Parenting cases and technology

The good, the bad and the ugly – a discussion

Paper presented by Michael Fellows [1] at the 60th conference of the North Queensland Law Association – May 2019

1.0 Introduction

1.1 This is the text and photograph of a Facebook post by me in July 2018

Carmel and I arrived in Delhi yesterday after 11 days/nights in Kashmir and Ladakh ... India is a puzzle in some ways - extreme poverty, yet everyone has a mobile phone; every shanty a satellite dish.

[1] Barrister, mediator and arbitrator, Sir George Kneipp Chambers, Townsville

1.2 Because of the population size of India and the economies of scale which result, almost anyone can rent a pre-paid mobile telephone and have unlimited Indian telephone calls and 1Gb of data transfer a month for (in 2018 prices) about AUS$5.00 per month.

1.3 The internet, the mobile telephone, email and similar technologies have been a marvellous "levelling" and democratic process in the ongoing march of civilisation. But is it a "good" or "bad" thing that internet access to the Australasian Legal Information Institute means that high conflict individuals are better able to argue their cases and "clog" the courts as self-represented litigants? It's probably both.

1.4 The theme of this paper is to make a brief exploration of the good and bad of modern technology and those occasional incidents of ugliness that arise in parenting litigation; and thereafter discuss various evidentiary and practical matters.

1.5 A useful summary of the tensions that arise can be seen in this passage from a recent decision by Justice Le Poer Trench in *Leos and Leos*. [2]

> 5. *This case illustrates the oft voiced statement that 'it is very difficult to prove what happens behind the locked doors of a family home'. This court sees cases every day where one party alleges actions and words were used against them within the walls of the family home and where those allegations are emphatically denied. In this case the father faced the frustration that although the NSW Police and the NSW Department of Family and Community Services made many visits to the family home, no action appears to have been taken to prevent the mother parenting very young children in what I am satisfied was an appallingly abusive manner. Being a child of the electronic age, he resorted (I am satisfied out of frustration and legitimate concern for his children) to the use of readily available hidden surveillance equipment.*
>
> 6. *I am satisfied the recorded material he obtained from that surveillance provided compelling evidence to support his case that the mother was, at that time, abusing his children in the manner of screaming at them, physically chastising them, and using appalling profanities and threats which terrified those children.*

[2] *Leos and Leos* [2017] FamCA 1038

7. *Ultimately, I did not have to look at the evidence contained in the recordings made from the surveillance because the mother conceded she had probably exhibited the types of behaviour which, it was said, could be seen and heard in that evidence.*

8. *My prediction is that this Court will be pressed to consider s 138 of the Evidence Act 1995 (Cth) more frequently as equipment readily available to the public to record abhorrent parenting behaviour and conflict is used. Already mobile phones, widely used in this society, have recording facilities which can be operated without the knowledge or consent of the person being recorded.*

2.0 The good

2.1 There are a range of benefits to be gained from modern technology –

[a] Most practitioners and judges will be aware of the Talking Parents website which at its base level is free and at a "premium level" costs $4.99 per month – it allows a reliable and accountable exchange between parents concerning their children; it includes a calendar system so that both parents can share the dates of important events.

[b] SMS messaging is a superb tool for emergencies – the work obligations, traffic delays, flat tyres and so on which mean that one parent or another is late for a contact changeover, parent-teacher meeting, the sports carnival and so on. Polite warning that a difficulty has arisen goes a long way to reducing misunderstanding and the inevitable tension. It was only 23 years ago that the first mobile telephone was available in Australia and only more recently that these devices are readily available to everyone at an affordable price – prior to then how did you warn your ex-partner that a last-minute delay/crisis had occurred?

[c] Those who cannot afford legal representation now have available to them the websites of the family courts which provide "do it yourself kits" for such events such as divorce, the initiation of proceedings, how to serve documents and so on. There is a superb range of information provided on the website of the Legal Aid Office, Queensland.

[d] The Australasian Legal Information Institute provides any person with an ability to research the legislation, the rules and the law.

Information based systems such as described in [a] to [d] are superb mechanisms for assisting most citizens to better cope with separation and the usually inevitable child disputation.

[e] The rise of the use of "apps" will see more and more tools become available. One example is DURESS, a mobile phone Australian app for those concerned about the risk of family violence. In an emergency it notifies the police, streams live video and tracks your location.

3.0 The bad and the ugly (perhaps a distinction without a difference)

3.1 The fountain pen rule

3.2 The risk with modern technology is its speed of use. Instantaneous communication and response are useful things; so long as the brain has been engaged. I'm old enough to have started in the profession (1977) when the only fast machines were the IBM golf ball typewriter and the telex. It was common for articled clerks and young lawyers to draft letters and documents by hand. Those of us of a more cultured bent (or at least we thought so) used fountain pens. I still use a fountain pen to draft more important documents. It aids the thinking process.

3.3 It is a common practice by me, in a first meeting with a client, to speak of the "fountain pen rule" – I refer to the importance, in any circumstance of anger, controversy, or confrontation of hand-writing a draft of an email, SMS, or other communication (such as Facebook messenger). I say that the process of hand-writing means that there is a benefit from time; the opportunity to think and be reasonable rather than to respond with emotion or anger.

3.4 Recording conversations and changeovers/covert surveillance

3.5 The following example comes from *Huffman v Gorman*, [3] a case I will discuss in more detail later in this paper. The father secretly recorded the mother saying -

M: You've got Thursday off. I'll give you till the end of Thursday to say goodbye to your son properly. If you dare to fuckin think I'm kidding again, I'll suffocate him in the meantime, okay?

M: I swear, as God is my witness, [father's first name], I will fuckin kill him if I think you're taking it as a joke, do you understand me?

M: you have got to the end of Thursday to say your proper goodbye. You either kill yourself or I swear to you, [father's first name], your son and I go. You fuckin dare, at any stage, treat this like a fuckin joke again, which is what you've done for the past three fuckin days – I almost did it yesterday, I'm telling you now, because I fuckin knew you were going to do what you did. Then I thought, give you the benefit of the doubt, like I always fuckin do, but I promise you, I won't do it again. If you think for one moment you take this for granted, I'll fuckin' kill him – that I'm still alive because I've got (indistinct) gaol, do you fuckin hear me?

3.6 It is now common-place in any case of even marginal conflict for one or both parties to record telephone and face-to-face conversations and/or to "video" changeovers of a child/children. At least in the past this had to be done relatively openly, given the size and limitations of the technology available but not anymore.

3.7 There are numerous devices now available which enable the covert recording of conversations or changeovers. Some examples include:-

[3] *Huffman v Gorman* [2015] FamCA 317


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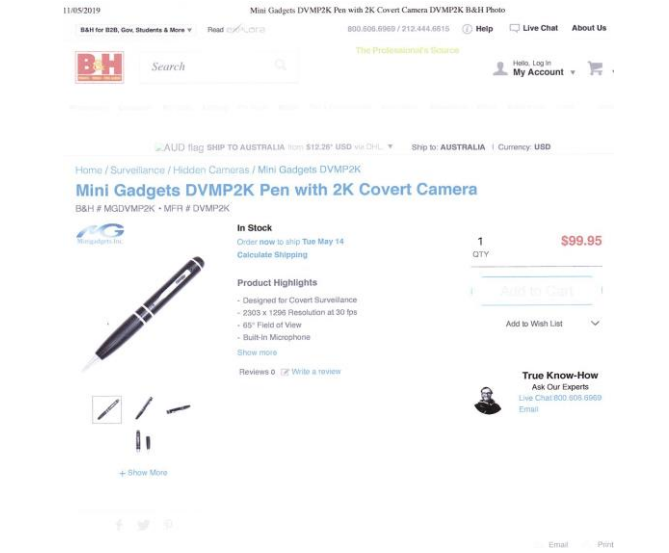
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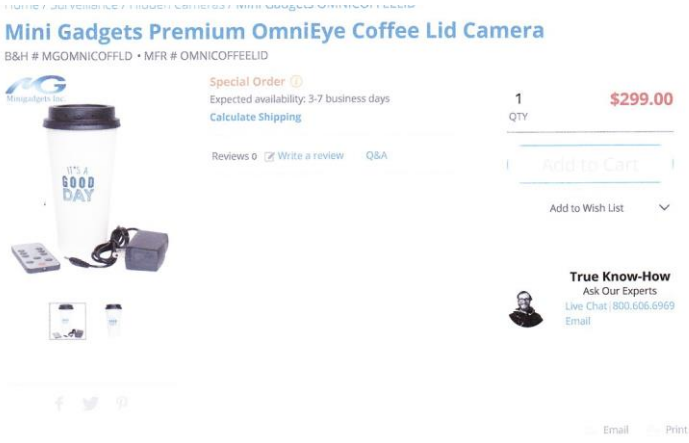
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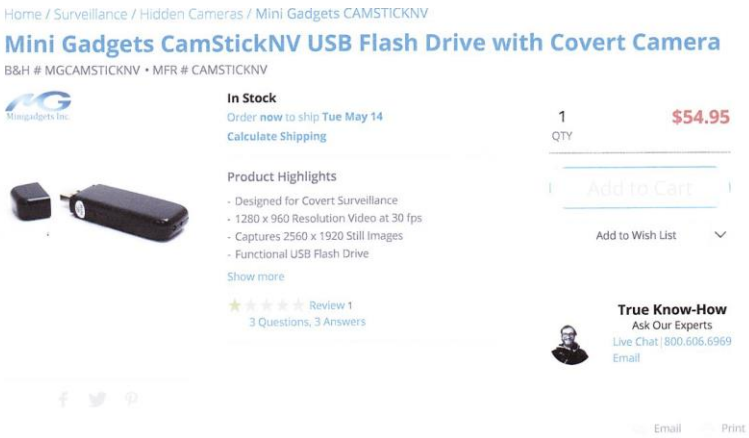
3.8 In the last 12 months or so I have been in four cases where there have been more extreme examples of covert recording or surveillance:

[a] The first was one of those "old fashioned" cases where one party engaged a private agent to run a surveillance operation on the other party;

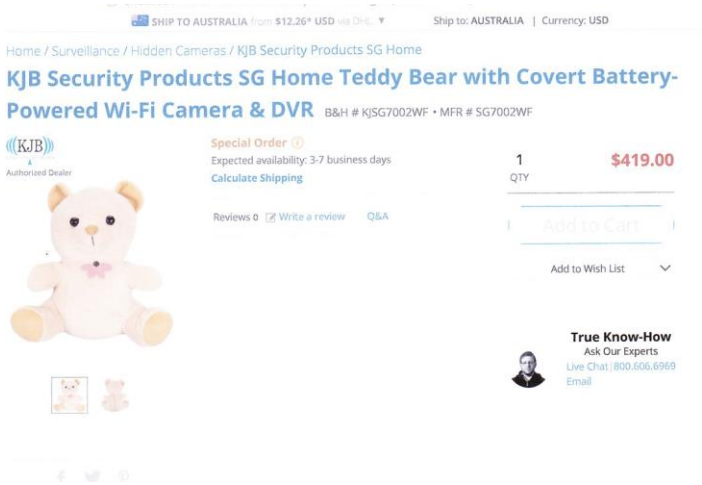
[b] The second was one where the father installed an app on his iPhone which was designed to recognise the phone number of the mother and automatically record the conversation that occurred – it recorded every conversation between him and the mother (which is lawful under the *Invasion of Privacy Act 1971* (Qld)) but also recorded 172 conversations between the mother and the children on the occasions when they were with him. (which is not lawful, as I discuss below).

[c] The third involved the use of a drone to photograph a parent's residence and back-yard.

[d] The fourth involved the use of ordinary looking USB thumb drives which could be conveniently scattered around the home – but with an inbuilt recording device inside the thumb drive– so that conversations between a parent and the children were recorded. They are easily obtainable.



3.9 It's always possible to be more inventive with the recording devices available.



3.10 Technology, including all-important factors such as battery power and miniaturisation is ever advancing.

3.11 Those of you personally attending this paper can see I have brought along with me some toys.

3.12 The first is a semi-professional DSLR fitted with a lens that shoots at a focal length of 800mm. It would be superb to spy on someone who was in excess of 100 metres away – but it is a little difficult to hide.

3.13 The second is my first-generation Mavic Pro drone. It can be programmed to fly to and hover at a designated GPS point; or you can show its camera a person or vehicle and it will fly along by itself and track that person until the point he/she or it enters a building; it has obstacle avoidance radar and so the operator (who can be at least several hundred metres away) can manoeuvre the drone as necessary; it can record still or video photography. It cost, in 2017, a little more than $2,000.

3.14 The next generation of this drone has been released. It has a greater battery life and flight time; redesigned "quiet" propellers; and you can choose between a camera with a zoom lens or a Hasselblad lens with a resolution of 20MP. It can be controlled from up to 8 kilometres away. [4] It costs $2,499

[4] Which is unlawful under the current rules applying to drones

4.0 The legal consequences of recording/surveillance

4.1 Apart from the limitation imposed by the *Telecommunications (Interception and Access) Act* 1979 (Cwth) this field is covered by the laws of the individual States and Territories.

4.2 The *Telecommunications (Interception and Access) Act* (1979) deals with the physical interception of telecommunication systems. So-called "wire-tapping". These cases are not so frequent because a positive interception of the telecommunication is required. In *Russell & Russell* the father was skilled enough to install a device inside a mobile phone. [5]

4.3 I am addressing this Queensland audience concerning the laws of Queensland. Importantly, where a case involves a party or parties from another State or Territory it is necessary to research the local laws.

4.5 For example, the penalty for a breach of the Queensland *Invasion of Privacy Act* (1971) is up to 2 years imprisonment; the roughly comparable New South Wales legislation [6] extends its reach beyond listening devices to "optical" surveillance in some circumstances and imposes a maximum penalty of 5 years imprisonment.

4.6 Invasion of Privacy Act 1971 (Qld)

4.7 It is an offence to use a listening device [7] to "overhear, record or monitor" a private conversation and an offence to "communicate or publish" that conversation. [8]

4.8 Private conversation means

> *... any words spoken by one person to another person in circumstances that indicate that those persons desire the words to be heard or listened to*

[5] The decision does not record how he did this, but his counsel conceded a breach of the Commonwealth legislation.
[6] The *Surveillance Devices Act* (NSW)
[7] Defined by s 4 to mean any instrument, apparatus, equipment or device capable of being used to overhear, record, monitor or listen to a private conversation simultaneously with its taking place.
[8] Section 44

only by themselves or that indicate that either of those persons desires the words to be heard or listened to only by themselves and by some other person, but does not include words spoken by one person to another person in circumstances in which either of those persons ought reasonably to expect the words may be overheard, recorded, monitored or listened to by some other person, not being a person who has the consent, express or implied, of either of those persons to do so.

4.9 So those who shout out abuse to their former partner in the car-park of McDonalds or at the school changeover and so on are not likely to be able to complain of a breach of privacy if they are recorded.

4.10 As is well known, an exception to the commission of the offence is where the party using the device was a party to the conversation. [9] Nevertheless, it remains an offence to communicate or publish that conversation [10] save where it is made "in the course" of legal proceedings [11] or where the communication or publication

is not more than is reasonably necessary

—

(i) in the public interest; or

(ii) in the performance of a duty of the person making the communication or publication; or

(iii) for the protection of the lawful interests of that person; [12]

4.11 Domestic and Family Violence Protection Act (2012)

4.12 Various parts of the definition at section 8 of this legislation need to be borne in mind.

4.13 Subsection 8(1) refers to conduct that is, inter alia

(b) is emotionally or psychologically abusive;

(c) ...

(d) is threatening; or

[9] Section 43
[10] Section 45
[11] Section 45(2)(b)
[12] Section 45(2)(c)

(e) is coercive; or

(f) in any other way controls or dominates the second person and causes the second person to fear for the second person's safety or wellbeing or that of someone else.

4.14 Subsection 8(2) provides

Without limiting subsection (1) , domestic violence includes the following behaviour—

(h) unauthorised surveillance of a person;

(i) unlawfully stalking a person.

4.15 Subsection 8(5) provides

"unauthorised surveillance" of a person, means the unreasonable monitoring or tracking of the person's movements, activities or interpersonal associations without the person's consent, including, for example, by using technology.

Examples of surveillance by using technology—

- *reading a person's SMS messages*
- *monitoring a person's email account or internet browser history*
- *monitoring a person's account with a social networking internet site*
- *using a GPS device to track a person's movements*
- *checking the recorded history in a person's GPS device*

4.16 <u>The Criminal Code</u>

4.17 Finally, Chapter 33A of the Criminal Code creates the offence of "Unlawful Stalking". Section 359B defines the offence as conduct -

(a) intentionally directed at a person (the "stalked person"); and
(b) engaged in on any 1 occasion if the conduct is protracted or on more than 1 occasion; and
(c) consisting of 1 or more acts of the following, or a similar, type—
(i) following, loitering near, watching or approaching a person;
(ii) contacting a person in any way, including, for example, by telephone, mail, fax, email or through the use of any technology;
(iii) loitering near, watching, approaching or entering a place where a person lives, works or visits;
(iv) ...
(v) ...;

(vi) an intimidating, harassing or threatening act against a person, whether or not involving violence or a threat of violence;

(vii) ...

and

(d) that—

(i) would cause the stalked person apprehension or fear, reasonably arising in all the circumstances, of violence to, or against property of, the stalked person or another person; or

(ii) causes detriment, reasonably arising in all the circumstances, to the stalked person or another person.

4.18 Section 359C provides

(1) For section 359B (a) , it is immaterial whether the person doing the unlawful stalking —

(a) intends that the stalked person be aware the conduct is directed at the stalked person; or

(4) For section 359B (d) , it is immaterial whether the person doing the unlawful stalking intended to cause the apprehension or fear, or the detriment, mentioned in the section.

(5) For section 359B (d)(i), it is immaterial whether the apprehension or fear, or the violence, mentioned in the section is actually caused

4.19 It follows that recording/surveillance activity of various kinds will or may expose the client to multiple offences/complaints.

4.20 <u>The position of the legal adviser</u>

4.21 Clients frequently ask their solicitor (and sometimes their barrister) – "should I be recording the mother/father/children?"; or "how do I get the evidence to prove he/she is exposing the children to risk?" Danger Will Robertson!

4.22 Counselling or procuring an offence is itself an offence. As expressed in the *Criminal Code* s. 7(1)(d) -

> *Each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say—*
>
> *(d) any person who counsels or procures any other person to commit the offence.*

4.23 And the wide ambit of the concepts of unprofessional conduct and professional misconduct create special risks for legal practitioners who themselves conduct surveillance of one form or another, or counsel others to do so. [13] Our paramount duty is to the court and to the administration of justice. [14]

4.24 Whilst it will necessarily involve special facts for a circumstance to arise, bear in mind as well *Family Law Act* s. 70NAC(b) which extends the definition of a person who has contravened an order to those persons who

> *... aided or abetted a contravention of the order by a person who is bound by it.*

4.25 It is important to go to 1884 and to the decision of *R v Cox and Railton* [15] which established the rule that legal professional privilege will not apply when the lawyer's communication furthers a crime. Over time that principle has been extended to cover a wide species of fraud, criminal activity or actions taken for illegal or improper purposes. Thus, Hogan J referred a solicitor and barrister to the Legal Services Commission in a matter entitled *Yamada v Bernard.* [16] The husband had taken deliberate steps to remove assets from Australia and done so on the advice of a solicitor and barrister – unfortunately a letter was sent confirming that advice and received by the wife's adult son! Her Honour determined that legal professional privilege did not apply to the letter -

[13] See for example *Legal Professional Complaints Committee v Rayney (No 2)* [2018] WASAT 5
[14] ASCR Rule 3; Barristers Rule 5(a).
[15] (1894) 14 QBD 153
[16] [2016] FamCA 977 especially at [48] – [55]

In my view, the Applicant has established to the requisite level of satisfaction that the communication was for the purpose of the Respondent putting property in which the Applicant had at the very least a prima facie interest beyond her reach and, therefore, privilege does not attach to it. Given the circumstances — which have in fact seen the Respondent remove funds from the Commonwealth of Australia and place them beyond the reach of the Applicant in these proceedings — I considered that no public interest was served by allowing legal professional privilege to attach to the correspondence.

4.26 It follows that where the legal practitioner has any involvement which may be characterised as aiding an illegal or improper purpose then the communications between lawyer and client about that may be disclosable.

5.0 Lawful surveillance

5.1 Different considerations arise where a client has lawfully recorded a conversation and those where the surveillance undertaken constitutes an offence, domestic violence or arguably does so.

5.2 Obviously enough, first be satisfied that the method of recording/surveillance was in fact lawful.

5.3 Where satisfied that no offence or domestic violence has occurred, and it is intended to rely upon the evidence that has been gathered, in my view the processes required are:

[a] the first consideration is – has the client given me everything? The client should be required to provide all of the recordings/video, not merely the "good ones". The best way to attract criticism from the bench or bar is by the production of material which is arguably misleading because it does not reveal the full story.

[b] review the material – listen to or watch the recording/video. The client's view of what the material may prove can be at variance from the reality – only

this week I was in a trial in Mackay where the father thought his recorded video "interviews" with a 4-year-old child helped his case. They didn't – he ended up with an Order that he be supervised.

[c] the next consideration is to consider whether disclosure is required even if your decision is not to rely upon what the client has given you.

Family Law Rule 13.01

Each party to a case has a duty to the court and to each other party to give full and frank disclosure of all information relevant to the case, in a timely manner.

Family Law Rule 13.07

The duty of disclosure applies to each document that:

(a) is or has been in the possession, or under the control, of the party disclosing the document; and

(b) is relevant to an issue in the case.

There are no comparable rules in the Federal Circuit Court, though the current proposal to consolidate the rules of the two courts is something to watch out for.

There are significant consequences attached to non-disclosure, more so in the Family Court. [17] Family Law Rule 13.14 provides

If a party does not disclose a document as required under these Rules:

(a) the party:

(i) must not offer the document, or present evidence of its contents, at a hearing or trial without the other party's consent or the court's permission;

[17] The effect of Division 14.2 of the *Federal Circuit Court Rules* limits the circumstances in which there will be consequences for non-disclosure. The author's view is that the substantial prevalence of recording and surveillance activity between parents is that this aspect of the FCCA Rules require serious reconsideration.

(ii) may be guilty of contempt for not disclosing the document; and

(iii) may be ordered to pay costs; and

(b) the court may stay or dismiss all or part of the party's case.

[d] the next consideration is – does the material carry sufficient weight? It may be lawful for the mother and father to record every conversation they have with each other but it is inevitably regarded with judicial distaste; and if your client is merrily recording every conversation because "I don't trust him/her" it may have a consequence for the argument as to equal shared parental responsibility. One poor conversation where a party has "lost the plot" may be irrelevant if there are otherwise numerous benign conversations.

[e] as the primary method of evidence production in the family courts is by affidavit, then the evidence should be included in an affidavit. In the case of verbal recordings, a transcript should be annexed; in the case of video a brief description should be given of what can be observed from the recording to be annexed or tendered as an exhibit.

[f] the primary source – the recording, video etc should be promptly disclosed to the opponent and a digital copy made available. The disclosure must include the benign behaviour as well.

[g] these things should be done sufficiently well in advance that your opponent does not obtain the opportunity to complain or seek an adjournment on the basis that there has not been enough time to review all the recorded material and/or to confirm the accuracy of a lengthy transcript.

[h] if it will be necessary to play the recording or video to the judge during the cross-examination or at some other time in the trial then:

(i) the length of that process needs to be included in the trial time estimate; and

(ii) there is not much point turning up at 9.55pm on the first day of trial to inquire about the available playing facilities.

5.4 Bear in mind *Evidence Act* 2005 s. 135.

> *The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:*
>
> *(a) be unfairly prejudicial to a party; or*
>
> *(b) be misleading or confusing; or*
>
> *(c) cause or result in undue waste of time.*

5.5 If your side has not efficiently produced the material, confirmed the accuracy of any transcript and made the necessary arrangements for recordings to be listened to or watched then the material may very well be excluded.

6.0 **Unlawful or improper activity – first the legislation**

6.1 The mere fact that some activity has been unlawful/improper does not of itself preclude the admission of evidence. The primary rule is that all relevant evidence is admissible. [18]

6.2 However, *Evidence Act* 1995 s. 138 leads to the exclusion of relevant evidence subject to the exercise of discretion to admit the evidence. The section provides –

> *(1) Evidence that was obtained:*
>
> *(a) improperly or in contravention of an Australian law; or*
>
> *(b) in consequence of an impropriety or of a contravention of an Australian law;*
>
> *is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.*

[18] *Evidence Act* 2005 s. 56

(2) ....

(3) Without limiting the matters that the court may take into account under subsection (1), it is to take into account:

(a) the probative value of the evidence; and

(b) the importance of the evidence in the proceeding; and

(c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding; and

(d) the gravity of the impropriety or contravention; and

(e) whether the impropriety or contravention was deliberate or reckless; and

(f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights; and

(g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention; and

(h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.

6.3 The interpretation of s. 138 – some decisions

6.4 The impropriety referred to in s. 138 *Evidence Act* need not be attended by bad faith or an abuse of power. [19] See *Hazan v Elias* [20] at paragraph 95 for a discussion of the circumstances in which a solicitor/father behaved improperly in recording his meeting with a family consultant.

6.5 *Latham v Latham* [2008] FamCA 877

The husband had recorded conversations between the wife and their children. He was physically present at the time. It was conceded the recordings *prima facie* contravened the relevant NSW legislation. The recordings, if correct, would paint the mother as a "seriously bad child abuser". The husband submitted that publication

[19] *R v Cornwell* (2003) 57 NSWLR 82; *DPP (NSW) v AM* (2006) 161 A Crim R 219
[20] (2011) 45 Fam LR 475

of the recordings fell within the NSW equivalent of the Qld *Invasion of Privacy Act* at s. 45(2)(c) – the protection of his lawful interests – which included the likelihood that the wife would deny the conversations, that he needed to protect himself from the risk of false accusations; and that the protection of the children's interest were by definition his lawful interests.

Le Poer Trench J determined that the exclusionary provisions of the NSW applied – that the recording was necessary to protect the father's lawful interests; thus, no issue of unlawfulness arose. But if wrong about that, His Honour would nevertheless admit the evidence pursuant to *Evidence Act* s. 138 by virtue of its probative value and importance given the interests of the children. His Honour found that the evidence was "potentially high" and "potentially important".

6.6 *Russell & Russell* [2012] FamCA 99

This is the case referred to above at paragraph 4.2 where the father installed a device within a mobile phone which was in the possession of the mother and was used by her for all calls to and from India and to each of the families. The essential issue in the trial was whether the children should remain living in Australia or go to live with the mother in India.

The conversations were in Hindi and the only transcript (and translation) available was made by the father. Amongst other things the transcripts showed considerable conflict between the mother and her father over an alleged dowry payment.

Justice Young determined that that the admission of the evidence marginally outweighed its exclusion. The list of factors referred to by His Honour were:

Against admission

- The motive of the husband – evidence gathering
- There remained an issue as to the probative value of the evidence given that the only translation/transcript was from the father

- The father's actions were reckless and demonstrated an intentional disregard for the wife's legal rights

For admission

- The evidence was important – there was "probative value" as to the anger and tension within the mother's family
- It was an international relocation case

6.7 *Callahan & Callahan* [2014] FCCA 2930

A contravention application. Part of the evidence relied upon included a recording of a telephone conversation between the mother and one of the children. The child made the recording and passed it on to the father. Judge Scarlett rejected the evidence as follows -

I am not satisfied that the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained by a child recording a telephone conversation with his mother and passing it on to his father. It is not desirable to encourage or even condone a child taking a partisan attitude to proceedings between his parents

6.8 *Alexander & Turner* [2015] FCCA 3197

A contravention application. It was alleged the father had denigrated the mother to a child. The mother relied upon a transcript of a recording made by the child of a conversation between the father and his partner. It was accepted that the mother player no part in the child doing this. The father conceded that if the evidence was admitted then he had denigrated the mother in breach of the usual order. After discussing the "dilemma" that the father could only be found to be in breach by admitting the evidence; but if admitted it could be seen as condoning the action of the child Judge Harland admitted the evidence and found the father to be in breach.

6.9 *Gawley v Bass* (2016) 55 Fam LR 396

The mother alleged the father had been domestically violent. The father alleged that the mother's violence extended to the children. Interim arrangements required the father to be supervised. During one of his supervised visits (at the mother's home) the father installed a listening/recording device. [21] Before disclosing a transcript of the recordings obtained, the father's counsel sought and obtained a certificate under s. 128 *Evidence Act.* [22] Once disclosure occurred it led to an adjournment of the hearing so that the mother could properly consider the material produced. There were over 60 hours of recorded material, some of it corrupted; and additional recorded material was no longer available; the only "transcript" available was one produced by the father with a typed running commentary.

Of all the conversations recorded, the father was present and participated in only one of them. [23] As a consequence, Judge Baker of the FCCA determined that this recording was lawful, and the recording could be admitted into evidence. The transcript was rejected because it's accuracy could not be determined "at this stage".

Turning to the balance of the recordings, it being accepted that these were made unlawfully, the Court refused to exercise the discretion available under s. 138. Because of the way the father had "transcribed" the recordings and added commentary Her Honour was unable to determine the probative value of them.

6.10 *Leos & Leos* [2017] FamCA 1038

I will not repeat the summary of this decision which appears at the opening of this paper. The father installed surveillance cameras in the former matrimonial home and in due course was charged and convicted of the relevant offence. Nevertheless, for the reasons outlined above at paragraph 1.5 the trial judge would have exercised the discretion to admit the evidence if it was necessary.

[21] The mother's discovery of this led to an Apprehended Violence Order being granted
[22] See below at 8.0 – 8.7; it is not possible to do this anymore
[23] The conversation also including the family priest!

7.0 The *Huffman & Gorman* litigation

7.1 I deal with this decision separately as it provides useful guidance as to a number of matters. It was a high conflict case. Austlii has 13 decisions of the Family Court and the Full Court of the Family Court concerning this case. After a short relationship of 5 years the parents were in dispute as to 3 young children. They lived primarily with the mother and spent limited time with the father. He alleged, however, that she was controlling and violent. During the relationship he commenced recording the mother's behaviour but only sought to rely upon the recordings after the date of separation and for the purpose of giving them to a court appointed psychiatrist. The material consisted of photographs, sound files stored on a USB thumb drive and transcripts of those sound files. The transcripts exceeded 1000 pages. The father brought an application in a case in advance of the trial to seek permission. It was conceded that, under the terms of the NSW legislation, the recordings were unlawful. It was clear that, if admitted, the recordings showed behaviour by the wife showing potentially significant violent behaviour by her.

7.2 In a decision given early 2014 Foster J declined to allow that process to occur [24] and imposed an injunction upon the father. His Honour's decision was, in effect, that the application was premature because *inter alia*, the admissibility of the material had yet to be determined, the probative value of the evidence was yet to be argued, and the integrity of the material had been put in question by the mother.

7.3 The next decision to consider is *Huffman v Gorman (No 2).* [25] At the commencement of the trial Hannam J conducted a *voir dire* to determine the admissibility of the material. By this stage the father had reduced the number of recordings (and therefore the volume of the associated transcripts) to just 22 recordings. Following the earlier decision of Foster J the parties had agreed upon a process to have the transcripts independently prepared. No controversy arose in the proceedings before Hannam J as to accuracy of the transcripts. Having regard to the concession made

[24] *Huffman & Gorman* [2014] FamCA 150
[25] [2014] FamCA 1077

earlier that the recordings were unlawful, Her Honour turned to *Evidence Act.* s. 138. The issue was described as

> *The court is required to balance the seriousness of the husband's conduct in secretly recording the conversations against the potential for harm to children if the evidence is not admitted.*

7.4 Her Honour then turned to the question of probative value, saying

> *They are highly probative of the issue of family violence which has been raised by both parties as they provide contemporaneous actual evidence of conversations in which threats of violence and abuse are directed by one party against the other*

And

> *The second issue in exercising the discretion is the importance of the evidence. I am of the view that the evidence is very important as it goes to the heart of this matter.*

7.5 Her Honour treated the father's conduct in making the recordings as at the less serious end of the spectrum, accepting that he did not know that what he was doing was unlawful.

7.6 Finally, in admitting the evidence Her Honour said

> *One of the other matters which a court may take into account in exercising the discretion is the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law. It is notoriously difficult to obtain evidence of family violence which takes place behind closed doors. It is the father's contention that he was the victim of family violence and his children were exposed to it in their home over a lengthy period of time, but he did not have the confidence to complain to police, especially as he was a man and the perpetrator was his wife. Even if he did complain to police, it would be extremely difficult for police to obtain this type of evidence of conversations which contemporaneously evidence the perpetration of family violence.*

7.7 The trial proceeded over 12 days. The examples of the mother's poor behaviour extended well beyond the short passage quoted at paragraph 3.5 above. Hannam J shifted the children into the care of the father; made a "no time" order for a period of 12 months and thereafter ordered that the mother be supervised. [26]

7.8 An Appeal was made by the mother; but admission of the recorded conversations was not challenged on appeal. The appeal against the children's orders was dismissed. [27]

8.0 **Obtaining a s. 128 certificate**

8.1 In cases where a client advises that she/he has committed an offence, difficulty arises because of the inevitable exposure to prosecution and the tension between that and the privilege against self-incrimination.

8.2 In the past a practice adopted by the profession (the writer included) was to prepare an affidavit containing the relevant confession of illegality but not file or serve it. An application was made to the trial judge based essentially upon an intimation that there was tantalising evidence on offer, but which could not be given unless a certificate was provided under *Evidence Act* s. 128.

8.3 More recent jurisprudence had begun to doubt whether such a practice was applicable given the preliminary wording of s. 128.

> *This section applies if a witness objects to giving particular evidence, or evidence on a particular matter, on the ground that the evidence may tend to prove that the witness:*
>
> *a) has committed an offence ... etc*

8.4 In *Churchill v Raske* [28] the wife, at the commencement of the trial, intimated that evidence could be given but necessarily would reveal an unlawful access to the husband's email account. His Honour Justice Tree recounted the uncertainty arising

[26] *Huffman & Gorman* [2015] FamCA 317
[27] *Gorman & Huffman* [2016] FamCAFC 174
[28] [2014] FamCA 848

in circumstances where s. 128 referred to an objection to giving evidence but where a party was, in effect, volunteering to give evidence in advance of the necessity to take objection.

8.5 His Honour referred to the different approach in the Family Court illustrated by cases such as *Ferrall & Blyton* [29] *Aitken & Murphy* [30] and *Jarvis & Pike* [31] compared to the decision in *Cornwell v The Queen* [32] where the High Court doubted, without deciding, whether a witness could object to giving evidence when it was part of the material they were attempting to adduce by way of evidence-in-chief from themselves; and the decision in *Song v Ying* [33]. In the latter, the NSW Court of Appeal made it plain that s.128 would not apply to parties who gave evidence in answer to questions from their own counsel, as the element of compulsion was not present.

8.6 The matter was considered in depth by the Full Court of the Federal Court in *CFMEU v ABCC* [34]. For present purposes, the Court's lengthy analysis of the history of the common law privilege and the adoption of s. 128, need not be repeated. I need only say that the Full Court preferred the reasoning in *Song v Ying*. The Court supported the decision of a trial judge who refused to give a s.128 certificate where the witness was giving evidence in chief and was not under any compulsion to give evidence. Subsequently in *Field v Kingston* [35] the Full Court of the Family Court adopted this reasoning.

8.7 Thus the practical difficulty faced by the legal practitioner is that when the client comes in and produces evidence obtained by an unlawful means, then to voluntarily give the evidence precludes a certificate being given. The risk of a prosecution inevitably arises.

[29] (2000) FLC 93-054
[30] [2011] FamCA 785
[31] [2013] FamCAFC 196
[32] (2007) 131 CLR 260
[33] (2010) 79 NSWLR 442
[34] [2018] FCAFC 4
[35] (2018) Fam LR 429

9.0 **Will the Court refer the matter for prosecution?**

9.1 Judges of the family courts are able to refer unlawful conduct to the relevant authorities. The most recent authority is that of the Full Court in *Malpass and Mayson* [36] at paragraph [31] where this passage appears:

> *Despite the authorities we do not think that it necessarily follows that the court is always under a duty to report the fact of commission of possible offences to relevant authorities including revenue authorities although it clearly has the power to do so. Questions of degree must be relevant. There are many cases where minor irregularities are revealed to taxation, social security and other issues. We think it unreasonable for the court to burden itself with a duty to report all of these matters. Different considerations may apply in relation to more blatant and substantial irregularities. We leave the determination of this issue to be determined in a case where the point arises directly. It does not arise here for there is no dispute as to the court's power to make such a reference as His Honour did.*

9.2 That decision involved a referral by the trial judge to the ATO. Since then, the only referrals I can find concern cases of bigamy (4), welfare fraud (1), taxation irregularity (2) and misuse of a self-managed superannuation fund (1). No referrals seem to have occurred for unlawful surveillance activity.

9.3 Bear in mind that the other spouse can make complaint even if the Court does not. [37]

10.0 **Conclusion**

10.1 Watch this space

[a] the range and capacity of technology available is ever expanding;

[b] I predict that recording/surveillance activity in many forms will increase as will the extent to which it is finds reference in court documents.

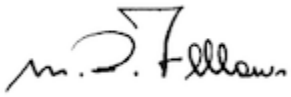
[36] {2000) FLC 93-061
[37] As happened in *Leos* (*op cit*)

10.2 Legal practitioners must be astute to avoid encouraging clients to engage in recording/surveillance activity where there is any possibility of illegality or improper conduct.

10.3 Where a client has engaged in surveillance activity of a kind which may be unlawful then it will be necessary to give advice to the client that if he/she voluntarily discloses the evidence obtained then an exposure to prosecution and/or a domestic violence application (or extension of an existing order) may arise. Whether that risk ought or ought to not be taken will be influenced by the weight of material that exists.

10.4 Once a decision to disclose is made then disclose promptly – and make arrangements to ensure that the potential for disputes as to the accuracy of recordings/video is resolved or ameliorated prior to the hearing.

10.5 The affidavit which discloses/annexes the material must lay the groundwork for the exercise of the discretion appearing in *Evidence Act* s. 138 – and there is no better way of doing that than following the helpful menu given by sub-paragraph s. 138(3).



M.A. Fellows
Chambers
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