S.65DAAA *Family Law Act 1975* – Do we need more keys to open the door?

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A “Final” Parenting Order is never final

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- s.65D(2) of the Act – can be varied by consent or court determination.

- Doctrine of res judicata and issue estoppel do not apply to parenting matters. ***Zawadzki & Zawadzki [2020] FamCAFC 131*.**

The Golden Thread

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- The need to protect children from repeated exposure to court proceedings.

“Continuing a seemingly endless and inconclusive litigation is usually emotionally damaging to the litigants and is likely to affect the children adversely… once the court, either at full hearing or by a consent order, has settled the question of custody, it is usually in the interests of the children that the order made by the court is treated as determining the dispute and be given the necessary support. Stability in the lives of children and also in the lives of adults is an essential prerequisite to their well-being”.

Freeman and Freeman [1986] FamCA 23

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The common law rule “ Rice & Asplund”

Facts:

- In October 1975, Supreme Court ordered that the child of the marriage live with the Father.
- 9 months later, Mother made application to vary the Order.
- Her changed circumstances were stabilized accommodation, remarried and child to start school, rendering the current order unworkable.

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The common law rule “ Rice & Asplund”

Decision:

- Order was varied – child to live with Mother
- Both parents capable of being primary carer, but concerned about Father’s ability to promote a relationship between child and Mother.

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The common law rule “ Rice & Asplund”

Evatt CJ set out the relevant and necessary considerations:

“The principles which in my view should apply… 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… [t]he Court would need to be satisfied by the applicant that … there was some changed circumstance which would justify such a serious step, some new factor arising, or at any rate, some new factor which was not disclosed at the previous hearing which would have been material.

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Is it “substantial”, ”material”, “significant” change.. ?

- the differing terminology used in authorities describes the same required standard.

“*The change or fresh circumstance must be such that … a court would be left in no doubt that it was necessary to relitigate the parenting issue*” ***King & Finneran (2001) FLC 93-079***

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The change.

- The Applicant must demonstrate that there is a prima face case that the circumstances have changed. ***Marsden v. Winch (2009) 42 Fam LR 1***
- Is determined on the basis that the Applicant's evidence would be accepted. ***SPS & PLS***

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Examples of “change”

Picton & Crowley [2020] FedCFamC1F

Final Parenting Order

Child live with Mother. No time with Father. High parental conflict. Court found Father not capable of shielding the child from negative views of the Mother. At trial, Father unsuccessfully contended the child at risk of physical abuse from the Mother.

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Examples of “change”

Picton & Crowley [2020] FedCFamC1F

Contended Change

Father sought child live with him and spend time with the Mother.

Father contended a miscarriage of justice because a police interview with the child was not played at the final hearing (even though the primary judge had included a full summary in Her Honour’s reasons).

Sufficient Change

No, not a new factor which was not disclosed at the original hearing.

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Examples of “change”

Jaynes & Rundle [2020] FamCAFC 292

Final Parenting Order

Order made in 2017. Child live with the Mother and spend a graduated increase of time with the Father.

Contended Change

In 2019, the Father made application seeking further graduated increase in time culminating in equal time in 2022. The Father asserted that changes were the child being older, now being at school, the child’s more advanced development and each party having re-partnered with blended families were appropriate changes.

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Examples of “change”

Jaynes & Rundle [2020] FamCAFC 292

Sufficient change

Yes, sufficient change to warrant a reconsideration of the parenting arrangements.

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Examples of “change”

Melounis & Melounis (No 4) [2024] FedFamC1F 778

Final Parenting Order

After substantial litigation history, it was finally ordered in 2022 that provided the Mother lived close to the children’s school, the parents equally share the care of the children, aged 4 and 7 on a week about basis.

The decision heavily influenced by the FR. Judge confident that the open conflict between the parents would stop.

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Examples of “change”

Melounis & Melounis (No 4) [2024] FedFamC1F 778

Contended change

Mother filed an application in 2024 for the final order to be discharged and reconsidered.

The Mother contended that the parental conflict had intensified post final order and was a psychological risk to the children.

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Examples of “change”

Melounis & Melounis (No 4) [2024] FedFamC1F 778

Sufficient change?

Court held: *“the parents lack of co-parenting ability, and the real likelihood of further protracted conflict, not anticipated by the original judge”* was a significant change in circumstances.

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More than just “change” is required – second stage

Stern & Colli [2022] FedCFamC1A 95

Facts

At the time of the final order in 2017, the Father had been living approximately 4 hours from the child, who lived with the Mother. He filed an Application in 2020 after relocating such that the distance from the child was reduced to a 40 minute drive. His Application was initially dismissed. On appeal, the Court found sufficient reasons to reopen the parenting case

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More than just “change” is required

Stern & Colli [2022] FedCFamC1A 95

Held:

The Court’s task is a two-staged process:

1. To make findings of fact as to the change that there has been in circumstances since the making of the current parenting order.
2. To assess whether the Applicant has established the change is sufficient to justify embarking on a second hearing as being in the child’s best interests.

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More than just “change” required

Defrey & Radnor [2021] FamCAFC 67

- The rule in Rice & Asplund involves the exercise of discretion and not merely a process of making factual findings, because *”the “rule” is a manifestation of the best interests principle”*

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When can the Application be made

- Judge has discretion.
- Maybe dealt with as a preliminary issue. If no change, the application can be summarily dismissed.
- Proceed to full hearing and determine the question of changed circumstances at the conclusion.
- Circumstances at the date of hearing (as opposed to date of Application)

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s.65DAAA

- been in operation since 6 May 2024.

- has been significant controversy in its interpretation.
  - does it codify the common law (as intended); or
  - create a departure from the application of the common law principles.

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s.65DAAA

Controversy centred around:

(1) If a final parenting order is in force in relation to a child, a court must not reconsider the final parenting order unless

(a) the court has considered whether there has been a significant change in circumstances since the final parenting order was made.

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s.65DAAA – the initial interpretation

Whitehill & Talaska

- Judge O'Shannessy

"But on its face, section 65DAAA does not require a change in circumstance… rather, whether there is or is not a change of circumstance must be " considered" and all the circumstances must be taken into account including s.60CC and whether there has been a change in circumstance".

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s.65DAAA – the initial interpretation

Rasheem & Rasheem [2024] FedCFamC1F 595

- Altobelli J – the Court must simply consider whether circumstances have significantly changed since the final parenting order;
- An actual significant change in circumstances is not a pre-requisite to allow a s.65DAAA application

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s.65DAAA – the initial interpretation

Rasheem & Rasheem [2024] FedCFamC1F 595

- The fundamental criteria is that “the court is satisfied that in all the circumstances.. it is in the best interests of the child for a final parenting order to be reconsidered (s.65DAAA (1)(b)). Other factors enunciated in s.65DAAA (2)(a)-(d) may inform the discharge of the statutory duty, especially if their evidentiary value outweighs the mere fact that a significant change has not occured.

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s.65DAAA – the initial interpretation

Rasheem & Rasheem [2024] FedCFamC1F 595

- Under common law, a dismissal of an application was not a parenting order. Consideration of s.60CC was not required.
- Under the new statute, a dismissal remains the same – not a parenting order.
- A successful application under s.65DAAA is a parenting order because best interests considered under s.60CC.

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s.65DAAA – the initial interpretation

Rasheem & Rasheem [2024] FedCFamC1F 595

- If neither party knows the outcome – is it necessary to engage in the initial procedural hurdle for the parties to attend mediation and to file a s.60I Certificate.

s.65DAAA – the appellate court interpretation

Radecki & Radecki [2024] [2024] FedCFamC1A 246

- Final order made with chid was 2 years of age. Parties had a good relationship at the time of making the final order.
- Father made application to vary the order 8 years later, citing that the co-parenting relationship had broken down and seeking more time with the child.
- Trial judge declined to re-open without a conclusion of whether there had been a significant change.

s.65DAAA – the appellate court interpretation

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Radecki & Radecki [2024] FedCFamC1A 246

- S.65DAAA codified the common law "*there is no discernible difference between the first stage test or threshold to be applied (*in the section*) and .. the rule in Rice & Asplund".*
- " the proper interpretation of " consider" should not be a literal one.
- Instead, the interpretation that would best achieve the purpose or object of the Act is to be preferred. s.15AA Acts Interpretation Act

s.65DAAA – the appellate court interpretation

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Radecki & Radecki [2024] FedCFamC1A 246

- "consider" means to contemplate the evidence and to make findings of fact as to the change. If there is no positive finding of changed circumstances, that is the end of the matter.

Further s.65DAAA considerations

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- The section requires (as one of the requirements) there to be a significant change in circumstances to justify a re-opening.

- Whenever a litigant applies to vary a parenting order, he or she must first demonstrate a significant change in circumstances to warrant the variation application being entertained.

The two stages in s.65DAAA

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- Identical to the common law following ***Radecki***
- **First stage –** make findings of fact as to what changes in circumstances (if any) there have been since the making of the anterior parenting orders.
- If there is no positive finding of changed circumstances, that is the end of the matter.
- The Application would be dismissed if part of a preliminary hearing.
- An Order dismissing a Parenting Application does not discharge, vary, suspend or revive an Order under s.64B(2) of the Act. Therefore, not a parenting order.

The two stages in s.65DAAA

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- **Second stage** - departs from the common law.
- The Court must make its determination as prescribed by s.65DAAA(1)(b) and otherwise having regard to relevant s.60CC considerations and the matters within 65DAAA(2).
- c/f the above with the common law second stage:

  to assess whether the appellant has established a prima face case of changed circumstances that would justify embarking on a second contested parenting hearing as being in the child's best interests. ***Defrey & Radnor [2021] FamCAFC 67***

The further obligations under s.65DAAA

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- at common law, the s**econd stage** did not involve a more general determination about whether new proceedings would be in the child's best interests having regard to section 60CC.
- Court now required to anticipate what final order may be made if the matter is reconsidered. S.65DAAA(2)(c)
- seek to determine whether a child may experience a benefit or detriment from the reconsideration of the final parenting order. S.65DAAA(2)(d)

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questions?