

FAMILY COURT OF AUSTRALIA

JANSSEN & JANSSEN

[2016] FamCA 345

FAMILY LAW – EVIDENCE – Admissibility – Admissibility of audio recordings made by the mother of exchanges between the parties in circumstances where the recordings were made without the consent of the father – Admissibility of transcripts of the audio recordings – Where the Court finds the audio recordings fall within the exception contained in sub-section 7(3)(b) of the *Surveillance Devices Act 2007* (NSW) as the recordings were reasonably necessary to protect the lawful interests of the mother – Where the Court exercises its discretion to admit the audio recordings and transcripts into evidence – Certificate issued to the mother pursuant to section 128 of the *Evidence Act 1995* (Cth).

FAMILY LAW – EVIDENCE – Application by the father under section 69ZT(3) of the *Family Law Act 1975* (Cth) for the provisions of the *Evidence Act 1995* (Cth) to apply – Where there are serious allegations of family violence made against the father – Where the Court is satisfied ‘exceptional’ circumstances apply – Rules of evidence to apply to evidence given in respect of events on a specific date and alleged threats made by the father concerning the children.

Evidence Act 1995 (Cth) ss 128, 135, 138
Family Law Act 1975 (Cth) ss 4AB, 69ZN, 69ZT
Surveillance Devices Act 2007 (NSW) s 7

Baker v The Queen (2004) 223 CLR 513
Corby & Corby [2015] FCCA 1099
Huffman & Gorman (No.2) [2014] FamCA 1077
Khalil & Tahir-Ahmadi [2010] FamCA 1080
Khalil & Tahir-Ahmadi (2012) FLC 93-506
Maluka & Maluka (2011) FLC 93-464

APPLICANT:

Ms Janssen

RESPONDENT:

Mr Janssen

INDEPENDENT CHILDREN’S LAWYER:

Ms Volk

FILE NUMBER:

SYC 5802 of 2013

DATE DELIVERED:

1 February 2016

PLACE DELIVERED:

Sydney

PLACE HEARD:

Sydney

JUDGMENT OF:

McClelland J

HEARING DATE:

1 February 2016

REPRESENTATION

COUNSEL FOR THE APPLICANT:

Mr Levy

SOLICITOR FOR THE APPLICANT:

Reid Family Lawyers

COUNSEL FOR THE RESPONDENT:

Mr Sansom

SOLICITOR FOR THE RESPONDENT:

Verekers Lawyers

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

Mr Anderson

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

Helen Volk Lawyers

ORDERS

1. That a certificate issue pursuant to s 128 of the *Evidence Act 1995* (Cth) in relation to the whole of the affidavit of Ms Janssen sworn on 1 February 2016.
2. The transcript of the audio recordings between the parties made by the mother on 4 April 2013, 30 April 2013, 1 May 2013, 10 June 2016, 23 August 2013, 24 August 2013 be marked as Exhibit 2 in the proceedings.
3. The audio recordings between the parties made by the mother on 4 April 2013, 30 April 2013, 1 May 2013, 10 June 2016, 23 August 2013, 24 August 2013 be marked as Exhibit 3 in the proceedings.
4. Except in relation to the events of 10 September 2013 and the alleged threats made by the father concerning the children, I will apply sections 69ZT(1) and 69ZT(2) of the *Family Law Act 1975* (Cth) in these proceedings.

IT IS NOTED that publication of this judgment by this Court under the pseudonym *Janssen & Janssen* 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 SYDNEY

FILE NUMBER: SYC 5802 of 2013

Ms Janssen
Applicant

And

Mr Janssen
Respondent

EX TEMPORE REASONS FOR JUDGMENT

1. Today is the first day of a four day hearing. At the commencement of the hearing, counsel for the applicant mother indicated that the applicant would seek to tender voice recordings of exchanges between the parties that occurred in the period from 1 April 2013 until 24 August 2013. The applicant also proposed to tender a transcription of the voice recordings.
2. The voice recordings and the transcription were provided to the respondent father's legal representatives only last Wednesday. That is outside the timetable set out in the trial directions for the filing of evidence. This must be balanced against the fact that the material contained in the tapes, and as transcribed, is relevant to the issues in these proceedings.
3. At the request of senior counsel for the father, the mother has sworn an affidavit setting out the context in which those recordings were made.
4. It was common ground between the parties that section 7 of the *Surveillance Devices Act 2007* (NSW) ("the *Surveillance Devices Act*") makes it unlawful to record private conversations without the consent of the parties to that conversation unless the recording of the conversation falls within one of the exceptions set out in sub-sections 7(2) and (3).
5. For the present purpose, sub-section 7(3)(b) is most relevant. It provides that the prohibition to the use of listening devices to record a private conversation does not apply for reasons that include that it "is reasonably necessary for the protection of the lawful interests of that principal party".
6. Having regard to the affidavit of the mother sworn today, I am satisfied that she made the recordings for the purpose of protecting her lawful interests. The primary question is whether her action was "reasonably necessary" to protect her lawful interests. In that respect, in the case of *Corby & Corby* [2015]

FCCA 1099, Judge Sexton applied the decision of the Court of Criminal Appeal in *DW v R* [2014] NSWCCA 28, to find on the facts before her:

23. ...that the Mother had the right to protect her interest not to be intimidated or harassed, and not to be forced to respond to the Father's demands for sexual activity...

7. Accordingly, her Honour found that the exception to the prohibition, set out in section 7(3)(b)(i), was satisfied and that the mother's actions were reasonably necessary to protect her lawful interests. In arriving at that conclusion a relevant factor was stated by her Honour to be that:

30. ...the Father may have had a public face very different from his private face, a possibility accepted by Dr Q, who agreed that the Father may be charming and delightful in company, and intimidating and frightening in the home, as alleged by the Mother.

8. The mother, in the case before me, makes an allegation to similar effect.

9. In *Huffman & Gorman (No. 2)* [2014] FamCA 1077, the Court considered whether to exercise jurisdiction under section 138 of the *Evidence Act 1995* (Cth) ("the *Evidence Act*"), to admit a recording into evidence despite the possibility of it being found that it was illegally obtained. In deciding that it should be admitted on the facts before her, Hannam J noted that:

It is notoriously difficult to obtain evidence of family violence which takes place behind closed doors.

10. Her Honour's reasoning is apposite in determining whether it was reasonably necessary for the mother to make the recordings in the case at hand.
11. If I am wrong in respect to the recordings falling within the exception set out in section 7(3)(b)(i) of the *Surveillance Devices Act*, I would have exercised my discretion to admit the evidence consistently with the provisions of section 138 of the *Evidence Act*. That is, I would have determined that the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way the evidence has been obtained.
12. In deciding to admit the evidence, I have noted the caution of senior counsel for the father, that there is a danger of the "floodgates" opening with parties to a marital relationship that are experiencing difficulties determining that it is appropriate to obtain surreptitiously obtained tape recordings.
13. In that context, my decision is very much one that is based on the facts before me, including the allegations that the father has maintained a charming public face but has engaged in conduct within the family home that is alleged to have constituted family violence in terms of the provisions of section 4AB of the *Family Law Act 1975* (Cth) ("the *FLA*"). I have also had regard to the potential

difficulty of obtaining evidence of alleged family violence when it occurs behind closed doors without any witnesses being present other than the alleged perpetrator and victim.

14. I also note that as a result of the competing contentions of the parties, regarding the issue as to whether family violence has occurred, that credibility will necessarily be in issue in these proceedings. The recordings and transcript will be directly relevant to that issue.
15. The senior counsel for the father submitted that even despite the considerations of section 7 of the *Surveillance Devices Act* and section 138 of the *Evidence Act*, the Court should nonetheless exclude the actual recording, that is, the voice recording as opposed to the typed transcript. In that respect he referred to section 135 of the *Evidence Act* which enables the Court to exercise its discretion to exclude evidence if its probative value is substantially outweighed by the danger of the evidence being unfairly prejudicial to a party.
16. In the context of unfair prejudice, senior counsel referred to the emotional impact on the Court and the possibility of the actual recordings unreasonably evoking sympathies against the father as a result of the tone in which the communication occurred. In addition, it was said that there was potential prejudice in that the conversations may have been triggered or induced by the mother such that the father said things in a tone which would not otherwise have been the case if the recordings were not being made.
17. In other words, senior counsel for the father said that the mother had the ability to determine when the microphone was switched on and off and the circumstances in which the conversation occurred and was recorded. That issue was also dealt with by Hannam J in *Huffman & Gorman (No. 2)* (supra) where her Honour said:

47. ...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 in the 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 that basis.

18. I respectfully agree with her Honour.
19. I also find that the potential for unfair prejudice as a result of the emotional impact of the actual recordings where I am sitting as a judge is of less significance than it otherwise would have been if it was a trial by jury.
20. In exercising my discretion to admit the recordings I also note that the Court is required to have regard to the provisions of the FLA and specifically section

69ZN, which provides that in exercising jurisdiction under this part of the Act dealing with children, the Court must have regard to the principles for conducting child-related proceedings, and those principles include, under the third principle, that the proceedings are to be conducted in a way that will safeguard the child concerned against family violence, child abuse and neglect as well as safeguard the parties to the proceedings against family violence.

21. In that context it was submitted by both counsel for the mother and counsel for the Independent Children's Lawyer ("the ICL") that an important aspect of the evidence contained in the tapes is not simply what was said, but how it was said. The ICL indicated that from the ICL's point of view, there would be significant issues in the case not only as to whether the father has engaged in physical violence and psychological intimidation, but also behaviour that could be modelled or mimicked by the children. Significantly, in that respect, counsel for the ICL submitted that the Court could not ignore that the recordings show that the children were present when some of the conversations occurred.
22. Finally, the ICL submitted that the recordings may also assist in determining whether the parenting abilities of the primary carer have been compromised as a result of the content and tone of the communication.
23. Having regard to those submissions, I determine that the best available evidence in this matter is not only what was said, as recorded in the transcripts, but also how it was said. On that basis I propose to admit both the transcript of the tapes and the tapes themselves.
24. As a second preliminary issue, senior counsel for the father has made an application that the provisions of section 69ZT(3) of the FLA be invoked. This would require the proceedings be determined according to the rules of evidence as set out in the *Evidence Act* and not according to the procedures set out in sub-sections 69ZT(1) and (2).
25. Sub-sections 69ZT(1),(2) and (3) relevantly provide:

69ZT Rules of evidence not to apply unless court decides

- (1) These provisions of the *Evidence Act 1995* do not apply to child-related proceedings:
 - (a) Divisions 3, 4 and 5 of Part 2.1 (which deal with general rules about giving evidence, examination in chief, re-examination and cross-examination), other than sections 26, 30, 36 and 41;

Note: Section 26 is about the court's control over questioning of witnesses. Section 30 is about interpreters. Section 36 relates to examination of a person without subpoena or other process. Section 41 is about improper questions.

(b) Parts 2.2 and 2.3 (which deal with documents and other evidence including demonstrations, experiments and inspections);

(c) Parts 3.2 to 3.8 (which deal with hearsay, opinion, admissions, evidence of judgments and convictions, tendency and coincidence, credibility and character).

(2) The court may give such weight (if any) as it thinks fit to evidence admitted as a consequence of a provision of the *Evidence Act 1995* not applying because of subsection (1).

(3) Despite subsection (1), the court may decide to apply one or more of the provisions of a Division or Part mentioned in that subsection to an issue in the proceedings, if:

(a) the court is satisfied that **the circumstances are exceptional**; and

(b) the court has taken into account (in addition to any other matters the court thinks relevant):

(i) the importance of the evidence in the proceedings; and

(ii) the nature of the subject matter of the proceedings; and

(iii) the probative value of the evidence; and

(iv) the powers of the court (if any) to adjourn the hearing, to make another order or to give a direction in relation to the evidence.

(Emphasis added)

26. There is merit in senior counsel's submission with respect to matters which were the subject of criminal proceedings involving the father. That is, the criminal charges that were brought against the father in respect to events which occurred on the evening of 10 September 2013. There is also merit in the senior counsel's submission in respect to allegations involving that the father has made a threat or threats to harm the children. That includes the allegations contained in paragraphs 120 to 123 of the mother's trial affidavit filed 15 January 2016. Clearly matters of alleged criminal culpability of that nature are serious matters and should, in my opinion, be determined in accordance with the principles of evidence that are codified in the *Evidence Act*.

27. In arriving at this decision, I have had regard to the fact that the Full Court in *Khalil & Tahir-Ahmadi* (2012) FLC 93-506 endorsed the decision of Dawe J at first instance in referring to the interpretation of “exceptional” by Callinan J in the High Court in *Baker v The Queen* (2004) 223 CLR 513, who in turn relied on the case of *R v Kelly (Edward)* [2000] QB 198 at page 208, where Lord Bingham said:

We must construe ‘exceptional’ as an ordinary familiar English adjective and not a term of art. It describes the circumstances which is such as to form an exception which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional, a circumstance need not be unique or unprecedented, or very rare, but it cannot be one that is regularly, or routinely, or normally encountered.

28. I regard the possibility of my arriving at a conclusion that is contrary to the decision of the District Court to dismiss charge against the father, in respect to the events that occurred on 10 September 2013, as one that is not routinely or normally encountered in family law proceedings, and on that basis falls within section 69ZT(3). Similarly, I regard allegations that a parent has made premeditated threats to harm their children, in the circumstances that they have been made in this matter, as exceptional and should be determined according to the rules of evidence.
29. In arriving at that conclusion I have also had regard to the fact that, if the allegations are substantiated, they may have very serious consequences for the father and the children. In that respect, I note that in this matter the mother is seeking orders that the father have no time with the children.
30. Other than in respect to those matters that I have referred, I am of the view that the evidence relates to matters that are regularly or routinely or normally encountered in this Court. In that respect I have had regard to *Maluka & Maluka* (2011) FLC 93-464 where at paragraph 123 the Full Court said:

...It must be remembered that it is not uncommon for such cases to involve, in effect, a risk assessment exercise that may not include consideration of whether to make positive findings of sexual abuse, or consider conduct which would constitute criminal offence in the upper range of seriousness. There are sound reasons associated with the protection of children and victim partners why, notwithstanding an order is sought to terminate a child’s relationship with a parent, a judge might determine the risk issue by reference to ss 69ZT(1) and (2) of the [FLA].

31. I have also had regard to the principles set out in section 69ZN including that:
- (5) ...the proceedings are to be conducted in a way that will safeguard:

- (a) the child concerned from being subjected to, or exposed to, abuse, neglect or family violence; and
- (b) the parties to the proceedings against family violence.

32. Applying the reasoning of the Full Court in the context of the principles applicable to the conduct of parenting cases, I have determined that, other than in respect to the issue of the events on 10 September 2013 and the issue as to whether the father has made threats to the children or to the mother in respect to the children, sections 69ZT(1) and (2) should be applied in respect to the remainder of issues in the proceedings.

33. I note that, in deciding not to apply the rules of evidence in respect to the remaining issues in the case, I have a discretion in considering the probative value of such evidence. In *Khalil & Tahir-Ahmadi* [2010] FamCA 1080, Dawe J, at first instance, said:

24. I do take into account the importance of some of the evidence, so far as it relates to various issues, and the nature of the subject matter, but I also take into account the provisions of section 69ZT(2), which gives the Court a discretion to give such weight, if any, as it thinks fit, to evidence admitted as a consequence of the provisions of the *Evidence Act* not applying.

25. To the extent, therefore, evidence in relation to the question of family violence will have to be established clearly, and matters of opinion put in appropriate context and given appropriate weight, depending upon who was expressing the opinion and on what basis, and the establishment of the necessary background facts.

34. For these reasons, other than in respect to the events that occurred on 10 September 2013 and the allegations that the father has made threats to the children or to the mother in respect to the children, I will apply the provisions of sub-sections 69ZT(1) and (2).

I certify that the preceding thirty-four (34) paragraphs are a true copy of the reasons for judgment of the Honourable Justice McClelland delivered on 1 February 2016.

Associate:

Date: 13 May 2016