

Corby & Corby [2015] FCCA 1099 (16 April 2015) – Federal Circuit Court of Australia

‘Admissibility’ – ‘Evidence’ – ‘Independent children’s lawyer’ – ‘Parenting orders and impact on children’ – ‘Recorded conversations’ – ‘Sexual and reproductive abuse’ – ‘Whether recordings were reasonably necessary to protect lawful interests’

Proceedings: Application for the admissibility of evidence.

Facts: On the first day of the final parenting hearing in relation to the parties’ only child X, counsel for the mother sought the Court’s leave to tender four short audio recordings of conversations between the mother and father that took place prior to separation. The mother accepted that these recordings were made without the knowledge of the father, that they are ‘private conversations’ and were therefore prima facie made in contravention of s 7 of the *Surveillance Devices Act 2007* (NSW). However, counsel for the mother submitted that the recordings were admissible because the recordings were ‘reasonably necessary’ to protect her lawful interests (s 7(3)) or, alternatively, the evidence ought to be admitted under s 138(1) of the *Evidence Act 1995* (NSW) because the desirability of admitting the evidence outweighed the undesirability of doing so.

Issue/s:

- > Whether the recordings were reasonably necessary to protect the mother’s lawful interests and consequently, admissible?
- > Whether the recordings ought to be admitted on the basis that the desirability of the evidence outweighed the undesirability of admitting the evidence?

Reasoning/decision: Sexton J held that the mother’s conduct was lawful under s 7(3)(b)(i) of the *Surveillance Devices Act 2007* (NSW) and therefore the recordings were admitted on this basis. In making this finding, Sexton J held that first, s 7(3)(b)(i) was satisfied in relation to the term ‘lawful interests’ as 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: *DW v R* (see [19]-[23]).

Second, Sexton J was satisfied that the recordings were ‘reasonably necessary’ (‘reasonably appropriate’ as opposed to ‘essential’ and judged objectively at the time of the recordings) to protect those lawful interests: *DW v R*. Here, the mother made the recordings for the purpose of having evidence which she could use to convince others to believe her, or to corroborate her word, or to protect herself and the child from further behaviour. Sexton J stated that, ‘[w]hile the complainant in the present case is an adult, she was, if her evidence is accepted, caught up in an abusive relationship with a man who damaged her self-worth and left her miserable and exhausted. If this was so, as the Court found in *R v Coutts*, it may not have been a realistic option for her to report her predicament to police and obtain a warrant for conversations with her husband to be recorded’ (see [29]). The evidence also disclosed that the father may have had a very different public face to his private face. The mother was not trying to obtain a confession but to establish her credibility if there was ever a dispute about what actually happened (see [24]-[31]).

Although the matter did not turn on the issue, Sexton J also considered whether the evidence should be admitted on the basis that the desirability of admitting the evidence outweighed the undesirability of admitting the evidence. Sexton J concluded that had it been necessary, she would have exercised the discretion to admit the evidence for a number of reasons including that the evidence was highly probative to making parenting orders in the best interests of the child, the allegations were extremely serious and it was necessary for the court to determine if the child was at risk in the father’s care, the impropriety of the mother in making the recordings was not of the “worst kind”, and it was “unlikely” the mother could have gained consent to make the recordings (see [32]-[36]).