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## Barrett & Plant [2009] FMCAfam 417 (14 April 2009)

Last Updated: 6 May 2009

### FEDERAL MAGISTRATES COURT OF AUSTRALIA

*BARRETT & PLANT*

[2009] FMCAfam 417

FAMILY LAW – Parenting – father seeks to change final parenting orders made by consent in November 2007 – preliminary Rice and Asplund issue - consideration of best interests of child – application for variation of Orders refused.

[Family Law Act 1975, s.65D](#)

*EJK & TSL (No. 4)* [\[2006\] FamCA 1022](#)

*King & Finneran* [\[2001\] FamCA 344](#); [\(2001\) FLC 93-079](#)

*R & BH* [\[2006\] FamCA 919](#)

*Sklovsky & Gastin* [\[2007\] FamCA 540](#)

*SPS & PLS* [\[2008\] FamCAFC 16](#)

*Rice & Asplund* (1979) FLC 90-215

Applicant:	MR BARRETT
Respondent:	MS PLANT
File Number:	SYC 544 of 2007
Judgment of:	Sexton FM
Hearing date:	14 April 2009
Date of Last Submission:	14 April 2009
Delivered at:	Sydney
Delivered on:	14 April 2009

### REPRESENTATION

Counsel for the Applicant: Mr S. Thomas

Solicitors for the Applicant: Mcgrath Dicembre & Company

Counsel for the Respondent                      Mr M. Wong

Solicitors for the Respondent                      Malouf Solicitors

UPON NOTING THAT:

- (a) The parties agreed in December 2008 to changeover taking place at the [H] Contact Centre, and those changeover arrangements continue; and
- (b) It is anticipated Mr Pickup's valuation of the father's business will be completed prior to the adjourned date.

THE COURT ORDERS THAT:

- (1) The father's application for variation of parenting orders made on 26 November 2007 be dismissed.
- (2) The matter be adjourned to 26 June 2009 at 10.00a.m. before me for interim hearing.

**IT IS NOTED** that publication of this judgment under the pseudonym *Barrett & Plant* is approved pursuant to [s.121\(9\)\(g\)](#) of the [Family Law Act 1975](#) (Cth).

**FEDERAL MAGISTRATES  
COURT OF AUSTRALIA AT  
SYDNEY**

**SYC 544 of 2007**

**MR BARRETT**

Applicant

And

**MS PLANT**

Respondent

**REASONS FOR JUDGMENT**

**Ex tempore**

1. These reasons are delivered orally.
2. By application filed on 10 October 2008, the father seeks to vary final parenting orders made by consent on 26 November 2007 in relation to the parties' two children, [A] aged 7 and [R] aged 5.
3. I am asked to decide as a preliminary issue whether there has been a change of circumstances such that the current parenting arrangements should be re-assessed. The mother asks that the father's application be dismissed because the father has not established that a change has occurred such to warrant the Court embarking on a hearing of the father's variation application.
4. Each party was represented in the 2007 proceedings. The November 2007 orders provide for [A] and [R] to live with the mother, and spend time with the father on alternate weekends from Friday afternoon until Sunday evening, half of the gazetted short-term school holidays and each alternate week during Christmas school holiday periods. The orders also include restraints in relation to who can be present when the children are bathing, where the children can sleep and physical discipline of the children. Orders were made for the use of a communication book, and the parties were ordered to attend a parenting after separation course and any other course recommended by Unifam. The parties are presently complying with those orders, subject to a variation in the changeover arrangements, agreed between them by way of a parenting plan in December 2008, while undertaking counselling at Unifam. It is common ground, however, that the orders were not complied with in the period 23 January 2008 to 7 September 2008.
5. In his application filed on 10 October 2008 for variation of these orders, the father seeks a reversal of the children's present living arrangements. He seeks an order that the children live with him and spend time with the mother on alternate weekends from Friday afternoon until Monday morning, half of the gazetted short-term school holidays and each alternate week during Christmas school holiday periods, as well as on other special days. He does not seek the restraining orders, nor does he seek orders for exchange of information between the parties concerning the children as provided in the 2007 orders. Although he seeks orders for changeovers at school/preschool during term time, at other times he seeks an order that the parties themselves attend changeover at McDonalds.
6. In her Response filed on 4 February 2009, the mother seeks that the father's application to vary these orders be dismissed. In submissions, however, the mother's counsel says the mother supports the current changeover arrangements continuing (at a contact centre), such arrangements having been agreed by the parties in December 2008 as a variation of the November 2007 orders.
7. Each party was represented by counsel in these proceedings. The mother relies on the expert report prepared by Dr Brent Waters in November 2007, parts of the affidavit of the father sworn on 20 April 2007 and parts of the affidavit of the father's wife, Mrs B, sworn on 27 July 2007. The mother also asks the Court to consider the father's amended application filed on 20 April 2007 in which the father sought an order that the children spend equal time with each parent. The father relies on his affidavits sworn on 9 October 2008, 18 December 2008 and 18 March 2009. Counsel for each party made written submissions in his case outline, and made oral submissions at hearing.
8. The mother is 47 and the father 39 years of age. The parties started living together in January 2001, married in May 2001, separated in March 2006 and divorced in May 2007. As already noted, final parenting orders were made on 26 November 2007. Property and spouse maintenance proceedings are still pending.

9. The mother has not been in the paid workforce for many years and relies for her income on Centrelink benefits, and limited child support income from the father. She lives with the two children, and her daughter [C], aged 21, from a previous relationship. The father is [occupation omitted]. He deposes to working long hours, though with a degree of flexibility. He has re-married and lives with his new wife Mrs B, and her two children, in a property owned by his wife at [P].

10. The onus is on the father, who is seeking to vary the current parenting orders, to adduce evidence sufficient to justify reconsideration of the November 2007 orders. There is no onus on the mother to prove that the current Orders should remain in force. If the Court finds that changed circumstances, such as to warrant the Court's further intervention have not been established, the application for variation may be summarily dismissed.

11. The father claims that at the time he signed the consent orders, he did not believe the orders were in the best interests of the children. The father says that during the course of negotiations, *"he did not fully consider the effect that the Orders would have upon me, the children and their implementation in relation to my spending time with the children"*. The father says the mother's conduct at changeover after the Orders were made continued to be hostile and denigrating towards him. He says it is in the best interests of [A] and [R] for the Court to undertake a full assessment of the situation in a contested hearing, and to put orders in place that better promote the welfare of the children.

12. The mother says nothing has occurred which would warrant the Court's intervention less than 18 months after the parties settled on the final parenting arrangements.

### The legal principles

13. All parenting proceedings are governed by [Part VII](#) of the Act. [Section 65D](#) provides that the Court must make such parenting order as it thinks proper. A Court may make a parenting order that varies, discharges, suspends or revives all or some of the earlier parenting orders, but as said by his Honour Justice O'Ryan in *Sklovsky & Gustin*[\[1\]](#), there is no statutory provision dealing particularly with when a Court may do so.

14. However, before varying existing parenting orders, the authorities are clear that the Court must be satisfied there are changed circumstances which require the Court to consider afresh how the welfare of a child should best be served.

15. It is open to the Court to deal with change of circumstances as a preliminary matter on the papers, or to proceed to a full hearing of the matter[\[2\]](#). The Full Court in *Rice & Asplund* (1979) FLC 90-215 held [\[3\]](#) that:

○ *...the principles which, in my view, should apply in such cases are that the court should have regard to any earlier order and to the reasons for and the material on which that order was based. 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 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...*

16. The Full Court said further that *"these principles apply whether the original order is made by consent or after a contested hearing."* [\[4\]](#)

17. These principles are well established by the authorities. His Honour Justice Collier in *King & Finneran* [5] said, “*The rule in Rice & Asplund is a rule evolved to protect children from involvement in further unnecessary litigation.*” His Honour said the question is whether the new material before the court makes it necessary, in the interests of the children, to allow further proceedings. This requires the court to give consideration to the importance or seriousness of the issues raised and the impact they may have on the children. His Honour went on to say[6]:

*The change or fresh circumstance must be such that upon becoming advised of it and being satisfied of its existence, a court would be left in no doubt that it was necessary to re-litigate the parenting issue in dispute between the parties. That is not to say a court must be satisfied that the fresh or changed circumstance would result in a change to the orders. It merely indicates that the change or fresh circumstance must be such that if taken into account there is real likelihood that a change may follow.”*

18. In the 2006 decision of *R & BH*[7] the Full Court approved[8] the dicta of Marshall SJ in *Houston v Sedorkin* [9] when his Honour said careful consideration should be given to discharging current orders when a relatively short period of time has passed since the making of the existing order.

19. In *SPS & PLS*[10] his Honour Justice Warnick said at paragraph 83:

○ *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.*

20. The overriding consideration is the best interests of the children.

Has there been a change of circumstance sufficient to warrant a reopening of the November 2007 parenting orders?

21. I must have regard to the circumstances as they existed at the time of those orders and to the material on which those orders were based.

22. Having regard to the father's affidavit material and to the submissions of the father's counsel, I summarise the matters relied on by the father as follows:

a. At the time the orders were made, the father was pressured into consenting to Orders that he did not believe were in the children's best interests. The Court needs now to carefully evaluate the situation at a hearing and put in place Orders that will best promote the children's interests.

b. The mother has repeated allegations of sexual abuse against the father's stepson, only two months after the orders were made.

c. The mother has denigrated the father at changeover, denigrates him on the phone and puts the phone on loudspeaker when the children speak to him.

d. The children did not see the father between 23 January 2008 and 7 September 2008.

e. There was an agreement to vary the orders in December 2008, followed by an attempt at further agreement in February 2009, which would, if agreed, have resulted in a variation of the current parenting arrangements.

f. The father's wife, Mrs B, has formed a strong bond with the children.

23. The father's counsel, Mr Thomas, submits that the parties have not yet litigated the issue of parenting orders as the earlier orders were made by consent.

Counsel submits the hostility between the parties has continued unabated. Since the orders were made, the parties' hostile behaviour has occurred in front of the children

at changeover which has affected the children adversely, the father's health and the father's relationship with his present wife. Mr Thomas submits that the orders sought by the father in his variation application would lessen the parties' opportunity to come into contact with each other, as changeover would take place without both parties present.

24. While Mr Thomas agrees the parties have altered the changeover arrangements themselves since the orders were made to ensure no contact between them at changeover, Mr Thomas says this decision to vary the orders supports his contention that the November 2007 orders are unworkable and should be changed. Mr Thomas asks the Court to re-open the case to put in place orders that will ensure the children are no longer subjected to the hostile exchanges between their parents.

25. Mr Wong, for the mother, says the father provides no explanation as to how reversing the custodial arrangements would benefit the children. Mr Wong submits that the present arrangements for changeover at a contact centre, agreed by the parties in December 2008, is already achieving that positive result, and even though there is no consent at this time to those arrangements being included as an order, neither party suggests the present workable changeover arrangements should change in the foreseeable future. Mr Wong says the father, in his 2007 Amended Application, had sought an equal time arrangement for the children. Mr Wong submits the father's position is not new and that he simply wants "another bite at the cherry".

## Conclusion

26. The current parenting orders were made 18 months ago. The children are now 7 and 5 years of age. The orders provide for the children to live with the mother and spend regular time with the father. Dr Waters, psychiatrist, prepared a lengthy and comprehensive report in 2007 which was released to the parties prior to the consent orders being made. Dr Waters supported the children being quarantined from conflict at changeover.

27. Mr Thomas emphasises in his submissions the need for a variation of the changeover provisions of the earlier orders to prevent further distress to the children and to the father as a result of the parties fighting with each other. But the father is not seeking a variation of the provisions relating to changeover alone, nor in fact is he seeking an order to ensure the parties never come into contact at changeover. Instead, the father is seeking a complete reversal in the children's living arrangements. He wants the children living with him 11 out of 14 days a fortnight during school terms, instead of the present arrangement which provides for the children to spend 12 out of 14 days with the mother in term time.

28. The father bases the need for this reversal in the children's living arrangements on the mother's conduct at changeover after the orders were made, and on the fact that her conduct resulted in the children, initially at his request, not seeing him at all for eight of the last 17 months since the orders were made.

29. The father and mother have already addressed the problem, for the children and each other, at changeover. They have agreed to changeover taking place at a contact centre. It remains open to them to ask the Court to vary by consent the changeover orders of November 2007 to reflect the agreed arrangements. The father does not propose this course. It is difficult to follow the father's logic if the changeover difficulties are the genuine basis for him seeking a change to the present orders.

30. In his report, Dr Waters referred to the mother's primary care-giving role to the children and the likelihood of the girls being distressed, particularly [A], if those arrangements were reversed. While Dr Waters commented on each party's parenting proposal at that time, which included the father considering the children living primarily with him, and other options which might have been considered, I was not referred by Mr Thomas to anything in Dr Waters' report which would indicate the orders made in November 2007 were directly contrary to the best interests of the girls.

31. Although there was a period of eight months last year when the children did not see their father at all, this was at the father's election, at least initially, albeit an election he later regretted. With the assistance of the counsellors at Unifam, the parties have managed to put the arrangements back on track. The children are presently spending time with the father substantially in accordance with the existing orders. The parties have sensibly, in my view, agreed to changeover at a contact centre to eliminate conflict occurring in front of the children at changeover. Neither party appears to want any change to that agreed variation, at least in the foreseeable future.

32. Regrettably for the children, as was the case prior to the November 2007 orders being made, the parties continue in an intensely toxic relationship, which I have no doubt has and will continue to have an adverse effect on the two children. As submitted by Mr Wong, Dr Waters' comments are noteworthy. Dr Waters said<sup>[11]</sup>:

○ *In general, children who can maintain a satisfactory relationship with both parents are less likely to experience emotional, behavioural, educational and relationship difficulties in the future. It is my view that these principles apply in this case. A challenge in this case would be for either party to enable this to occur. The mutual acrimony is extremely high and both parents have their supporters.*

33. The question is whether the changes asserted by the father are sufficient to justify a reassessment of the parenting arrangements. In relation to the matters relied on by the father as to a change of circumstances since the making of the November 2007 orders:

○ I accept Mr Wong's submission that what happened outside the Courtroom on the day of hearing between the parties' legal representatives does not create a change in circumstances and is irrelevant to the question I must decide. Mr Thomas for the father, appropriately in my view, did not refer to this material in his submissions.

○ I accept each counsel's submissions that the parties have, since well before the November 2007 orders were made, behaved in a hostile and inappropriate manner towards each other, at times in front of the children, and that it would be in the children's best interests for them to remain well away from each other at changeover. I accept Mr Wong's submission that the father's complaints about the mother's behaviour after the orders were made, are similar to the complaints he made about her behaviour before the orders were made.

c. I accept Mr Wong's submission that the father's present wife deposed to having a close relationship with the children before the orders were made in 2007.

34. I am satisfied the parties are substantially complying with the orders of November 2007, and that the variation in changeover arrangements agreed by the parties has significantly decreased the children's exposure to violence and hostility between the parties.

35. The father continues to work full time and the mother remains available to care for the children, as were the circumstances when the November 2007 orders were made. The hostility between the parties that the father complains of existed before the orders of 2007 were made, and continues to exist. Unfortunately, there is nothing before me to suggest this situation will not continue, perhaps particularly while litigation continues. It is noteworthy that despite the assistance of skilled therapists in Unifam's *Keeping Contact* programme, these parties remain largely resistant to changing their behaviour towards each other for the sake of the children. As I said to them at the hearing, it is highly likely their children will, as a result, have poorer long-term outcomes both intellectually and emotionally.

36. The authorities are clear that there must be circumstances which require the Court to consider afresh how the welfare of the children should best be served. I am not persuaded that the continuing hostilities between the parties, and the father's decision to stop spending time with the children in accordance with the orders from January to September last year, constitute changed circumstances sufficient to justify a reconsideration of the earlier Orders. Nor, if the matter were reopened, am I persuaded there is a likelihood the father would succeed in his application to have the children live with him.

37. Warnick J in *SPS v PLS* said<sup>[12]</sup>:

○ *When the application of the rule in Rice & Asplund is dealt with as a preliminary matter, and the Court is satisfied there is a sufficient change in circumstance to warrant a reopening of the orders, then the issue of residence and time to be spent with each party must be determined in the usual way in accordance with the provisions of Part 7 of the Act. This is likely to involve a further round of investigation and preparation of a report at financial cost to the parties and the community and at significant emotional cost to the children.*

38. I have determined that to re-open the parenting aspect of this matter would be further damaging to these children, already vulnerable as a result of the continuing hostility in their parents' relationship. I will therefore dismiss the father's application.

**I certify that the preceding 38Error! Style not defined. !Syntax Error, !Error! Style not defined.Error! Style not defined. !Syntax Error, !thirty-eightthirty-eight (38) paragraphs are a true copy of the reasons for judgment of Sexton FM**

Associate: Skye Owen

Date: 1 May 2009

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[1] [\[2007\] FamCA 540](#) at paragraph 123

[2] See *King & Finneran* [\[2001\] FamCA 344](#); [\(2001\) FLC 93-079](#) and *EJK & TSL (No. 4)*[\[2006\] FamCA 1022](#)

[3] At 78,905

[4] At 78,906



[\[5\]](#) (2001) FLC 93-079

[\[6\]](#) At paragraph 50

[\[7\]](#) [2006] FamCA 919

[\[8\]](#) At paragraph 12

[\[9\]](#) [\(1979\) FLC 90-699](#) at 78,728

[\[10\]](#) [2008] FamCAFC 16

[\[11\]](#) Expert report prepared by Dr Waters in 2007 at page 19

[\[12\]](#) At paragraph 84

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