

***Janssen & Janssen* [2016] FamCA 345 (1 February 2016) – Family Court of Australia**

‘Discretion to admit the audio recordings and transcripts into evidence’ – ‘Evidence’ – ‘Independent children’s lawyer’ – ‘Recordings made without consent’ – ‘Serious allegations of family violence’ – ‘Whether recordings were reasonably necessary to protect lawful interests’

Proceedings: Application relating to the admissibility of evidence and application as to whether the rules of evidence ought to apply in a Family Court hearing.

Facts: On the first day of a four day hearing, counsel for the applicant (the mother) sought leave to tender voice recordings and transcripts that had been made without the knowledge of the father. Under s 7 of the *Surveillance Devices Act 2007* (NSW), it is 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 in s 7(2) and (3).

Issue/s:

- > Whether both the voice recordings and transcripts were admissible.
- > Whether there were ‘exceptional circumstances’ as per s 69ZT(3) requiring the proceedings to be determined according to the rules of evidence set out in the *Evidence Act* and not according to the procedures set out in s 69ZT(1) and (2) of the *Family Law Act 1975* (Cth) (‘the FLA’).

Reasoning/Decision: First, McClelland J held that both the voice recordings and the transcripts were admitted in evidence under s 7(3) of the *Surveillance Devices Act 2007* (NSW) (the recordings were reasonably necessary to protect the applicant’s lawful interests) and, in the alternative, under s 138 of the *Evidence Act* (the desirability of admitting the evidence outweighed the undesirability of admitting evidence that had been obtained improperly).

McClelland J noted the ‘floodgates’ caution from senior counsel for the father i.e. that there was a danger of parties to a marital relationship experiencing difficulties surreptitiously recording their partner. However, in this regard, His Honour stated that his decision was very much one based on the facts of the case, including the allegations that the father had maintained a charming public face but had engaged in conduct within the family home that was alleged to have constituted family violence in terms of the provisions of s 4AB of the FLA. His Honour also had regard to the potential difficulty of obtaining evidence of family violence when it occurs behind closed doors without any witnesses present other than the perpetrator and victim. Further, His Honour noted that the recordings and transcript would be directly relevant to the issue of credibility as to whether family violence occurred in the proceedings (see [6]-[14]).

Notwithstanding the findings above, senior counsel for the father submitted that the Court ought to exclude the voice recordings (permitting the inclusion of the typed transcript) because the danger of the evidence being unfairly prejudicial to the father outweighed its probative value (s 135 *Evidence Act*). This was because the mother had knowledge and control of the recording and the circumstances in which the conversation occurred and was recorded. McClelland J dismissed this argument and held the voice recordings were admissible. This could be a matter for cross-examination by the father: [Huffman & Gorman \(No. 2\)](#). Further, His Honour noted submissions from counsel for the applicant and counsel for the Independent Children’s Lawyer that an important aspect of the evidence contained in the tapes was not simply what was said but how it was said. This was relevant to whether the father’s behaviour could be modelled or mimicked by the children and whether the parenting abilities of the primary carer had been compromised as a result of the content and tone of the communication (s 69ZN of the FLA) (see [15]-[23]).

Second, McClelland J held that the rules of evidence were to be applied in respect to the issues of the events on 10 September 2013 (these events were the subject of criminal proceedings) and to the issue as to whether the father made threats to the children or to the mother in respect to the children (s 69ZT(3)). For the remainder of the issues, the rules of evidence would not apply (s 69ZT(1) and (2)) and His Honour would therefore have the discretion to consider the probative value of such evidence. His Honour stated, ‘*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*’ (see [24]-[34]).