Brett Hartley Mediations
Discourage litigation

CHILDREN'S WISHES & CHANGES IN CIRCUMSTANCES
Morton v Berry [2014]

Introduction – Facts

No doubt, many of you have read the recent Full Court decision in *Morton v Berry* [2014] FamCAFC 208. If not, I would recommend that you read the decision as Justice Ainsley-Wallis writes a concise, but helpful summary of the development of the Rule in *Rice v Asplund*.

The Case involved a residency dispute of a child who was about 10 and a half – 11 years old at the time of the Hearing. Previous Consent Orders had been made only some 2 and a half years earlier in March 2011, when the child was about 7 years of age.

In those Orders, we are led to believe that the mother was the uncontested primary parent and the daughter had contact with the father.

Also, it appears there was a Family Report conducted prior to the signing of the Consent Orders in 2011. However, it was noted that the child did not express a wish as to residency (as a 7 year old), during the Report process.

The father's Application was that the child was now expressing a strong wish to live with him full time. Although we did not know the precise the details, it appears that the husband provided detailed evidence about the child's wishes.

In the lower Court, being the Federal Circuit Court, the Judge heard an Application by the mother's lawyers for the summary dismissal of the father's Application. The Judge accepted the husband's evidence at its "highest", but found that there was no significant change in circumstances from the short time that had elapsed since the Consent Orders were made and accordingly, dismissed the father's Application.

At first blush, that decision may not seem surprising to us.

The Full Court's Decision

In a unanimous decision, the Full Court comprising of Justices Ainsley-Wallis, Watts and May JJ, allowed the Appeal and remitted the matter for a re-hearing by a Judge.

The Full Court repeated the principles discussed in the 1979 Case of *Rice v Asplund* and more recently the Application of those principles by the Full Court of *Marsden v Winch* [2009] 42FamLR 1.

The Full Court placed particular emphasis on the evidence that was before the Trial Judge as to the extent and nature of the wishes of the child. The father's evidence was particular in

that the child had been expressing a wish since the start of 2012 to live with him and the insistence by the child was unabated. The father deposed to the fact that the child had told her mother of her wishes and that the child had prepared a list of reasons as to why she no longer wanted to live with her mother. That list was apparently before the Trial Judge. The father also gave evidence in relation to incidents that had happened at school, including interviews with the school counsellor.

As it was a summary dismissal, the Trial Judge rightly concluded that he needed to take the father's evidence at its highest.

In this respect the Full Court found that the Trial Judge failed to take into account the seminal matter necessary for consideration which was the best interest of the child. The Full Court said that the Trial Judge's consideration miscarried by reason of his failure to take into account the child's interest as paramount.

There was an Application before His Honour, during the summary dismissal Hearing that a Family Report should be ordered because of the nature and detail as to the father's evidence of the wishes of the child. The Trial Judge dismissed that Application for a Family Report.

The Full Court noted that the Trial Judge had erred in failing to appreciate that in the earlier proceedings, and in particular, in the earlier Family Report, the child had not expressed a view either way about where she wished to live, and thus, the issue of her views were a significant change. Further, the Trial Judge erred in not ordering a Family Report by which means the child's wishes could be canvassed.

Practical Considerations for Solicitors

These are my thoughts of some important matters that need to be looked at in change of circumstance cases such as this and what we need to address in evidence:-

1. The child's interest is still the paramount consideration – therefore do not confine material only to issues that have recently arisen, but also detail any other relevant considerations under the Act that would normally be relevant in the dispute as they apply to the particular facts of your case;

2. Pay particular attention as to how the Agreement was reached on the previous occasions. Was there a Family Report conducted? If so, how was it conducted and what recommendations were made; what were the basis of those recommendations;

3. Consider all the possible changes in circumstances to a child's welfare, including but not limited to the following:-

    3.1 Physical location (relocation);

    3.2 Social factors;

    3.3 Educational issues;

    3.4 Development issues;

    3.5 Care arrangements and other important adults in the child's life;

    3.6 Any wishes being expressed and the nature and context in which those wishes are expressed;

3.7 Is the change of circumstance a one off or is it a constant?

3.8 Are any changes in wishes expressed by the child occurring over a long period of time, or over a short period time?

3.9 What were the key past circumstances in the previous decision that may have changed?

3.10 Is the variation sought a significant one to justify getting over the threshold question?

3.11 Was the previous agreement by consent, with little or no litigation, or was there substantial litigation involved?

3.12 Has there been a long history of conflict between the parents that this child has been exposed to, or is there little history of conflict.

In my view, practitioners should always be cautious of bringing Applications where a limited amount of time (less than five years) has elapsed since a previous Final Order.

We need to be particularly careful in the drafting of Affidavits on behalf of our client and look to provide as much detail and particulars as to the changes in circumstances that are alleged, with as much corroboration as possible, even at an early stage.

In *Morton v Berry*, Her Honour Justice May in agreeing with the reasons of Justice Ainsley-Wallis, added the following important comment:-

> *"I would add in this case the circumstances raised by the father were not an isolated incident or trivial in nature…"*

Some Thoughts

In child inclusive Mediation there is an opportunity for the parents to specifically focus on the best interests of the child, regardless of whether there has been a significant change in circumstances or not.

In my view, I have always had difficulty with the decision in *Rice v Asplund* being referred to as a "Rule". As the High Court has reminded us, hardened Rules are dangerous when a Judge has a wide discretion as to what is in the best interests of a child.

The welfare of the child is always the paramount consideration. There is no "cause of action" estoppel that must take precedence over a child's interest. Therefore, in my view, it is a nonsense to talk about any Rule being binding and overly restrictive when it comes to considering an Order that is in the best interests of the child.

The Full Court in *Morton v Berry* touched on this, but commented that it was not relevant to determination of that particular Case to consider as to whether the *Rice v Asplund* and subsequent Authorities have "hardened" into binding principles or a Rule.

In my view, one must, if considering there is no change in circumstances, look to bring the Application to dismiss as a preliminary Application, rather than have it heard at the Final Trial. When one thinks about it, it really is nonsense to say that the so called "Rule" can survive and be applied at the end of the Hearing. What is the purpose?

There has already been a concluded Hearing at great expense and no doubt delay to all litigants. The Court then hears all the evidence. We are aware the comments of Justice Warnick in the Case of *SBS v PLS* [2008] FLC93-363 and other comments by the Full Court about the fact that the exercise can still be performed (i.e. the threshold test) even at the conclusion of a Final Hearing.

However, from a practical client-focused point of view, it is hard to envisage a situation where we would be justified bringing on such an argument if an opportunity exists to do it well beforehand and to save our client considerable monies and stress.