When will the Court reconsider parenting orders? - Clarification of the Rice v Asplund rule

Author: Jane Holford
Email: jane@smithfamilylaw.com.au
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Changes to the *Family Law Act 1975* (Cth), specifically the introduction of section 65DAAA, have raised questions about how final parenting orders will be reconsidered in light of the longstanding *Rice v Asplund* precedent. This article seeks to clarify these legislative changes and explains the process the Court will follow when determining whether final parenting orders should be revisited, particularly in cases where there has been a significant change in circumstances.

You can read more about all the May 2024 changes in family law in our earlier blog, "Significant changes to the Family Law Act effective from May 2024".

Wording of legislative changes created uncertainty when considering changes to parenting orders

On 6 May 2024, a number of legislative changes were made to the *Family Law Act 1975* (Cth) ("**the Act**"), including the addition of section 65DAAA.

The intention of section 65DAAA was to codify (i.e. incorporate into the interpretation of the law) the long-standing precedent established in the matter of *Rice v Asplund*. This precedent provided guidance in relation to what circumstances the Court could reconsider final parenting orders.

However, the wording of section 65DAAA differed from the long-established rule of *Rice v Asplund*, and there was uncertainty as to how the amended legislation should be interpreted and applied to specific matters.

On 19 December 2024, the Full Court of the Federal Circuit and Family Court of Australia (Division 1) delivered its judgment in *Radecki &Radecki*. This decision allowed the Full Court to provide guidance on the interpretation and application of section 65DAAA concerning the reconsideration of final parenting orders.

The established rule in Rice v Asplund in parenting matters

In general terms, the precedent or 'threshold test' established in *Rice v Asplund* is two-pronged. The Court will only entertain a new application after final orders are made about children if both the following criteria are met:

1. The Court determines that there has been a "significant change in circumstances"; and
2. The Court determines that it is in the child's best interests to re-open proceedings.

This is based on the understanding that it is usually not in a child's best interests to expose them to further litigation, and so it will usually only be in a child's best interests to expose them to further proceedings **only if** there has been a significant change of circumstances since the making of the final orders.

What is a "significant change in circumstances"?

There is no 'checklist' of criteria to follow to determine whether there has been a significant change in circumstances. It will be heavily reliant on the circumstances as at the making of final orders, what has happened since the making of final orders, and the current circumstances.

We strongly recommend you obtain legal advice from a specialist family lawyer if you consider there has been a significant change of circumstances following the making of final parenting orders. This is especially important as even if there is a significant change in circumstances, this does not necessarily mean it is such a significant change as to warrant the re-opening of litigation.

Due to the complexities of reconsidering final parenting orders, it is imperative that if you are considering revisiting final parenting orders, you obtain advice on the likelihood of success of any application before taking any further steps.

Interpreting section 65DAAA of the *Family Law Act* – effective from May 2024

As of 6 May 2024, section 65DAAA of the Act provides that the Court *"must not reconsider a final parenting order unless:*

- *the Court**has considered** (emphasis added) whether there has been a significant change of circumstances since the final parenting order was made; and*
- *the Court is satisfied that, in all the circumstances (and **taking into account** (emphasis added) whether there has been a significant change of circumstances since the final parenting order was made), it is in the best interests of the child for the final parenting order to be reconsidered.*"

The wording adopted in the legislation varied from the established rule in *Rice v Asplund.* In *Rice v Asplund*, the Court needed to determine that there was an “actual” significant change of circumstances, whereas section 65DAAA suggests the Court need only “consider” whether there was any significant change of circumstances.

This difference has led to uncertainty as to whether the first prong of the test, as established in Rice v Asplund, had changed. The question was whether the Court was only required to ‘consider’ or ‘take into account’ whether there had been a significant change in circumstances to vary final parenting orders or whether the Court still needed to be satisfied that there was a significant change in circumstances.

A number of first decision judgments were published in mid-late 2024, which grappled with this question, with their conclusions ultimately differing between Judges (see: *Babic &Taccini; Carlyon &Graham; Rasheem &Rasheem; Melounis &Melounis; Sciacchitano &Zhukov; Whitehill &Talaska).*

On either interpretation, the second prong of the threshold test as set out in *Rice v Asplund* remained intact – being that the Court can only make Orders in relation to children (including Orders to vary final parenting orders) if they are satisfied that to do so would be in the child’s best interests.

Full Court provides clarity and guidance on interpreting section 65DAAA of *the Family Law Act*

In December 2024, the Full Court was given the opportunity to provide clarity and guidance over how section 65DAAA is to be interpreted in the judgment of *Radecki &Radecki.*

Radecki &Radecki judgment affirms use of Rice v Asplund rule

In summary, the judgment in *Radecki &Radecki* has confirmed that section 65DAAA is to be interpreted and applied the same way as the rule established in *Rice v Asplund.* Referring to the explanatory memorandum, the Full Court held that it is ‘not in doubt’ that section 65DAAA was intended to codify *Rice v Asplund* and should be interpreted as such.

That is, the Court is not only required to merely ‘**consider**’ whether there has been a significant change in circumstances. The Court **must be satisfied** that there **has been** a significant change in circumstances following the making of final parenting orders before they can then consider whether re-visiting those orders is in the children’s best interests.

As summarised by Aldridge J, “*if s 65DAAA did not require a finding that there had been a change of circumstances it would be otiose and the whole section pointless*” (*Sciacchitano &Zhukov* at [11]).

Following the decision in *Radecki &Radecki,* it is clear that section 65DAAA is to be interpreted as a codification of the long-established rule in *Rice v Asplund*.

Get legal advice from an experienced family lawyer

Due to the complexities of reconsidering final parenting orders, it is imperative that if you are considering revisiting any orders you may currently have that you obtain advice on the merits of your case before taking any further steps. This is particularly the case where a poorly considered application (to vary orders) may be subject to a costs order made against the party seeking to re-litigate final parenting orders.

If you would like to discuss your circumstances and how the judgment in *Radecki &Radecki* affects your family law parenting matter, please get in touch with one of our family lawyers to make an initial appointment.

Contacting Smith Family Law

03 8625 8957

info@smithfamilylaw.com.au
