumstances it is necessary to consider the reasons for judgment in *S & S* and the matters put before the Court in the present application. In some respects it is difficult to isolate the issues, for as often happens in this jurisdiction, the Father was self-represented, and did not file or hand up an outline of case document or an outline of submissions. The Father's opening was brutally short:

> *"As you're perhaps aware, your Honour, this matter has been ongoing for some time. I first made application to the Court so subsequently - reviewed in 2003 for the seven-on seven-off, as I call it, the joint parenting arrangement.*
>
> *There has been some discussion since then in an attempt to resolve the matter, but it's got to the point where we're seeking the arbitration of the Courts to do that. And in the best interests of the children, that's the reason we're here today. That's all."*[22]

13. What emerges from that opening is that the Father considered that this was an "ongoing matter" in which he could seek to have the Court revisit the equal time arrangement he had first sought, but which was rejected, in 2003.

14. Various issues sought to be re-agitated in these proceedings were the subject of extensive consideration by the Court in the previous reasons for judgment and orders. They included:

[20] *D & M* [2005] FMCAfam 89.
[21] See, for example, *In the Marriage of Paskandy* (2005) 33 Fam LR 509; [2005] FamCA 755.
[22] Transcript at 2.

a) the nature of the relationship and communication between the parents, culminating in the "parlous parenting relationship" between them;[23]

b) the extent of the Father's relationship with, and time spent by the Children with the Father and the issue of make-up time (particularly arising from the Father's business arrangements);[24]

c) the Children's relationship with significant persons, other than their parents, and in particular the Mother's family;[25]

d) the practical difficulties associated with the Children spending time with both parents;[26]

e) the responsibilities of parenthood and the parties attitudes to the Children;[27]

f) the parent's poor relationship, its volatile nature and responsibility for that in the context of any family violence involving the Children, and its effect upon the question of with whom the Children should live and spend time;[28]

g) the Father's business interests and the adverse effect they had on his relationship with the Children, including the spending of time with them, and the positive effect in terms of the family's future financial security;[29] and

h) the nature, and maintenance, of the relationship between each parent and the Children.[30]

15. There was nothing significantly new or startlingly different about any of the issues raised in relation to the above matters in these proceedings to warrant variation of the previous orders. Essentially, what the Father

[23] *S & S* at para. 110, see also paras. 9, 17, 24, 135, 142-145, 155, 157 and 159; Transcript at 45, 46, 46, 51, 56, and 57.
[24] *S & S* at paras. 25, 59-60, 115 and 160; Transcript at 47 and 56.
[25] *S & S* at paras. 116-117, 136; Transcript at 58.
[26] *S & S* at paras. 131-134.
[27] *S & S* at paras. 140-141.
[28] *S & S* at paras. 46-50 and 142-145; Transcript at 47.
[29] *S & S* at paras. 25, 149-150 and 160.
[30] *S & S* at paras. 154.

sought to do was "review" the reasons for judgment and orders in *S & S* and re-agitate the issues.

16. Two issues were however identified which warrant consideration in the context of whether there has been a material change in circumstances. They were:

    a) the Children's age and schooling changes; and

    b) a change in the recommendation of the Family Report writer.

17. In this case the Oldest Child is now entering high school, while the Youngest Child turned ten years of age shortly after the hearing.

18. A change in the age and schooling requirements of a child does not, of itself, constitute a sufficiently material change in circumstances to warrant a variation of a previous order. If it were, almost every parenting order of this Court (and the Family Court) would be susceptible to constant variation as children grew older and went through the normal transitions in schooling. There must be some other special change in circumstance, allied to the change in age and schooling requirements, before variation of previous orders could be considered. Otherwise, "the changes that every child will go through in their life",[31] would be sufficient to constitute a material change in circumstance. That cannot have been in the Parliament's contemplation when it specifically retained the Rice and Asplund Rule.[32] There is nothing in the evidence in this case which takes it out of the ordinary run of circumstances concerning children of this age and their schooling requirements. There has been no material change in age or schooling circumstances warranting a variation of the previous orders.

19. Any change in view of a Family Report writer cannot be taken into account as evidence unless given as sworn evidence, which was not the case here, or without the consent of the parties.[33] In this case there was no such consent, and the Family Report writer's opinion is not in evidence.

[31] Mother's Counsel's submission, Transcript at 49.
[32] *FL SPR Act*, Schedule 1, part 2.
[33] *FL Act*, s.69ZU.

20. There is therefore no evidence before the Court of any material change in the circumstances concerning the recommendation of the Family Report writer.

21. In the event that the opinion of the Family Report writer may be taken into account, the Court notes that the Family Report writer recommends that the Children continue to live with their Mother, but also recommends the Children have more contact with the Father, and says that an additional day or two days per fortnight with the Father "could be considered". The recommendation is thus somewhat equivocal.

22. Furthermore, an examination of the Family Report fails to identify any material circumstance which has changed, or so materially changed, as to warrant a reconsideration of the previous orders. The same issues considered by the Court in *S & S* are considered by the Family Report, and the conclusions reached are not dissimilar to those reached by the Court in 2003. In all of the circumstances the Family Report does not identify any sufficiently material change in circumstances to warrant reconsideration of the previous orders. Further, to the extent that the recommendations made by the Family Report writer is a change, it is not sufficiently material to warrant reconsideration of the previous orders, because there has been no change in the relevant underlying circumstances such as to warrant, in the Court's view, the recommendation made.

Conclusion

23. The Rice and Asplund Rule requires that, as a threshold matter, there be a sufficiently material change in circumstances before a previous parenting order of this Court will be varied.

24. The Father has failed to establish a sufficiently material change. The application must be dismissed.

I certify that the preceding twenty-four (24) paragraphs are a true copy of the reasons for judgment of Lucev FM

Associate: J. Semler

Date: 2 November 2007