

FAMILY COURT OF AUSTRALIA

HUFFMAN & GORMAN (NO. 2)

[2014] FamCA 1077

FAMILY LAW – PRACTICE AND PROCEDURE – Admissibility of evidence – voir dire – admissibility of recording of conversations without the consent of the other party – where a considerable period of time between creating of recordings and use of recordings – recordings prima facie inadmissible unless exclusionary provision applies - were the recordings reasonably necessary to protect the lawful interests of the principal party – unable to determine some facts at this stage of the proceedings – court’s discretion under section 138 *Evidence Act* to admit evidence – probative value of evidence – evidence is admissible.

Evidence Act 1995 (Cth) ss 135, 138
Family Law Act 1975 (Cth) ss 60CC, 69ZT
Listening Devices Act 1984 (NSW) s 5
Surveillance Devices Act 2007 (NSW) ss 3, 7

APPLICANT:

Mr Huffman

RESPONDENT:

Ms Gorman

INDEPENDENT CHILDREN’S LAWYER:

FILE NUMBER:

PAC 3882 of 2011

DATE DELIVERED:

13 October 2014 - Orders
4 December 2014 - Reasons

PLACE DELIVERED:

Parramatta

PLACE HEARD:

Parramatta

JUDGMENT OF:

Hannam J

HEARING DATE:

13 October 2014

REPRESENTATION

COUNSEL FOR THE APPLICANT:

Mr Maddox

SOLICITOR FOR THE APPLICANT:

Caldwell Martin Cox

COUNSEL FOR THE RESPONDENT:

Ms Judge

SOLICITOR FOR THE RESPONDENT:

Redmond Hale Simpson

**COUNSEL FOR THE INDEPENDENT
CHILDREN'S LAWYER:**

Ms Wearne as advocate

**SOLICITOR FOR THE INDEPENDENT
CHILDREN'S LAWYER:**

Mr Naidovski
Legal Aid Parramatta

ORDERS

- (1) The application to exclude evidence contained in paragraphs 25, 128 to 150 and 235 of the father's affidavit filed on 23 September 2014 is dismissed. The evidence is admitted.

IT IS NOTED that publication of this judgment by this Court under the pseudonym *Huffman & Gorman* has been approved by the Chief Justice pursuant to s 121(9)(g) of the *Family Law Act 1975* (Cth).

FAMILY COURT OF AUSTRALIA AT PARRAMATTA

FILE NUMBER: PAC 3882 of 2011

Mr Huffman
Applicant

And

Ms Gorman
Respondent

REASONS FOR JUDGMENT

INTRODUCTION

1. In parenting proceedings which concern the three children of Mr Huffman (“the father”) and Ms Gorman (“the mother”) a question of admissibility of evidence arose.
2. Following a hearing on the voir dire, I admitted the evidence that was objected to, and indicated that I would publish my Reasons for Judgment at a later date. These are those Reasons.

BACKGROUND TO THE APPLICATION

3. The father and mother are parents of three young children, L who is seven, S who is six and Z who is four. The parents separated after a five year marriage and the parenting application before the court concerns the long-term parenting arrangements for the children.
4. Following the breakdown of the parents’ relationship, the children have lived with their mother and spent limited time with their father. The father seeks orders that the children live with him as he contends that the mother’s controlling and violent conduct has emotionally and psychologically harmed the children. The mother denies that the children have been harmed as a result of her behaviour or mental state and seeks orders that they live with her and that she have sole parental responsibility for them.
5. It is central to the father’s case that the mother was violent to him throughout the relationship and that the children were throughout their lives exposed to family violence perpetrated by the mother. The mother denies any violence on her part and alleges that the father was violent to her throughout the relationship.

6. There is no dispute between the parties that at some point in the relationship the father began tape recording some of the conversations between himself and the mother, without the mother's knowledge and consent.
7. Although the proceedings have been on foot since they were initiated by the father in August 2011, the father only relatively recently revealed the existence of the tape recorded conversations and sought to have them provided to the expert psychiatrist, Dr K in December 2013 who was engaged for the purposes of preparing a report in the proceedings. At that stage the father proposed that a large number of recorded conversations and volumes of transcripts be provided to Dr K. The mother opposed the father's proposal for these transcripts and recordings to be provided to the expert and in a judgment by Foster J on 17 March 2014, his Honour determined that the recordings and transcripts were not to be provided to the expert.
8. At the commencement of the trial the mother objected to paragraphs 25, 128 to 150 and 235 of the father's trial affidavit filed on 23 September 2014. These paragraphs contain transcripts of either entire conversations or extracts of conversations between the parties secretly taped by the father. It had been initially anticipated that the father may wish to rely upon all of the taped conversations being the large volume that had been proposed to be provided to Dr K. However, it became clear that the father only wished to rely upon 22 recorded conversations, the transcripts of which are contained in the paragraphs objected to.
9. It was common ground that the transcripts of the recorded conversations contained in the paragraphs objected to accurately record the words spoken by the mother and the father on the recordings.
10. The basis of the mother's objection was that the evidence was unlawfully obtained and was inadmissible. Both the father and the Independent Children's Lawyer sought to have the evidence admitted and argued that even if it were prima facie inadmissible the court should exercise its discretion to admit it.

EVIDENCE ON THE VOIR DIRE

11. For the purposes of the voir dire the mother relied upon two affidavits dated 6 December 2013 and 2 March 2014 which were prepared in relation to the father's application to provide Dr K with the recordings and transcriptions. The father relied upon those portions of his trial affidavit which related to the making of the secret recordings and transcriptions, specifically paragraph 24 and paragraphs 108 to 128. The Independent Children's Lawyer relied upon some paragraphs of Dr K's report. No party was required for cross-examination.
12. In relation to the making of the recordings the father says in his trial affidavit that while he was at University during the 1990's he purchased a small

dictaphone which he then used between late 2006 and late 2008 to record conversations between himself and the mother. The father acknowledged that in an earlier affidavit he said the tapes were recorded up until 2009, he now says having reviewed them that the last recording was in 2008. The father says that the tapes from 1 to tape 21(A) were taped from late 2006 to December 2007, he commenced recording tape 21(B) in December 2007 and that tape 24 was recorded in 2008. The father's evidence is that these recordings are not a complete record of conversations with the mother. He says that during the period of time when he was making the recordings he kept the dictaphone either on himself, or in his work bag in the garage at the family home. When he recorded the conversations he placed the dictaphone inside his belt buckle or waistband of his pants and covered it with his shirt. In summary the conversations record arguments between the mother and father in which the mother is threatening and abusive towards the father and, in at least one case, threatens to harm one of the children. In some recordings, a child is heard in the background.

13. The father says that his motivation for making the recordings was that they could be used as evidence if he or his children were killed or seriously injured by the mother. He further says that he wanted the recordings to be used in the event he got the courage to attempt to end the violence by convincing police or medical professionals about the mother's domestic violence, due to people's general perception that men are the perpetrators of this type of violence, rather than women. He states that he never intended to use the tapes for family law proceedings. He recorded approximately 24 or 25 tapes and after a tape became full he would leave the tape at his parents' house in the hope that if something happened to him, his parents would be able to listen to the tapes and understand what was happening.
14. In September 2013 the father selected six tapes, transferred them onto a computer USB thumb drive and gave it to his solicitor with instructions for the contents to be transcribed. Following an order by Foster J in December 2013, the parties agreed on a transcription service to transcribe the tapes and an agreed transcription of all the tapes was produced. The complete transcriptions comprise over 1000 pages however only those conversations, which are set out in the paragraphs objected to are now being relied upon. In each conversation one speaker is nominated as "V1" and the other as "V2". The father contends that "V1" of the recordings is the mother and that "V2" is the father.
15. The mother says that she believes the recordings are of conversations which occurred during December 2006 to July or August 2007, with the first recording occurring when the eldest child was only a few weeks old. She says that she first became aware that the father was taping conversations in mid-2007 when she recalls finding about five tapes and the dictaphone in the garage. The mother said she listened to the tapes which she describes as "bits of

conversations between [the father] and myself when we had been arguing”. She says that she recalls that the taped conversations only reflected parts of the conversations. The mother confronted the father about the tapes when she found them and the father promised he would not make recordings of the conversations again. The mother was not aware that the father made further tapes of the conversations.

16. Although it appeared that the mother was initially contending that the tapes may have been in some way tampered with, there is no evidence as to this issue. Although it was also submitted that there was some significance in the fact that the length of pauses in conversations was not recorded this issue was not pursued. It further became clear that the mother was provided with the tapes and given an opportunity to check the accuracy of the father’s transcripts. She agrees that the transcripts in the father’s affidavit accurately transcribe the recordings.

THE LAW

17. It was submitted on behalf of the mother that the evidence is unlawfully obtained by operation of the *Listening Devices Act 1984 (NSW)* (“*Listening Devices Act*”) or *Surveillance Devices Act 2007 (NSW)* (“*Surveillance Devices Act*”), whichever was in force at the time when the recordings were made.
18. The *Listening Devices Act* came into effect on 11 February 1985. The *Surveillance Devices Act* came into effect on 1 August 2008, and repealed the *Listening Devices Act*.
19. The *Listening Devices Act* section 5 subsection (1) provides:
 - (1) A person shall not use, or cause to be used, a listening device:
 - (a) to record or listen to a private conversation to which the person is not a party, or
 - (b) to record a private conversation to which the person is a party.
20. Section 5 subsection (1)(b) will not apply to the use of a listening device by a party to a private conversation if:
 - (a) all of the principal parties to the conversation, consent, expressly or impliedly, to the listening device being so used, or
 - (b) a principal party to the conversation consents to the listening device being so used and:
 - (i) the recording of the conversation is reasonably necessary for the protection of the lawful interests of that principal party, or
 - (ii) the recording of the conversation is not made for the purpose of communicating or publishing the conversation, or a report

of the conversation, to persons who are not parties to the conversation.

21. The *Surveillance Devices Act* section 7 subsection (1) states:
 - (1) A person must not knowingly install, use or cause to be used or maintain a listening device:
 - (a) To overhear, record, monitor or listen to a private conversation to which the person is not a party, or
 - (b) To record a private conversation to which the person is a party.
22. Section 7 subsection (1)(b) does not apply to the use of a listening device by a party to a private conversation if:
 - (a) all of the principal parties to the conversation consent, expressly or impliedly, to the listening device being so used, or
 - (b) a principal party to the conversation consents to the listening device being so used and the recording of the conversation:
 - (i) is reasonably necessary for the protection of the lawful interests of that principal party, or
 - (ii) is not made for the purpose of communicating or publishing the conversation, or a report of the conversation, to persons who are not parties to the conversation
23. It is the father's case that the recordings were made at various times during 2006, 2007 and 2008. The mother says the recordings are of conversations between 2006 and July or August 2007. The *Listening Devices Act* is therefore the relevant act governing the recordings for the majority or entirety of the period in which they were made.
24. These two legislative schemes are broadly similar and under both schemes, it is unlawful to record private conversations without consent of the parties to the conversation. However, under both schemes the prohibition on using a listening device to record private conversations does not apply in circumstances where the recording is reasonably necessary for the protection of the lawful interests of the principal party.
25. Although the submissions made by the father were mainly directed to the *Surveillance Devices Act*, whereas the *Listening Devices Act* appears to be the more applicable statute, the provisions relied upon by the father that the recording of the conversations was reasonably necessary for the protection of his lawful interest, are identical in each Act. So far as the lawful interests are concerned, the father says he has a lawful interest of bringing the mother to account in the event that he or the children were killed by the mother. He also

says he wished to use the recordings as evidence to support his allegations about the mother's violence if he ever had the courage to seek assistance from police to end the violence. He says he needed the evidence to protect himself from allegations that his account was false.

26. The Independent Children's Lawyer agreed with the father's submission that the recording of the conversations was reasonably necessary for the protection of the lawful interests of the father. The Independent Children's Lawyer says that the father's evidence concerning his motivation for making the recordings is corroborated by the account he gave to Dr K and Dr K's expert opinion.
27. Dr K felt that the father was more earnest in his attempt to collect evidence of the mother's actions behind closed doors compared to the mother who was in his view deceitful, selective, manipulative and coercive. Dr K opined that the father did not use this evidence in a manipulative way, especially while the parents were in a relationship. Further, Dr K was of the opinion that the father's efforts in collecting the evidence were rather passive in an attempt to attest to his experience, should the mother act on her threats to harm him, which the doctor inferred from the father's actions in hiding the tapes from the mother, and telling relatives where they could be found.
28. It was submitted by the mother that the father's belated use of the tapes suggests that he was unconcerned about his safety and the safety of his children during the period between the recording of the conversations and revealing their existence, which may suggest that he made them for some purpose other than protecting his lawful interest. It was also submitted on behalf of the mother that the way in which the father sought to have possibly inaccurate transcripts put to Dr K affects the issue of his motivation and reason for recording the conversations in the first place and the court could conclude that the recordings were not reasonably necessary for the protection of the lawful interests of the father.
29. The Independent Children's Lawyer submitted that the fact that the father did nothing with those recordings forensically until late 2013 may be relevant to other matters, but should not be determinative of this application.
30. The father was not cross-examined about any issue, including the reason why he did not act upon the recorded conversations, or go to police at the time, or soon after they were made and why he did not use them for the purpose he says they were made. He was also not cross-examined about the delay in using the tapes in these proceedings.
31. In these circumstances, on the limited evidence I am unable to find that the father recorded these conversations in circumstances where it was reasonably necessary for the protection of his lawful interests to do so. Therefore, the father's actions, in covertly taping conversations with the mother without her consent is unlawful.

32. However, unlawfulness does not of itself, make the evidence inadmissible. To determine the admissibility of the unlawfully obtained evidence, the court must consider the applicable provisions under the *Evidence Act 1995* (Cth) ("*Evidence Act*").
33. Although section 69ZT of the *Family Law Act* excludes certain parts of Chapter 3 the *Evidence Act* in child related proceedings. Part 3.11 of Chapter 3 which deals with discretionary and mandatory exclusions is not excluded by the operation of section 69ZT.
34. The question of admissibility is determined by the relevant provisions in the *Evidence Act* and in this case to evidence in question was sought to be excluded under section 135 or section 138.

SECTION 138 OF THE EVIDENCE ACT

35. Section 138 of the *Evidence Act* 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,
- (c) 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.

...

(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.

- 36. In summary, 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.
- 37. In determining whether to exercise the discretion to admit the evidence, the first matter to consider is the probative value of the evidence in question.
- 38. It was submitted on behalf of the mother that the evidence has less probative value as the father only sought to use it two years after the commencement of the proceedings. It was also submitted on behalf of the mother that the recorded conversations were of less probative value as the father had previously consented to interim orders which provided for all the children to live with the mother, prior to October 2012. In my view, these matters do not make the recorded conversations less probative. 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.
- 39. 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. Two of the considerations to which the court must have regard in determining a child's best interests are the primary consideration of the need to protect children from psychological harm from being exposed to family violence and the additional consideration of any family violence involving the child or member of the child's family.
- 40. So far as the nature of the proceedings is concerned, these are family law proceedings where the court is required to make a determination about appropriate parenting orders. One of the important matters to determine is whether either of the parents has perpetrated family violence. These are proceedings where the best interests of the children are the paramount consideration.
- 41. Neither party made submissions about the gravity of the father's conduct in covertly recording the conversations between himself and the mother, but I am of the view that his conduct was at the less serious end of the spectrum. The circumstances in question are not similar to those often being considered by a court, when exercising this discretion, which involve a law enforcement officer covertly recording a conversation rather than utilising available lawful means, such as obtaining a warrant. There is no evidence in this case to suggest that the father consciously and deliberately sought to use unlawful means to obtain the evidence and the recordings were made in his own home, of conversations with his then wife.

42. The action of taping the conversations without consent was deliberate but it does not appear that the father was aware at the time that his actions were unlawful.
43. 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.
44. I am of the view that taking all of these matters into account the desirability of admitting evidence of family violence in a hearing where the best interests of children are paramount outweighs the undesirability of admitting evidence which was obtained unlawfully.

SECTION 135 EVIDENCE ACT

45. The mother also submitted that the admission of the recordings into evidence was unfairly prejudicial to her and sought to have it excluded under section 135 of the *Evidence Act*. This section provides a general discretion to exclude evidence as follows:

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.
46. It was submitted on behalf of the mother that there were a number of aspects of unfairness about the recorded conversations, and if they were admitted it would be prejudicial to her. It was submitted that the father was able to manipulate and set up the environment in which the conversations were recorded, which resulted in the mother being portrayed unfavourably. It was also submitted that as the recordings were only of parts of conversations and did not record the events that led up to those parts of conversations they were thereby prejudicial to the mother.
47. However, it is unclear on what basis the mother asserts that the admission of the recorded conversations would be **unfairly** prejudicial to her as required by the section, especially where she concedes that the transcripts accurately record the words spoken. The circumstances of their making, and the suggestion that

in some way the environment was manipulated can be the subject of cross-examination of the father and may ground submissions as to the weight to be attached to the recorded conversations. As previously indicated, in my view, the probative value of these conversations is significant and in circumstances where it has not been clearly identified how the admission of the evidence may be unfairly prejudicial to the mother, the evidence in my view should not be excluded on this basis.

CONCLUSION

48. For the reasons given, the evidence contained in the recorded conversations was prima facie unlawfully obtained. I am unable to be satisfied at this early stage in proceedings where the evidence is untested that the conversations were recorded in circumstances where the prohibition against secret recordings does not apply.
49. However, I admit the evidence under section 138 of the *Evidence Act* in an exercise of my discretion for the reasons given.
50. I am not satisfied that the probative value of the recorded conversations of the evidence is outweighed by the unfair prejudice to the mother.
51. Accordingly, the mother's application to exclude paragraphs 25, 128 to 150 and 235 of the father's affidavit filed on 23 September 2014 is dismissed. The evidence is admitted for the purposes of these proceedings.

I certify that the preceding fifty one (51) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Hannam delivered on 13 October 2014.

Legal Associate:

Date: 4 December 2014