

**LEGALWISE SEMINAR – RELEVANT MATTERS CONCERNING ADMISSIBILITY
AND NATURE OF EVIDENCE IN CHILDREN’S MATTERS IN THE LIGHT OF
RECENT PARENTING CASES**

Workshop Problems

Problem 1 – Inadmissibility of Fresh Evidence on Appeal in Children’s Matters

A client consults a solicitor and informs the solicitor that she had represented herself in a residency Trial in the Family Court. She tells the solicitor that she was unsuccessful in that Trial and her Husband was granted residency of the two (2) young children. She informs the solicitor that she had been seeing a Psychiatrist for a number of years in relation to Domestic Violence perpetrated by the Husband but did not present any evidence from the Psychiatrist at the Trial. Further, she informs the solicitor that she had other witnesses who could say things about her parenting abilities and Domestic Violence but she did not put Affidavits in from these witnesses at Trial.

The solicitor questions the client and ascertains that all this evidence could quite easily have been put before the Court at the first Trial. The client had solicitors up until a week before Trial but due to cost issues the client represented herself at Trial. The solicitor informs the client that because the evidence was readily available at the time of the Trial that there is no prospect of having that evidence admitted as fresh evidence on an Appeal.

Is the solicitor’s advice correct?

You have now received instructions to act on behalf of this client. You are instructed to make an Application for fresh evidence for the purpose of the Appeal. What are some important matters that should be covered in the evidence that you present to the Full Court?

Problem 2 - Admissibility of Recorded Conversations in Children’s Cases

1. In each of the following scenarios comment on whether you think the recorded conversation would be admissible in the Family Court (ie not a prohibited interception of a communication under the Telecommunications (Interception) Act):

Scenario 1

A Father listens into a conversation between his child and the Mother on an extension handset. He records that conversation by placing a tape recorder next to the receiver.

Scenario 2

Same situation as Scenario 1 expect the Father places a suction cap on the receiver (which is attached to a recording device) whilst the child speaks to his Mother and he records the conversation.

Scenario 3

Mother rings Father’s household and leaves abusive message on answering machine (built into the phone).

Scenario 4

Father talking to Mother on the phone about the child and Father holding handheld Dictaphone next to receiver and recording conversation.

Scenario 5

Father talking to Mother on mobile phone and recording conversation through in built recorder in the mobile phone.

2. What should you give consideration to when advising a client as to whether they should record a private conversation pursuant to each of the above Scenarios?

Problem 3 – Choice of Schools (Specific Issue)

You are acting for a client who is defending an Application by her ex-Husband to change the private school that the children currently attend. In advising your client on the prospects of defending such an Application and further in preparing evidence, what are the relevant issues for consideration that you will need to obtain instructions on so as to advise your client and so as to properly present evidence to the Family Court?

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Answers to Workshop Problems

Problem 1 – Admissibility of Fresh Evidence on Appeal in Children's Matters

1. No.
2. Some of the areas that should be covered in the fresh evidence should include the following matters:
 1. Detailed evidence as to why the evidence was not put before the Trial Judge. A proper explanation (for example, late filing of material by the other side, self represented litigant not being aware fully of procedures, any difficulties in obtaining the evidence etc).
 2. Make sure that the evidence that is being presented is relevant to matters that were at issue at the Trial. The evidence needs to show that the Trial Judge would have come to different conclusion if the evidence had been available. Therefore, the evidence should be detailed and the focus should be on relevance (for example, in relation to Domestic Violence the evidence would need to be filed by not only the client but also the Psychiatrist detailing the history of Domestic Violence, its affect on the Wife and her parenting abilities and perhaps any affect that the Domestic Violence has had on the children etc).
 3. Be extremely careful to make sure that the evidence is admissible. It cannot be tested under cross-examination on Appeal. It must be credible and relevant. No hearsay, comment, opinions, irrelevant statements.
 4. Be careful not to place too much emphasis on facts that have occurred since the Trial. Whilst there may be relevant events that have to be put into evidence the Appeal Court is loathed to receive evidence of changes in circumstances that would normally be expected to occur. For instance, a child not doing as well in school as they had before (say 12 months after a Trial) or a child expressing wishes not drastically different to what they expressed at Trial.

Problem 2 – Admissibility of Recorded Conversations in Children's Cases

1. *Scenario 1*

Recorded conversation is admissible. No interception of communication.

Scenario 2

Recording is a prohibited interception of a communication. Therefore inadmissible.

Scenario 3

Recording is admissible. Answering machine is part of the apparatus or equipment that is part of the telecommunication service.

Scenario 4

Once again there is no interception of the communication – admissible.

Scenario 5

If it can be proved that there is no external recording device attached to the mobile phone, then the recording would be admissible as the in built recorder would be part of the apparatus or equipment forming the telecommunication service.

2. In all circumstances one should be very cautious about giving advice to clients to tape record a conversation. In my experience there are very limited circumstances where the value of such evidence outweighs the negatives. In most cases the recording will either directly or indirectly have some impact upon the children who are part of the current dispute. In that manner, the client's actions may damage their case and be seen by the Court as actions that have little regard to the welfare of the children.

It is also important to remember that there is State Legislation in Queensland (Invasion of Privacy Act 1971) that is also relevant to the above Scenarios. Whilst admissibility is covered by the Federal Act there are still indictable offences outlined in the Invasion of Privacy Act.

In general terms, a person (who is a party to a private conversation) is allowed to listen to and record that conversation. However, if the person recording or listening to the conversation is not a party to the private conversation then there would be a breach of the Invasion of Privacy Act.

Therefore, in Scenario 1 above the Father could arguably be committing an offence under the State Legislation by listening into and recording the private conversation, he is not a party to it.

Further, a party must lawfully be on premises (where the recording takes place) for the conversation to be admissible (under the Federal Act) and also for it not to attract a punishable offence under the State Act. If for example, a Private Investigator (by deceit) enters a property and records conversations or a relative (for example a relative of the Father) gives some false story to the Mother so as to enter her premise and listen to and record a conversation on an extension handset then this would arguably be inadmissible and also a breach of the Invasion of Privacy Act.

Problem 3 – Answer

There are a number of factors that may be relevant in competing Applications as to the choice of schools for children. These factors could include the following:

1. Was there a previous decision made in relation to the children's attendance at the particular school? If so, how long ago and in what circumstance was the decision made.
2. How long have the children been at the current school?
3. How are the children progressing at the current school?

4. What are the children's attachments to that school (friends, Counsellors etc)?
5. Who is the primary parent? How long has that party been the primary parent? What contact does the other parent have?
6. What history do both parents have in relation to their involvement in the school? In relation to day to day issues and also important educational issues (attendance at parent/teacher nights etc).
7. What are the financial circumstances of each party and the comparable costs of attending each school?
8. What are the children's wishes (depending upon their ages) and in what context are those wishes made?
9. How far do each of the parents reside from each school?
10. What are the respective merits of the school academically, culturally and sporting? How is that relevant to the individual circumstances of each child?
11. What are the primary parent's views upon the alleged change of school? Is there any real impact on the primary parent in relation to a change of schools?