



Full Court Rules That Even Supervised Time with Convicted Father Too Much of a Risk to Child's Safety

The Case of *Rice v Asplund* applied by the Full Court of the Family Court to deny father contact time with daughter after his release from prison

INTRODUCTION

The recent decision in *Tindall & Saldo* [2016] FamCAFC 146 (10 August 2016) was an appeal allowed on the basis that the trial judge failed to properly apply the principles in *Rice v Asplund* (where it was held that parenting order cases should not be reopened without there being a significant change in circumstances such that reopening the case is in the best interests of the child); failed to give sufficient weight to evidence of family violence by the father (a convicted felon), and demonstrated appealable error by elevating the wishes of the child to see their father against the primary consideration of protecting the child from harm. According to the Full Court of the Family Court, the case had to do with the best interests of the child.

BACKGROUND

It was held by the Full Court of the Family Court that the trial judge gave insufficient weight to the mother's fears without proper consideration of the evidence of violence towards both the child and the mother. The father was convicted of the offence of assault occasioning actual bodily harm and two counts of kidnapping (one of them aggravated). The judgment of the Full Court recounted what had occurred in the household, leading to the father being charged and subsequently imprisoned:

"The father grabbed the child and carried her to the door of the bathroom and holding a Samurai sword to her chest, told the mother he would kill her as punishment for betraying him. The father called her a dirty slut during this and the mother begged for her life and the life of her daughter. She believed that both herself and her infant daughter were about to be killed such was the rage of the father."

The father was sentenced to imprisonment of five years with a non-parole period of two and a half years.



Very shortly after the parties separated, the father had refused to return the child to the mother and, on hearing an application for recovery of the child, the Court in December 2008 ordered the father to return the child and made orders that the child live with the mother and that the mother have sole parental responsibility. The father was not allowed contact with the child, other than to send gifts and a letter three times a year.

Once the father was released from prison and applied for a variation of parenting orders, the trial judge allowed the father to have supervised time with the child (a 10 year old daughter), graduating to unsupervised time after a period of twelve months. The mother did not want the child to have any contact with the father, due to continued fear for her safety based on the father's previous behaviour.

The Full Court found that the trial judge gave too much weight to subsequent comments by the child that she wished to have a relationship with her father, and did not account for the fact that due to the father's violent behaviour leading to imprisonment, the child did not have anything to do with the father or know anything about him. It was the idea of a father that the child was craving, rather than having a meaningful relationship with her actual father, being a violent criminal.

***RICE v ASPLUND* AND THE BEST INTERESTS OF THE CHILD**

The Full Family Court in *Rice v Asplund* (1979) FLC 90-725, stated that varying a parenting order is something that should not be taken lightly and in such instances, the applicant must establish the threshold issue which applies to either a new factor that has arisen, or there has been a change in circumstances which warrants reopening the case. This prevents futile litigation whenever one party or another has a minor detail which he or she thinks casts new light on already tortured litigation.

The rationale for the so-called "rule" in *Rice v Asplund* is to give expression to the principle that there must be an end to litigation particularly in relation to children. This is because endless litigation over parenting arrangements is by itself considered contrary to the interests of the child or children involved, due to the time, cost and energy consumed by the parties having to go through Court proceedings to arrive at parenting orders.

The cases have refined the rule in *Rice v Asplund* to essentially a two-step inquiry which a judge in the relevant case needs to work through:

- a) is there a prima facie change of circumstances involving the child/ren since the original court decision?, and
- b) is there a sufficient change of circumstances on the facts that reopening the parenting arrangements to a hearing before the Court would be in the best interests of the child/ren.



When working through these steps, the court is to consider whether the new material placed before it would lead to a different conclusion from the original court decision as to what parenting arrangements would be in the best interests of the child or children going forward.

DECISION

In the case at hand, the Full Court considered that while the father was released from prison and the child had indicated a desire to have a relationship with the father, the change of circumstances were not significant enough to outweigh the concern for the safety for the child in having any relationship with the father based on what had occurred in the past. The Full Court cited a doctor's opinion which was consistent with the concern that the Court had and which led to the Court arriving at its decision that the parenting orders should not be varied so that the father could have regular time (supervised or unsupervised) with the child.

"Because of the clear violence that has been perpetrated both against the mother and the child I now need to revise my view about the father's risks. It is clear that when there is conflict with the mother the father can be an unacceptable risk to the child. This therefore, raises serious issues about how and when the father could have contact with the child."

Ultimately, in this case the child had expressed a wish to see the father, but given the facts of the case, this was held not to be in the best interests of the child.