Managing Concurrent Family Law Proceedings in Two Courts

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This paper considers the evidentiary issues arising out of proceedings in other courts subsequent or concurrent to family law proceedings. The paper begins by considering what to do when there is a concurrent proceeding for a criminal offence and a witness might not be able to answer questions that could incriminate them in the other court. In particular, this paper considers the privilege against self incrimination and s 128 of the *Evidence Act 1995*. This section then considers the use of evidence or materials given in family law proceedings in the other proceedings.

The privilege against self-incrimination

The privilege against self-incrimination is enshrined in s 128 of the *Evidence Act*. In matters where there are (or even foreshadowed) criminal proceedings concurrent or subsequent to the family law proceedings, parties and witnesses will need to consider whether their evidence tends to prove that they have committed an offence. In the family law context, this is particularly relevant where there are current intervention orders. Evidence that a parent (for example) had time with a child or communicated with a child outside of court orders, or attended the other parents home, or sent text messages to the other parent may need a certificate to protect the client.

In such circumstances, a witness will need to be issued a certificate pursuant to s 128 of the *Evidence Act*. Such a certificate protects the witness from the evidence given being used against them in criminal proceedings (except for proceedings for perjury).

Section 128 can be distilled into 5 questions:

1. Does the witness object to giving evidence on the ground that it may tend to prove that he or she committed an offence or is liable to a civil penalty? s128(1)
2. Are there reasonable grounds for the objection? s128(2) and s128(3)
3. Is the witness willing to give the evidence under the protection of a certificate? s128(3)
4. Does the evidence tend to prove that the witness has committed an offence against or arising under, or is liable to a civil penalty under, a law of a foreign country? s128(4)(a)
5. Do the interests of justice require the witness to give the evidence? s128(4)(b)

The first requirement to enliven s 128 of the *Evidence Act* is that a witness 'objects' to the giving of evidence. The leading decision in the family law context on objecting to evidence is the Full Court decision of *Ferrall v Blyton* (2000) FLC 93-054; [2000] FamCA 1442. In that decision, the Full Court held:

> [89] Firstly, we think it would be unrealistic to limit the availability of a certificate to a situation where a witness is asked a particular question in cross-examination. We think the availability of a certificate clearly applies to evidence given in chief, otherwise an inappropriate forensic advantage would rest with the other party who would be in a position to prevent the question of an objection arising by simply not seeking to cross-examine.
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> [90] In the particular circumstances of the Family Court of Australia, evidence in chief is normally given by affidavit. **We think that in the circumstances of the present case, the witness was objecting, in the sense required by s.128, by indicating that he would not file the affidavit unless a certificate was given.** We see the situation as no different from that which would have been the case if he had been sworn in and asked to answer questions concerning the matter in evidence in chief, and had objected to doing so without the issue of such a certificate. [Emphasis added]

Vital to the operation of s 128 is that the witness is objecting to the giving of evidence. Once an affidavit has been filed (or a question answered) it can no longer be said that the witness 'objects' to the question. There is a general belief by practitioners that s 128 can act retrospectively by virtue of sub-s 128(6). Subsection 128(6) reads as follows:

> (6) The court is also to cause a witness to be given a certificate under this section if:
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> (a) the objection has been overruled; and
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> (b) after the evidence has been given, the court finds that there were reasonable grounds for the objection.

There is (anecdotally) a misconception that s 128(6) will operate so that the Court can provide a certificate after an affidavit has been filed with the Court. However, sub-s 128(6) only applies where 'the objection has been overruled' and then once the evidence has been heard it transpires that a certificate ought to have been granted. If an affidavit has been freely filed, then there will be no objection and s 128 will not be enlivened. The only recourse to a party who has filed an affidavit containing self-incriminating evidence would be to seek to have it excluded pursuant to s 138 of the *Evidence Act*, which provides for the exclusion of improperly obtained evidence. Section 132 requires the Court to satisfy itself that the witness or party is aware of the effect of s 128. In *LGM & CAM* [2011] FamCAFC, the Full Court of the Family Court observed that if a witness does not understand the effect of s 128, it may be excluded as improperly obtained evidence.

The High Court has raised concerns as to whether a witness can ever 'object' to giving evidence in chief, whether on affidavit or by way of viva voce evidence. In *Cornwell v R* [2007] HCA 12; (2007) 234 ALR 51; 81 ALJR 840, the High Court at [111] questioned whether a witness who is 'eager to reveal some criminal conduct in chief, because it is thought the sting will be removed under sympathetic handling

from their own counsel or for some other reason' should be afforded the same protection as a witness compelled to answer questions under cross-examination. The High Court suggested that an interpretation of s 128 which permitted objection of evidence in chief 'strains the word "objects"', nor can it be said that a Court would need to 'require' a witness to answer pursuant to s 128(4). Moreover, the High Court suggested that such an interpretation is contrary to the history of s 128. Unfortunately, the High Court did not ultimately determine the issue, as it had not been argued in the intermediate appellate Courts, and was not pressed by the parties. The issue therefore remains unclear.

Respectfully, the High Court's position in Cornwell is not reflected in the legislation or in the Explanatory Memorandum. Indeed, the Explanatory Memorandum states that "if the evidence is given, either voluntarily or under compulsion, that a certificate shall be granted preventing the use of that evidence against the person in another proceeding". This would indicate that parliament requires a certificate to be issued, whether the person is being compelled or freely giving the evidence. But until the High Court definitively determines the issue, it will remain largely unsettled law.

Young J considered the discrepancy between Ferrall and Cornwell in the decision of *Aitken & Murphy* [2011] FamCA 785. In that case, his Honour saw the key in reconciling the two decisions in relation to whether the witness was being compelled to give evidence. In this regard, it is clear that any witness who is compelled to answer a question can be afforded the protection of s 128, whether that is under cross examination or examination in chief. This is different, however, when it is the party themselves, who is being asked questions by their own legal representative. In those circumstances, the party cannot be seen as being 'compelled' in any real sense. In such a circumstance, the High Court's doubts as outlined in Cornwell would apply. That being said, there are circumstances where a party is compelled to give evidence. Young J considers that the requirement to file a financial statement outlining a party's financial circumstances will fall under s 128 if the completion of such an financial statement will incriminate the party. Of course, what is key is that the objection is noted prior to the filing of the financial statement. Whether that applies to affidavit material generally is unclear, but currently doubtful. Certainly, the only prudent way of dealing with this matter is to not file any incriminating affidavit material without the matter being considered by the Court and a certificate being issued.

As the law currently stands in the family law jurisdictions, as noted in both *Aitken & Murphy* and by Tree J in *Churchill & Raske* [2014] FamCA 848, unless and until the High Court ultimately determines the issue, *Ferrall* remains binding and affidavits which are objected to will be able to receive the protection of a s 128 certificate.

Once a witness objects to the giving of evidence, the Court must determine whether there are 'reasonable grounds' for the objection. In *Sorby v Commonwealth* (1983) 152 CLR 281 Gibbs CJ held that an objection under s 128(1)(a) would not be allowed if there is no 'reasonable ground to apprehend danger of incrimination to the witness if he is compelled to answer'. In *R v Bikic* [2001] NSWCAA 537, Giles

JA held that 'it seems to me to be a matter of commonness that reasonable grounds for an objection must pay regard to whether or not the witness can be placed in jeopardy by giving the particular evidence'. Reasonable grounds will not exist where the person could not be convicted and punished for the offence. Thus, s 128 won't apply where a person has been granted an immunity or been indemnified against prosecution (*Sorby*), or where the person has already been convicted or acquitted of the offence, or if the evidence has already been disclosed.

If the witness is happy to give evidence after the Court finds there are reasonable grounds to object, then the Court must issue a certificate pursuant to s 128(5). Alternatively, the Court may require the witness to give evidence if the evidence does not tend to prove the witness has committed an offence under foreign law, and if it is in the interest of justice for the witness to give the evidence. The exception for offences under a foreign law exists because a certificate provided under s 128 will be of no assistance to a witness overseas, where their self-incriminating evidence could potentially be used against.

There is no definition in the *Evidence Act* as to what constitutes "the interests of justice", but a number of decisions, and in particular *R v Lodhi* [2006] NSWSC 638, have considered the issue. Odgers in *Uniform Evidence Law* broadly outlined some of the factors to be considered by the Court. They include:

- The importance of the evidence;
- The likelihood that the evidence will be unreliable even if a certificate is given;
- The nature of the cause of action in the proceedings;
- The nature of the offence to which the evidence relates;
- The likelihood of any proceeding being brought to prosecute the offence;
- Any resulting unfairness to a party (for example, unfairness arising from the party being forced by tactical considerations to disclose potentially incriminatory conduct which would not be protected by a certificate);
- The likely effects of requiring the giving of evidence and the means available to limit its publication;
- Whether the substance of the evidence has already been published;
- Whether the matter has been dealt with;
- How the refusal to give evidence is to be approached by the Court (adverse inferences).

As noted by the Full Court in Ferrall and as followed by Young J in *Aitken & Murphy* [2011] FamCA 785, the appropriate procedure for seeking to adduce self-incriminating evidence is to file an application in a case (or seek interim orders in an initiating application) with a supporting affidavit outlining that the applicant in a case wishes to give evidence which may incriminate himself, but that he will not file the material without an affidavit. An affidavit with the incriminating evidence would then need to be provided to the Court (and the other side) at the hearing for the

Court to determine whether there are reasonable grounds in granting a certificate. Young J's orders in the decision of *Aitken* provide an excellent precedent in relation to the orders to be sought in such an application in a case. A party should seek:

> 1. Pursuant to s 128 of the *Evidence Act 1995* (Cth) a certificate be given to the applicant in relation to the particular evidence given by him in these proceedings insofar as that evidence may tend to prove that the applicant has committed an offence or civil penalty and only as contained in:
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> (a) his Financial Statement and affidavit sworn on DATE; and
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> (b) any further amended Financial Statement and affidavit of the applicant in these proceedings.
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> 2. A sealed copy of the certificate pursuant to s 128 of the *Evidence Act 1995* (Cth) remain on the court file.
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> 3. Any Financial Statement or affidavit filed and served by the applicant in these proceedings containing evidence the subject of the s 128 certificate have attached a sealed copy of the certificate.

Evidence/materials given in the Family Court in the Magistrates Court

When there are concurrent or subsequent matters to the family law courts in another court, whether criminal proceedings, intervention order proceedings, or related civil proceedings, there is a temptation to use material acquired in during the family law proceedings in the other court. Two issues arise in relation to the use of material in other proceedings. First, it will likely be in breach of the implied undertaking not to use evidence or material for any other purpose than the proceedings for which they were provided. Second, particularly in the case of family reports, there may be specific orders preventing the provision of such material to another court.

It should be noted that the ban on publication found in s 121 of the *Family Law Act* does not apply to this situation. While s 121 of the *Family Law Act* makes it an offence to:

> publish in a newspaper or periodical publication, by radio broadcast or television or by other electronic means, or otherwise disseminates to the public or to a section of the public by any means, any account of any proceedings, or of any part of any proceedings, under this Act that identifies:
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> (a) a party to the proceedings;
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> (b) a person who is related to, or associated with, a party to the proceedings or is, or is alleged to be, in any other way concerned in the matter to which the proceedings relate; or
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> (c) a witness in the proceedings;

Paragraph (g) of sub-s 121(9) states that s 121 does not apply where the communication is to 'persons concerned in proceedings in any court … for use in connection with those proceedings'. The phrase 'any court' in paragraph (g) is not restricted in any way and is wide enough to cover civil and criminal courts. In *Bateman & Patterson* (1981) FLC 91-057, the Full Court of the Family Court held:

> In the present case, it is sought to use evidentiary material produced in the Family Court proceedings for the purpose of disputing a proof of debt. A public

> examination is, as its name suggests, a public proceeding. It may be conducted before a registrar or a magistrate who may adjourn the further hearing into court (see sec 69(5) of the *Bankruptcy Act 1966*). Notes of the examination or a transcript of evidence are made or taken, and these notes and transcript are open to inspection by the public. Even though this be the case, the proper view is that the use of *Family Law Act* material in the bankruptcy proceedings is not publishing within the meaning of sec 121(1). If there be doubt about this, then it seems that sec 121(5)(a) [now s 121(9)(A)] is wide enough to include an examination before the registrar or a magistrate on the basis that all such persons are 'concerned' in the proceedings. … [T]he use of relevant transcript and other documents produced, filed or tendered in the Family Court proceedings is not contract to sec 121(1) of the Act.'

Thus, while there are issues in relation to the use of evidence and materials in other courts, s 121 is not such an issue.

Documents provided by one party to another by way of discovery are subject to an implied undertaking to not use any document disclosed for any purpose otherwise in relation to the litigation to which it is disclosed. This obligation is known as the '*Harman* Obligation' after the leading UK authority *Harman v Secretary of State for Home Department* (1983) 1 AC 280. The High Court in *Hearne v Street* [2008] HCA 36 summarised implied undertaking as follows:

> [96] Where one party to litigation is compelled, either by reason of a rule of court, or by reason of a specific order of the court, or otherwise, to disclose documents or information, the party obtaining the disclosure cannot, without the leave of the court, use it for any purpose other than that for which it was given unless it is received into evidence.

The High Court held that the types of material to which the *Harman* Obligation applies include:

- documents inspected after discovery;
- answers to interrogatories;
- documents produced on subpoena;
- documents produced for the purposes of taxation of costs;
- documents produced pursuant to a direction from an arbitrator;
- documents seized pursuant to an *Anton Piller* order;
- witness statements served pursuant to a judicial direction; and
- affidavits.

A party (or a third party) can be released by the Court from the implied undertaking where there are special circumstances. In *Springfield Nominees Pty Ltd and ors v Bridgelands Securities Ltd and ors* (1992) 110 ALR 685, the Federal Court held that a court would not release or modify the implied undertaking save in special circumstances and where the release or modification would not occasion injustice. Wilcox J held:

> For 'special circumstances' to exist it is enough that there is a special feature of the case which affords a reason for modifying or releasing the undertaking and is not usually present.

Once special circumstances are found, the court needs to determine whether to exercise the discretion in light of the 'interests of justice'. In *Bailey v Australian Broadcasting Corporation* [1995] 1 Qd R 476, Lee J considered the exercise of discretion as:

> a process of identifying and balancing competing factors in order to determine if the public interest is best served by discharging, relaxing or modifying the undertaking. In effect, the Court is called upon to exercise a value judgment in order to determine where the public interest lies, Millett J., in a passage which I would respectfully adopt, stated this proposition in Bank of Crete at 925 as follows:
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> > "[A]lthough the basis of the law's protection of confidence is that there is a public interest that confidences should be preserved and protected by the law, nevertheless that public interest may be outweighed by some other countervailing public interest which favours disclosure." See also Distillers at 622-625 per Talbot J. and Rank Film at 442, 447.

In *Springfield Nominees*, the Federal Court listed of a number factors to be considered in exercising the discretion. Wilcox J held:

> It is neither possible nor desirable to propound an exhaustive list of those factors. But plainly they include the nature of the document, the circumstances under which it came into existence, the attitude of the author of the document and any prejudice the author may sustain, whether the document pre-existed litigation or was created for that purpose and therefore expected to enter the public domain, the nature of the information in the document (in particular whether it contains personal data or commercially sensitive information), the circumstance in which the document came into the hands of the applicant for leave, and perhaps most important of all, the likely contribution of the document to achieving justice in the second proceeding.

Examples of the family law courts providing leave to use court material in other proceedings are numerous. In *Bergman & Bergman (No 4)* [2008] FamCA 525, the Family Court authorised the husband to disclose specific material to various relevant police services. In *Banks & Loffler* [2015] FamCA 380, the Family Court made orders permitting the father to provide copies of court documents and subpoenaed material to the Director of Public Prosecutions, his criminal law barristers and solicitors, the South Australian Police and the District Court of South Australia. In *Miller & Murphy* [2016] FCCA 975, the Federal Circuit Court made orders permitting the husband to use the s 11F report in his intervention order proceedings.

Further to the above limitations, further limitations can be placed on material by Court order. This is particularly and indeed regularly the case for family reports. The standard order release family reports in many chambers is now in the following form:

> 1. Copies of the family report, if accompanied by a copy of this Order, may be given to:
> (a) the parties and their legal representatives;
> (b) any independent children's lawyer in the proceedings;
> (c) a children's court;
> (d) a child protection authority;

(e) a State or Territory legal aid authority;

(f) the convenor of any legal aid dispute resolution conference; and

(g) any other person or organisation to whom a specific order permits provision of the report.

AND that no person release the report, or provide access to the report, to any other person.

This is largely in line with r 23.01A of the *Federal Circuit Court Rules 2001*. Notably absent from this standard order (and r 23.01A) is a provision permitting the family report to be handed to the Magistrates' Court (cf the Children's Court). A family report subject to this order cannot be released to a Magistrates Court (whether for intervention order matters or criminal proceedings) without specific leave as imagined in by paragraph 1(g). A breach of this order would be subject to the standard contravention provisions of the *Family Law Act*.