FAMILY COURT OF AUSTRALIA

SPS & PLS ***[2008] FamCAFC 16***

FAMILY LAW - APPEAL – From decision of Federal Magistrate – CHILDREN – With whom a child spends time – An appeal by the father against orders dismissing an application for equal shared care of the parties' two children – The father had further sought that if equal care was not ordered, his time with the children at least be increased

FAMILY LAW - APPEAL – From decision of Federal Magistrate – Point of law – The rule in *Rice and Asplund* – Whether the Federal Magistrate erred in the application of the rule in *Rice and Asplund* – Consideration of some facts to which the learned Magistrate applied the rule in *Rice and Asplund* and those to which he could have applied it – Misunderstanding by the Federal Magistrate of the broader parameters of dispute in the earlier proceedings where parenting arrangements had been determined on a final basis – The question of the parameters and the focus of the earlier enquiry may have had some bearing on the Federal Magistrate's assessment of the degree and sufficiency of change in circumstances since the final order – Significant change of circumstances – Wishes of the children not identified by the Federal Magistrate as a factor that fell for consideration as a new circumstance – Detailed analysis of the rule in *Rice and Asplund*

FAMILY LAW - APPEAL – From decision of Federal Magistrate – Evidence – On appeal it was argued by the father that the Federal Magistrate failed to admit into evidence a court ordered Family Report and a consequent failure to give any weight to the wishes of the children and the recommendation of the Family Court Counsellor – Whether the Family Report should have been admitted, or in fact was by necessary implication, admitted – Whether, since the learned Magistrate proceeded to address the contents of the Report, in the alternative to his refusal to admit it; there were any consequences, in particular a denial of natural justice, of a failure to admit the report – Argued that the Federal Magistrate failed to sufficiently explain the rule in *Rice and Asplund* to the father who was self represented at trial

Family Law Act 1975 (Cth); Part VII; ss 60B; 60CA; 61DA; 64B; 65DAA; 69ZU; 79; 79(A)(1A)
Family Law (Shared Parental Responsibility) Act 2006 (Cth)
Federal Proceedings (Costs) Act 1981 (Cth)

In the Marriage of Bennett (1991) FLC 92-191
In the Marriage of D and Y (1995) FLC 92-581
In the Marriage of McCabe (1995) FLC 92-634
In the Marriage of McEnearney (1980) FLC 90-866

In the Marriage of F and N (1987) FLC 91-813
In the Marriage of Newling and Mole (1987) FLC 91-856
In the Marriage of Rice and Asplund (1979) FLC 90-725
In the Marriage of Zabaneh (1986) FLC 91-766
Sommerville v Sommerville (2000) FLC 93-042

APPELLANT:	SPS
RESPONDENT:	PLS
FILE NUMBER:	DNM 2236 of 2001
APPEAL NUMBER:	NA 79 of 2007
DATE DELIVERED:	28 February 2008
PLACE DELIVERED:	Brisbane
PLACE HEARD:	Brisbane
JUDGMENT OF:	WARNICK J
HEARING DATE:	7 February 2008
LOWER COURT JURISDICTION:	Federal Magistrates Court
LOWER COURT JUDGMENT DATE:	2 November 2007
LOWER COURT MNC:	[2007] FMCAfam 907

REPRESENTATION

COUNSEL FOR THE APPELLANT:	Mr Gould
SOLICITOR FOR THE APPELLANT:	Withnalls Solicitors
COUNSEL FOR THE RESPONDENT:	Mr Lawrence
SOLICITOR FOR THE RESPONDENT:	North Australian Aboriginal Justice Agency

ORDERS

(1) That the appeal be allowed.

(2) That the orders of Federal Magistrate Lucev made 2 November 2007 be set aside.

(3) That the application of the father filed 3 November 2006, in so far as therein the father sought orders that the children spend further time with him than provided for in orders made 12 December 2003 in the Federal Magistrates Court of Australia, be remitted for rehearing by a Federal Magistrate other than Federal Magistrate Lucev.

(4) That the court grants to the appellant father a costs certificate pursuant to the provisions of section 9 of the *Federal Proceedings (Costs) Act 1981* being a certificate that, in the opinion of the court, it would be appropriate for the Attorney-General to authorise a payment under that Act to the appellant father in respect of the costs incurred by the appellant father in relation to the appeal.

(5) That the court grants to the respondent mother a costs certificate pursuant to the provisions of section 6 of the *Federal Proceedings (Costs) Act 1981* being a certificate that, in the opinion of the court, it would be appropriate for the Attorney-General to authorise a payment under that Act to the respondent mother in respect of the costs incurred by the respondent mother in relation to the appeal.

(6) That the court grants to each of the appellant father and the respondent mother costs certificates pursuant to the provisions of section 8 *Federal Proceedings (Costs) Act 1981* being certificates that, in the opinion of the court, it would be appropriate for the Attorney-General to authorise payments under that Act to each of the appellant father and the respondent mother in respect of the costs incurred by each in relation to the new trial.

IT IS NOTED that publication of this judgment under the pseudonym ***SPS and PLS*** is approved pursuant to s 121(9)(g) of the *Family Law Act 1975* (Cth).

THE FULL COURT OF THE FAMILY COURT OF AUSTRALIA AT BRISBANE

Appeal Number: NA 79 of 2007
File Number: DNM 2236 of 2001

SPS
Appellant

And

PLS
Respondent

REASONS FOR JUDGMENT

1. The "rule" in *In the Marriage of Rice and Asplund* (1979) FLC 90-725 - (at least, in one of its shorter formulations) that, where there has already been a final order in respect of parenting issues, before the court embarks on a rehearing of those issues, the applicant must establish a significant change of circumstance – is certainly useful, if not essential. But it is not the primary principle in applications for parenting orders. Nor is its utility or weight uniform across cases in which it might be applied. In particular, those attributes vary, according to whether the rule is applied at the outset of or at the end of a hearing. Both these qualifications to the "rule" arise for consideration in this appeal.

2. The orders challenged are those of Lucev FM, dismissing an application by Mr SPS that he and Ms PLS share equally the care of their children, B, then around thirteen years of age and S, then around ten years of age. The father had further sought that if equal care was not ordered, his time with the children at least be increased.

3. In 2003, after a contested hearing, Brown FM had ordered that the children live with the mother in the Darwin area and that the father spend time with the children four days a fortnight and half of the school holidays.

4. There are three grounds in the father's appeal. The first relates to the Federal Magistrate's application of the rule in *Rice and Asplund.* The second relates to a failure by the learned Magistrate to admit into evidence a court ordered Family Report and an allegedly consequent failure to give any weight to the wishes of the children and the recommendation of the Family Reporter. The final ground asserts a failure to accord the father natural justice, both in respect

of the refusal to admit the Family Report and an asserted failure to sufficiently explain to the father, who was not legally represented at trial, the *Rice and Asplund* "rule".

5. The actual grounds are unusually cast and do not squarely raise all points argued, but Mr Lawrence, counsel for the mother, took no exception on that basis.

6. Because arguments about the application of, as distinct from the content of, the rule in *Rice and Asplund* are necessarily connected with both the evidence as it was before the learned Magistrate and any evidence that should have been before the learned Magistrate, before discussing the rule and its application by Lucev FM, I will discuss firstly the matter of the Family Report, then some of the facts upon which the learned Magistrate founded his application of the *Rice and Asplund* rule and other facts, mainly contained in the Family Report, upon which the Federal Magistrate could have founded his application of that rule.

THE ALLEGED FAILURE TO ADMIT THE FAMILY REPORT

7. Under this topic I will address:

   i. Whether the Family Report should have been admitted, or in fact was admitted by necessary implication; and

   ii. Whether, since the learned Magistrate proceeded to address the contents of the Report in the alternative to his refusal to admit it; there were any consequences, in particular a denial of natural justice, of a failure to admit the Report.

(i) Whether the Family Report should have been admitted, or in fact was admitted by necessary implication

8. The Report in question was prepared by Ms X, an experienced psychologist and Family Reporter, who had prepared a Family Report utilised in the proceedings determined in 2003, and who had been professionally involved with the family for a couple of years before the preparation of that Report.

9. Ms X prepared her later Report on 18 May 2007, pursuant to court order. Both Mr Gould, Counsel for the father on appeal and Mr Lawrence are agreed that, at the trial which took place on 25 June 2007 (in the words of Mr Lawrence), "everybody thought that the Report was in evidence." Mr Gould provided a schedule of transcript references to the Report, including seven references by and for the mother, ten by the father and two by the learned Magistrate. All these references indicate assumption that the Report was in evidence. Submissions were made as if the Report was in evidence. The learned Magistrate himself sought the assistance of counsel for the mother, as to the terms of Ms X's proposals in the Report.

10. Yet, in his reasons for judgment, delivered on 2 November 2007, what the learned Magistrate said of whether or not the Family Report was in evidence before him was:

> 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. In this case there was no such consent, and the Family Report writer's opinion is not in evidence.
>
> 20. There is therefore no evidence before the Court of any material change in the circumstances concerning the recommendation of the Family Report writer.

11. A footnoted reference to the first sentence of paragraph 19 was to s 69ZU of the *Family Law Act 1975* (Cth) ("the Act"). That section provides:

> **Evidence of family consultants**
> The court must not, without the consent of the parties to the proceedings, take into account an opinion expressed by a family consultant, unless the consultant gave the opinion as sworn evidence.

12. During the trial no one had made any reference to that section.

13. I observe in passing that the section was introduced by the 2006 amendments which introduced a raft of changes to Part VII of the Act (dealing with applications relating to children). Those included procedural changes that were likely to bring Family Reporters to court on the first occasion in which a case came before the court and at which it was unlikely that a written Report would have been prepared, but oral opinions might well be sought and given. That was not previous practice.

14. I also agree with Mr Gould's submissions that, prior to those changes, it was not common practice to call the author of the Family Report merely to swear to its contents and verify its authenticity, but rather, only if cross-examination was proposed.

15. I do not have before me any papers from the Federal Magistrates Court file that might indicate lists of documents that were to be relied upon by the parties at trial. I therefore do not know if the Family Report was nominated as such a document prior to the commencement of the hearing. At the hearing, the father was the first witness. The Federal Magistrate asked him formal questions, identified three affidavits and enquired whether the father wished to rely upon them, following which cross-examination by the legal representative for the mother commenced. After establishing that the father had taken material with him into the witness box, the mother's lawyer asked whether he had the Family Report with him as well and immediately embarked upon a series of questions derived from the content of the Report. During that process, she referred the

learned Magistrate to a paragraph of the Report on which she was basing a question. However, the transcript does not disclose that at any stage anyone made a formal application that the Report be received into evidence.

16. Mr Gould primarily argued (as the ground was framed) that a denial of natural justice arose from the refusal of the learned Magistrate to regard the Family Report as in evidence before him. However, in his written summary, he also submitted that the Report had been impliedly admitted into evidence.

17. Mr Lawrence in his written summary merely stated that s 69ZU was "very much a mandatory provision" and that "Strictly speaking therefore the learned Magistrate is correct".

18. In my view, Mr Gould's argument receives support from comparison with the way in which this court has treated the terms of s 79(A)(1A) of the Act, which provides that a court may, with the consent of all (relevant) parties, vary a s 79 property order. Cases such as *In the Marriage of McCabe* (1995) FLC 92-634 and *Sommerville v Sommerville* (2000) FLC 93-042 show that that consent may be implied from conduct.

19. Though the point was only lightly touched upon, my opinion is that the parties had by necessary implication consented to the Report being received into evidence.

20. In any event, Lucev FM did not regard the Report as before him. I think there is no doubt that if the learned Magistrate was right in so ruling, the course of the trial and requirements of fairness obliged him to recall the parties to inform them of his view, or, in the alternative, deal with the Report as if it were in evidence. That leads to the next question.

(ii) Whether, since the learned Magistrate proceeded to address the contents of the Report in the alternative to his refusal to admit it, there were any consequences, in particular, a denial of natural justice, of the failure to admit the Report

21. Following the two short paragraphs quoted earlier, in which the Federal Magistrate ruled that the Report was not in evidence, he said:

> 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.

22. In my view, that Lucev FM addressed the alternative to his ruling that the Report was not in evidence, namely that it was, is sufficient to avoid the denial of natural justice which would have clearly otherwise arisen. Whether he correctly and/or sufficiently addressed the Report's contents is another question altogether.

SOME FACTS TO WHICH THE LEARNED MAGISTRATE APPLIED THE *RICE AND ASPLUND* RULE AND THOSE TO WHICH HE COULD HAVE APPLIED IT

23. Mr Gould pointed to findings in paragraphs 13 and 15 of the learned Magistrate's reasons to indicate that Lucev FM had misunderstood the issues in the proceedings before Brown FM in 2003, and the result of those proceedings. If Mr Gould is correct, the father must take some responsibility for the error, in light of what Lucev FM recorded of what the father told him.

> 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* [the decision of Brown FM) 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."*
>
> 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.

24. What the learned Magistrate presumed, albeit based on inferences from what the father said, was incorrect. The opening words of Brown FM's judgment of 2003 are: "This is a relocation case." The mother wished to move to Alice Springs. As seen earlier, the father succeeded in his opposition to that proposal. As to Lucev FM's conclusion that Brown FM had rejected the father's proposal for an equal shared care arrangement, in his 2003 judgment Brown FM said:

> 17. The Family Report was released to the parties on the 11th of November 2003. Ms [X] was not supportive of the husband's proposal that the children be cared for by both their parents on a week about basis. Ms [X] believed that such an arrangement would intensify the high level of conflict already existing between the parties. To his great credit, in the light of this report, the husband abandoned his proposal for a shared care arrangement in respect of [B] and [S]. However, he continues to oppose the mother's relocation with the children either to Alice Springs or elsewhere. At the outset of the hearing on the 19th of November 2003 he indicted that he sought the following orders: …

25. Brown FM then set out in full the orders that the father had sought, including that the children spend time with him on each alternate weekend during school terms, 2.30pm on Friday until 8.00am on Monday, every other week from Thursday after school until the commencement of school on Friday morning, as well as holiday contact. The orders made by Brown FM differed little from those that the father sought.

26. However, Lucev FM's misunderstanding of the broader parameters of the dispute before Brown FM may not of itself amount to appellable error. The fact remains that the issue of the proper parenting arrangements had been finally determined in 2003. But the question of the parameters and the focus of the earlier enquiry may well have had some bearing on the Federal Magistrate's assessment of the degree and sufficiency of change in circumstances since the 2003 order.

27. As to his understanding of the more specific issues raised between the parties in the 2003 trial, Lucev FM said:

> 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:
>
> (a) the nature of the relationship and communication between the parents, culminating in the "parlous parenting relationship" between them;
>
> (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);
>
> (c) the Children's relationship with significant persons, other than their parents, and in particular the Mother's family;
>
> (d) the practical difficulties associated with the Children spending time with both parents;
>
> (e) the responsibilities of parenthood and the parties attitudes to the Children;
>
> (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;
>
> (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; and
>
> (h) the nature, and maintenance, of the relationship between each parent and the Children. [footnotes omitted]
>
> 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 sought to do was

> "review" the reasons for judgment and orders in *S & S* and re-agitate the issues.

28. For present purposes, that Lucev FM did not identify any wishes of the children as among the issues considered by Brown FM, is significant.

29. At paragraph 16 of his reasons, Lucev FM said:

> 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.

30. Again, Lucev FM did not identify wishes of the children as a factor that fell for consideration as a new circumstance.

31. The two paragraphs in which Lucev FM considered the contents of the Family Report were set out earlier. Mr Gould argues that that consideration was deficient. I think it was, in two respects.

32. Firstly, the recommendations made by the Counsellor were as follows:

> 55. Thus it is recommended that [B] and [S] continue to reside primarily with their mother.
>
> 56. It is also recommended that the children have more contact with their father than currently but not to the degree of equal shared care. Thus a 5:9 or 6:8 ratio per fortnight could be considered.

33. As noted above, the learned Magistrate described the recommendation of the Counsellor as "somewhat equivocal". In my opinion that is not so. The father was already spending time with the children four out of fourteen nights per week. The Counsellor clearly said that he should spend more time with them, but not "7:7". This only left ratios of 5:9 or 6:8, as to which the Counsellor made no particular recommendation. There is nothing at all unclear about her position.

34. Secondly, as to the question of the children's wishes, the Family Reporter said:

> 29. Initially, in the company of her sister, [B] informed she would like to spend more time with her father. When queried about how much more time [B] reported she would be happy with a 5:9 ratio and even a 6:8 ratio still preferring to spend more time at her mother's home. …
>
> …

30. After the weekend spent at her father's home… [B] was less certain about considering a 6:9 ratio. She reported she felt less comfortable at her father's home and was more fearful, preferring to share a room with her father. At her mother's home she can sleep alone.

…

37. It seemed clear that [B] loves both her parents dearly; believes she is well cared for in both environments and is starting to see her parents' faults probably due to the maturation process. It is apparent she prefers to accommodate and not cause conflict but is clearly triangulated in the family system.

…

39. In the company of her sister [S] was keen to spend more time with her father but was not sure a 6:9 or 8:7 ratio would suit her. She reported she sometimes does not feel safe at her father's home. Whilst it was clear it was not her father she feared, she could not articulate what her fears were.

40. The second time she was interviewed [S] reported she was less sure about a 7:7 ratio as she believed this would "stress" and "annoy" her mother.

…

42. [S] would like to be able to visit her father outside of the allotted contact times now that he is living so close, but is aware her mother will only allow this if she is in a "good" or "good mood."

…

44. [S] reports she has felt bribed by her father to think about spending more time with him. She does not trust his promises as much as she trusts her mother's promises and cannot be sure her father would spend more time with them. …

45. Whilst [S] will consider more time with her father she is aware that as she gets older her body will change and her mother will be the expert, who can help her in this domain.

…

47. As her mother has told her that when she is thirteen years old and at high school she can make her own decisions because

> she can understand more things, [S] thinks she would like the care arrangements to stay like it is currently.

35. While the view may well have been open that the wishes of the children were hedged and equivocal and possibly had been arrived at under a feeling of some pressure by the father that they spend more time with him, the question remains whether the evidence of the children's wishes was of such significance in the case that the Federal Magistrate should have dealt with it.

36. Ms X did not dismiss the children's wishes as equivocal. Immediately prior to the recommendations earlier set out, Ms X summarised the approach that led to them:

> 54. The assessor's clinical judgment is that of the two parents [Mr SPS] has the necessary psychological flexibility to be able to tolerate an unequal care arrangement than [Ms PLS] has to tolerate an equal one. Considering the best interests of [B] and [S], it appears too risky to recommend an equal shared care arrangement currently. [Mr SPS] may need to wait until the girls are older and feel more empowered to make their own decisions about contact arrangements.

37. In his submissions to the Federal Magistrate, the father had said:

> It is clear from the Family Report that [B] particularly wishes to see a more equal or shared arrangement with her parents and [S]'s prevaricated from wanting it and not wanting it and I wonder whether, given that they both express their concern of perhaps time of going contrary to their mother's wishes, that they feel a great pressure to do that.
>
> Certainly in my discussions with [S], she has rarely wanted it to stay as it was. She's always wanted to have more time with me but with uncomfortable perhaps going straight to 7 on, 7 off and I was a little surprised to read that in the Family Report but I acknowledge that that's clearly what [S] said.

38. Thus, based on Ms X's Report and the father's case, the issue of the children's wishes was an important factor in the trial.

39. In his judgment, Lucev FM made no express mention of the children's wishes. As to whether he impliedly considered them, the effect of the discussion in paragraph 22 (earlier set out) is that the learned Magistrate considered that the Family Report did not identify any sufficiently material change in circumstances to warrant reconsideration of the previous orders. However, the expression of this view follows the sentence, "The same issues considered by the court in *S v S* are considered by the Family Report, and the conclusions reached are not dissimilar to those reached by the court in 2003." As recognised earlier, the Family Report in 2003 contained no mention of wishes by the

children to spend more time with the father, so it is very doubtful that in the sentence quoted the learned Magistrate had evidence about the wishes of the children in mind.

40. In *In the Marriage of Bennett* (1991) FLC 92-191 the Full Court of the Family Court said that the path by which the result is reached must be discernible from reasons for judgment, either by implication or otherwise. Here, while one could possibly infer that in paragraph 22 of his reasons, the learned Magistrate had the children's wishes in mind, by no means is that a necessary inference. To the contrary, it is an unlikely one. Moreover, even if he is taken to have had the children's wishes in mind, how the learned Magistrate regarded them and the questions of whether they constituted a change of circumstance, and, if so, a sufficient change of circumstance to invoke a fresh examination of the question of the time that the children should spend with the father, is indiscernible.

41. The question of what issues raised by the evidence the learned Magistrate should have addressed is connected with his application of the rule in *Rice and Asplund.* I will shortly discuss features of that rule. For present purposes, I simply observe that in the instant case, the learned Magistrate embarked on a hearing and he chose not to determine the *Rice and Asplund* question as a preliminary mater.

42. As later discussed, when the rule in *Rice and Asplund* is applied after a full hearing, its weight is likely to be less and correspondingly, factors that commonly point to what is in a child's best interests (such as the wishes of thirteen and nine year old children) will likely deserve greater attention.

43. Moreover, the force of the rule will likely vary according to the nature and degree of change sought to a previous order. At one end of the parameters in the instant case, the father sought only a relatively small increase in time with the children. Again, the factors that bore upon whether that increase was or was not in the children's best interests at least deserved discussion.

44. In summary, in my view, the learned Magistrate fell into appellable error because of his:

- misapprehension of the parameters of the 2003 hearing and the result measured against those parameters;
- failure to recognise that the wishes of the children were not an issue in the 2003 proceedings;
- failure to discuss the children's wishes as they were on the evidence before him; and
- incorrect treatment of the recommendations of the Family Reporter.

DID THE LEARNED MAGISTRATE ERR IN THE APPLICATION OF THE RULE IN *RICE AND ASPLUND*?

(a) The rule

45. Discussion of the rule has not always used consistent terminology. In particular the term "threshold" has sometimes been used in a temporal sense, to indicate something done at the beginning of a hearing as opposed to at the end and, at other times, the term has been applied to consideration of the rule (irrespective of when in a trial that was given) ahead of consideration of (or as the initial application of) other relevant or potentially relevant principles.

46. I will use the term "threshold" to mean, "the first question to be determined" and which, depending on the answer to it, may be dispositive of an application for parenting orders, irrespective of when in a hearing it is posited and answered. I will refer to the situation arising when the question is posed and answered at the outset of a hearing as treatment of the question as a "preliminary matter".

47. The rule is long established - nearly thirty years now in this jurisdiction – and was alive well before that in similar jurisdictions, and so, one might think, is in little need of discussion. But sometimes familiarity and repetitive usage may abrade the subtleties of a principle or expose those not originally appreciated.

48. In my view, reflection on the rule shows that:

    (i) What the application of the rule can achieve if dealt with as a preliminary matter is different from what it can achieve if dealt with at the end of a full hearing.

    (ii) In its original formulation, the rule is directed to application as a preliminary matter. Yet, contemporaneously with that formulation the court in *Rice and Asplund* determined that the rule could equally be applied at the end of a full custody hearing. The consequences of that determination have received little attention.

    (iii) At whatever stage of a hearing the rule is applied, its application should remain merely a manifestation of the "best interests principle".

    (iv) Discussion in terms that the rule may be applied as a "preliminary matter" or the primary application be first heard "on the merits" may be unhelpful, particularly because of the implication that, if the rule is applied as a preliminary matter, the parenting application is **not** then dealt with "on the merits".

    (v) The application of the rule is closely connected with the nature of, and degree of, change sought to the earlier order.

(vi) "Shorthand" statements of the rule may contribute to its misapplication.

(vii) Any application of the rule must now measure the evidence against the principles set out in Part VII of the Act, in particular the objects of the Part, the presumption of equal shared parental responsibility and the steps required by the Act consequent upon an order made or to be made in that regard.

49. I support these observations as follows.

(i) What the application of the rule can achieve if dealt with as a preliminary matter is different from what it can achieve if dealt with at the end of a full hearing.

(ii) In its original formulation, the rule is directed to application as a preliminary matter. Yet, contemporaneously with that formulation the court in *Rice and Asplund* determined that the rule could equally be applied at the end of a full custody hearing. The consequences of that determination have received little attention.

50. *Rice and Asplund* involved an appeal from custody orders which reversed an order made nine months beforehand. In her reasons for judgment, Evatt CJ said of the position of a court confronted with an application to change an earlier order that (at 78,905):

> … It 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, to quote *Barber J*., there is some changed circumstance which will justify such a serious step, some new factor arising or, at any rate, some factor which was not disclosed at the previous hearing which would have been material.

51. In the remainder of the paragraph immediately following this passage, Evatt CJ said that the threshold question is not necessarily one for a preliminary determination. Yet in my view, her Honour had formulated the rule as one to be applied as a preliminary matter. As seen, she said that the court **should not lightly entertain an application to reverse an earlier custody order**.

52. In *Bennett* the Full Court, comprising Nicholson CJ, Simpson and Finn JJ, seems also to have thought that the rule in *Rice and Asplund* was primarily one that would be applied as a preliminary matter. That court expressed the view that while it was a matter of discretion as to whether a judge embarked upon a full hearing of a matter or determined the threshold question as to a change in circumstances, that in no way derogated from **the general principle** expressed in *Rice and Asplund* "that fresh applications for custody should **not be**

entertained unless there exists a substantial change in circumstances." [emphasis added]

53. The original formulation does not well describe the position of a court effectively considering what weight to give to a previous order at the end of a full hearing of an application to alter that order. Then, as a matter of terminology alone, the rule would be at least directed to the question, not of whether to entertain an application, but whether to reverse (or alter) an earlier order.

54. This difference may seem unimportant, but it is not.

55. The ends served by the rule will vary according to whether it is applied at the outset of, or at the end of, a hearing.

56. As seen above, in *Rice and Asplund*, Evatt CJ recognised that a purpose of the rule was to discourage "endless litigation". I opine that the public interest in the finality of litigation is at least partly derived from a desire to avoid the public expense of subsequent hearings and the imposition of them on court time.

57. In *In the Marriage of McEnearney* (1980) FLC 90-866, Nygh J moved beyond the general position of public interest in the finality of all litigation, to purposes more specific to family law. He said (at 75,499):

> …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**. (emphasis added)

58. Another end served by the rule is that it avoids one judge substituting his or her opinion of what is in the best interests of a child for that of another judge, though both opinions are based on the same or similar facts. This "evil" is avoided by a requirement that the previous order should not be altered unless there has been a change of circumstances sufficient to justify that result.

59. If the rule is addressed as a preliminary matter and proves determinative of the application, all these purposes can be served.

60. If the rule is not applied until the end of a full hearing, they cannot; the parties will have litigated in a full hearing; likely that very situation will have impacted on the children, who however may have been more directly involved, for example, in interviews for a Report; public resources will have been expended.

61. In my view, a likely and important consequence of a diminution in the ends to be served by a rule is a diminution in the weight it should carry, among the other principles pertinent to an overall result. This observation is reinforced by consideration of the nature of the hearing that takes place if the rule is not applied as a preliminary matter.

62. As mentioned earlier, in *Rice and Asplund* Evatt CJ said that the threshold question is not necessarily one for application as a preliminary matter. Her Honour added at 78,905 – 78,906:

> … but they are matters that the judge should consider in his reasons for decision. It is a question of finding that there are circumstances which require the court to consider afresh how the welfare of the child should best be served. …

63. I think this passage raises two awkward concepts. As already stated, at the end of the hearing, a judge will not be enquiring whether there are "**circumstances which require the court to consider afresh how the welfare of the children should best be served**". That enquiry will have already been conducted.

64. Secondly, in strict logic, if a judge is unable to determine on the papers if a change of circumstances, sufficient to embark on a fresh hearing of a parenting issue exists, then what the judge should embark upon is a hearing directed to that question, not one directed to "how the welfare of the children should best be served".

65. However, ellipsis in logic or not, subsequent authority has clearly reiterated that if the rule is not applied as a preliminary matter, then the hearing that follows is a full hearing of a "custody" dispute.

66. *In the Marriage of F and N* (1987) FLC 91-813 Nygh J, with whom Evatt CJ and Burton J agreed, said at 76,137:

> *Rice and Asplund* in fact makes the point that this court should be reluctant in assuming jurisdiction too soon after there has been a full and adequate hearing of the custodial dispute between the parties.
>
> Generally speaking, a court should as a matter of practice not assume such jurisdiction unless there is a change of circumstances that has occurred since the last determination. As I have pointed out earlier in this case, such a change of circumstances had in fact occurred. *Rice and Asplund*, in my view, also makes it clear that once the Court assumes jurisdiction the normal rules applicable to custodial decisions apply. That is to say, the earlier decision does not assume any particular onus upon the person who seeks a change from the existing situation to show that this is or is not justified. The Court must consider the matter afresh in the light of what it considers to be in the best interest of the child.

67. In *Bennett*, the trial Judge had embarked upon a fulsome hearing of a custody issue and the Full Court expressed no disapproval of that course.

68. In *In the Marriage of D and Y* (1995) FLC 92-581 the Full Court, referring to *Bennett's* case, clearly regarded the choice for a court, where departure from a previous order was sought, as between determination of the threshold question as a preliminary matter or a "full hearing of a custody dispute".

69. Though I refer to a "leap in logic" there may be good reason for it. In reality, the facts that relate to the best interests of children per se and to the determination of such questions as whether there has been a change of circumstances of sufficient magnitude to justify fresh consideration of parenting arrangements are likely to be identical or at least intertwined and to the extent that the facts are otherwise, they may well not be susceptible of identification or assessment for weight until all of the evidence bearing upon factors that relate to a child's best interests are before a court. The nature of the hearing that follows if the *Rice and Asplund* rule is not applied as a preliminary matter, as described by authority, may well be the wise and practical choice.

70. But the concern is that to proceed in the circumstances under discussion to a "full hearing of a custody dispute" may cause the threshold question to fade completely away. This observation may explain what the Full Court said in *Bennett* (at 78,262 - 78,263):

> In some cases, however, and her Honour apparently considered that this was one of them, it is not easy to determine the threshold question without going into the merits of the matter. Obviously, if this is done, and as a result of taking such a course, the trial Judge comes to the conclusion, as her Honour did, that a change of custody is warranted in the interests of the child, then it would be unthinkable not to give effect to such a conclusion on the basis that no change in circumstances have been shown.
>
> …it seems to be almost impossible to argue that if a trial Judge has concluded that, in the interests of a child, there should be a change in custody, such a decision should be set aside upon the basis that there has been no sufficient change of circumstances. …

71. This statement seems equivalent to saying that the rule in *Rice and Asplund* need not be applied.

72. I would put the position a little differently. While I have said that the rule needs to be re-formulated if applied at the end of a hearing, and may also carry less force, I do not think that the rule in *Rice and Asplund* should be cast aside at the end of a hearing to change a previous order, even if the trial Judge has come to the conclusion that on all considerations **other than the rule**, the best interests of the child require change.

73. There are two matters of public policy that support the application of the threshold question even at the end of a hearing. Namely, that it is important for one judge not simply to substitute his or her conclusion for another judge, unless there has been a change of circumstance sufficient to justify that course. Secondly, albeit the particular litigation has run, if no such rule is even considered, in a general sense litigation will not be discouraged.

74. In summary:

- The rule in *Rice and Asplund* is generally expressed – as a rule to be applied as a preliminary matter;
- If applied as a preliminary matter it may achieve all its purposes; and
- If applied at the end of a full hearing of parenting issues, the rule cannot achieve all its ends, but can achieve some and ought still receive consideration. However, its force may be diminished.

(iii) At whatever stage of a hearing the rule is applied, its application should remain merely a manifestation of the "best interests principle".

(iv) Discussion in terms that the rule may be applied as a "preliminary matter" or the application be first heard "on the merits" may be unhelpful, particularly because of the implication that, if the rule is applied as a preliminary matter, the parenting application is not then dealt with on the merits.

75. As seen from the passage from *Bennett* earlier quoted, the Court there said:

> In some cases, however, and her Honour apparently considered that this was one of them, it is not easy to determine the threshold question without going into the merits of the matter.

76. This implies that had the threshold question been answered at a preliminary stage and the application dismissed, it would not have been dealt with "on the merits". I think that implication should be avoided.

77. An order simply dismissing an application to vary or discharge an earlier parenting order may not neatly fit within the definition of "Parenting Order" as set out in s 64B, although a variation or discharge of the earlier order would. However, the paramountcy principle still applies to the decision to dismiss an application to vary, because of the terms of s 60CA which are:

> **Child's best interests paramount consideration in making a parenting order**

> In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration.

78. Authority supports this view. Speaking of the rule in *Rice and Asplund*, Nygh J with whom Barblett and Fogarty JJ agreed, said in *In the Marriage of Newling and Mole* (1987) FLC 91-856 at 76,467:

> Since the principle that the welfare of the child is the paramount consideration applies in all matters affecting children, it is, in my view, not appropriate to speak of cause of estoppel. What this rule really illustrates is that it is, generally speaking, not in the interests of the child to have repeated applications concerning its custody and access before the court. …

79. Again, in *In the Marriage of F and N* (supra), Nygh J said at 76,136:

> Indeed it is fair to say, as I have said on several occasions, that basically in custodial matters there is only one rule, and that is that the welfare of the child is the paramount consideration. Everything else is but a reflection of that rule.

80. And in *McEnearney* (supra) Nygh J further said at 75,499:

> 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 to 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.

81. Thus, in my view when the threshold question described in *Rice and Asplund* is determined as a preliminary matter, it remains a determination "on the merits". Where an application is dismissed at a preliminary stage, it is not dismissed for some technical reason, such as the failure of a party to appear or some lack of compliance with form and procedure but rather because, assuming the evidence of the applicant is accepted, there is an insufficient change of circumstance shown to justify embarking on a hearing. Though sometimes unstated, the underlying conclusion will or ought be that the interests of the child in not being the subject of further litigation is more powerfully in the child's welfare than to allow the application to continue.

(v) The application of the rule is closely connected with the nature of and degree of, change sought to the earlier order.

82. This proposition lay behind what Evatt CJ said in *In the Marriage of Zabaneh* (1986) FLC 91-766 at 75,587 (Fogarty and Renaud JJ agreeing):

> The welfare of children may ultimately demand that issues concerning access, custody and so forth, and so on, be reconsidered, but only when there is some evidence of an underlying change in the circumstances, whether that be in the attitudes of the parties, or the needs or circumstances of the children. The fact that time has elapsed or a considerable time, may be relevant, but it is not the only factor to take into account.
>
> Different issues arise in relation to reinstatement of access. The issues involved in reconsidering access relate much more directly to the children and their needs, their own attitudes and wishes. Time may play a part in this. This Court would not wish to subject children to the repeated intervention of court proceedings to the extent that they have to be reassessed every few months, or every year, by court counsellors to see if they maintain the same attitudes. That certainly could not be encouraged, but there may come a time when there are such changes in the attitudes of the parties, or such evidence relating to the children and their needs and attitudes towards their parents, that it would be reasonable to reconsider access.

83. Accordingly, the rule may not impede hearing an application for a small alteration, which may require only a short and narrow enquiry, but may properly prevent a hearing in respect of more far-reaching changes.

(vi) "Shorthand" statements of the rule may contribute to misapplication.

84. Although I do not suggest that, when judgments of the court in which the rule is discussed are read in full, the rule is in any case inaccurately or even insufficiently expressed, sometimes "shorthand" descriptions of the rule are used and are then taken up by others in later cases. Some phrases used seem to better direct attention to the essential question than others. For example, the phrase used by Nygh J in *McEnearney* (supra), that a court should discourage a parent from coming back to court where there "is really no startling new circumstance" focuses attention on the character of the circumstance itself. Similarly, terms such as "a substantial change in circumstance since the making of an existing order", as used by the Full Court in *D and Y* (supra), may tend to focus attention on the character of a particular event or events. The essential question however is as to the sufficiency of new events to provoke a new enquiry. The answer to this question involves putting events in the context of the broader circumstances pertaining to arrangements for a child and measuring the significance of the events against the significance of the steps that might follow in light of them.

(vii) Any application of the rule must now measure the evidence against the principles set out in Part VII of the Act, in particular the objects of the Part, the presumption of equal shared parental responsibility and the steps

required by the Act consequent upon an order made or to be made in that regard

85. Paragraph 44 in Part 2 of Schedule 1 to the *Family Law (Shared Parental Responsibility) Act 2006* (Cth) provides:

> 44 The amendments made by this Schedule are taken not to constitute changed circumstances that would justify making an order to discharge or vary, or to suspend or revive the operation of, some or all of a parenting order that was made before commencement.
>
> Note: For the need for changed circumstances, see *Rice and Asplund* (1979) FLC 90-725.]

86. This provision and the position that the rule in *Rice and Asplund* is merely a manifestation of the best interests principle, establish that the rule survives. However, its application must recognise the new legislative content in which the question is now posited and answered. This includes the objects (and underlying principles) of the Part, set out in s 60B and s 61DA which provides that, when making a parenting order in relation to a child, the court must apply a presumption that it is in the best interests of the child for the child's parents to have equal shared parental responsibility for the child. The presumption may be rebutted, but if it is not, then under s 65DAA, the court must consider whether the child spending equal time with each parent would be in the bests interests of the child or, if such an order is not to be made, whether the child spending substantial and significant time with each parent would be in the best interests of the child.

87. While it is clear that of themselves the legislative changes introduced by the 2006 Act do not constitute a change of circumstance for the purpose of the *Rice and Asplund* rule, a change in relevant facts may take on a significance because of the legislative amendments that it would not have possessed before them.

(b) The judgment of Federal Magistrate Lucev

88. In the instant case, when Lucev FM referred to the rule in *Rice and Asplund*, he framed the rule with a focus on the nature of the change of circumstance itself:

> 6. The first issue … is whether the father can show **a material change in circumstances** since the making of the orders in 2003.
>
> …
>
> 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.
>
> …

12. To determine if there has been **any sufficiently startling material change in circumstances** it is necessary to consider the reasons for judgment … .

…

15. There was **nothing significantly new or startling different about any of the issues** raised in relation to the above matters in these proceedings to warrant variation of the previous orders. (emphasis added)

89. As I have suggested, these shorthand formulations of the rule may unduly truncate the proper enquiry.

90. Most of the first 16 paragraphs of the learned Magistrate's reasons have already been set out. Paragraphs 19 to 22, concerning the treatment of the Family Report have also been set out. There are, in any event, only 24 paragraphs. The final two paragraphs under the heading "Conclusion" are:

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.

91. In my view, as I have already said, the learned Magistrate erred in his treatment of the evidence. Had he recognised the correct position with regard to the issues raised in, and the result of, the 2003 proceedings, and as to the wishes of the children, then, in applying the rule in *Rice and Asplund*, he should have taken account of the fact that the further hearing had already occurred; that the children had been involved in further reporting; that they had expressed their wishes; that the ends to be served by the application of the rule were therefore diminished; and that at one end of the parameters of the father's application he sought only a small increase in time with the children.

92. In short, a more extensive and subtle consideration of the application of the rule in *Rice and Asplund* than was given by Lucev FM would have been necessary. In this sense, there is merit in the argument which emerges from ground one.

Conclusion

93. It follows from the aforegoing that there is merit in the grounds of appeal and the appeal must succeed, leading to the question of what should now be done with the father's application.

Remission or Re-exercise

94. In the Notice of Appeal, remission for rehearing was sought in the event merit was found in the appeal. Though Mr Gould did not oppose re-exercise of the discretion by me, both counsel saw considerable difficulty in a re-exercise of discretion because of the rather summary approach taken by the learned Magistrate and the consequently limited findings of fact. It is also now nearly nine months since the trial. Mr Lawrence said that the mother wished to put further evidence in. That evidence may be contentious. In the circumstances, the matter should be remitted.

Costs Certificates

95. Both parties sought costs certificates for the appeal and retrial. I consider the grant of costs certificates appropriate.

I certify that the preceding ninety-five (95) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Warnick.

Associate:

Date: 28 February 2008