Privilege against self-incrimination in family law proceedings

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Family lawyers often struggle with the timing of when to seek a certificate for their client under s 128 *Evidence Act 1995 (Cth)*. Section 128 deals with the privilege against self-incrimination. A certificate is commonly sought to protect a client from criminal charges, such as for tax or Centrelink fraud. Recent decisions of the Family Court have looked at this issue and the breadth of the protection offered by a certificate.

What does s 128 *Evidence Act* say?

A claim for protection under the privilege against self-incrimination can be sought under s 128(1):

> "if a witness objects to giving particular evidence or evidence on a particular matter on the ground that the evidence may tend to prove that the witness:
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> (a) has committed an offence against or arising under an Australian law or a law of a foreign country; or
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> (b) is liable to a civil penalty".

When to apply for a s 128 certificate?

A common view is that the certificate needs to be sought before an affidavit, which includes evidence which may incriminate the witness, is sworn and filed. Once the evidence has been given, it may be too late to apply for a certificate. There is also a view that the certificate can be sought after the affidavit has been sworn but before it has been filed and served. Another view is that it can be granted before the affidavit is relied on, even if it has already been filed and served.

The usual practice to seek the certificate is to apply in one of the following ways:

1. Apply for a certificate before filing the affidavit. This application can be made orally on, for example, the First Day of Trial; or

2. File an Application in a Case seeking a certificate. In the client's affidavit, exclude the evidence which is sought to be covered by a certificate, but set out that the client will seek a certificate with respect to that issue.

3. Prepare an affidavit which contains the evidence for which the certificate is sought. Serve an unsworn copy of the affidavit or a proof of evidence on the other party's lawyers and

advise that a certificate will be sought at the next available opportunity - such as the commencement of the trial - but before the affidavit containing the material is sworn. If and when the certificate is granted, the client swears the affidavit.

Justice Thornton in *Turner & Brown (No.2)*[1] referred to Pt 15.2 *Family Law Rules 2004 (Cth)* which contains a note that the filing of an affidavit does not make that affidavit part of the evidence, and affidavits only become evidence when they are relied upon by a party at a trial. In that case, the trial had started, but the unrepresented respondent mother had not yet started her case when the trial judge recommended that she seek the advice of counsel. After obtaining advice, the respondent sought certificates. Thornton J granted retrospective certificates in relation to affidavits which had already been filed by the respondent.

Thornton J's warning to the respondent was consistent with the approach required by the Full Court in *LGM & CAM* [2] which is:

- Section 132 of the *Evidence Act* "imposes an active obligation on a trial judge to be alert to circumstances in which an objection to giving the evidence might arise";
- "the guidelines concerning litigants appearing in person superimpose duties on trial judges which comfortably encompass obligations of the kind imposed by s 132".[3]

In *LGM & CAM* the husband's lawyer had sought that the certificate granted to the unrepresented wife not be retrospective, although there were pending contravention and contempt applications. The Full Court of the Family Court set aside the trial judge's orders and the sentence imposed on the wife. The Full Court said that it was open to the trial judge "at any time to grant a certificate notwithstanding that the evidence had already been given".[4] The Full Court relied on s 128(6) which states:

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

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1 [2014] FamCA 226
2 (2011) FLC 93-481
3 at paras 140 and 142
4 at para 158

The Full Court said further in relation to the protection granted by s 128 and the retrospectivity of the section:

> "Section 128 is protective in its operation. It seems to us that answers may at the time of being given appear innocuous but later, in the context of other evidence or answers, take on another complexion that require a warning to be given and a certificate considered. To interpret the section in a way so as to limit the power to grant a certificate only to the point in time at which the condemning evidence is given would be to rob the section of its intent".[5]

This appears to be a misinterpretation of s 128(6) which allows a retrospective certificate to be given only when an objection to giving evidence has been previously overruled. In *LGM & CAM* the wife did not object to giving evidence at an earlier stage.

Can a certificate be granted for evidence-in-chief?

The issue of whether parties can obtain certificates for evidence in chief was considered by Justice Tree in *Churchill & Raske*.[6] Justice Tree queried whether or not the practice of giving certificates to cover evidence-in-chief was proper and found that the law on the issue was in an unsatisfactory state.

The mother sought a certificate to cover certain evidence which she wanted to give by way of an affidavit which had not yet been filed. The mother had obtained material by accessing the father's email account without his authority. Her conduct might have been an offence under s 478 of the *Criminal Code (Cth)*. Tree J referred to the decision of the Full Court of the Family Court in *Ferrall & Blyton*[7] as authority for the proposition that a s 128 certificate can be given to cover evidence-in-chief given by a party by way of affidavit. However, he also referred to *Cornwell v The Queen*[8] where the High Court doubted, without deciding, in the context of criminal proceedings, whether a witness could object to giving evidence when it was part of the material they were attempting to adduce by way of evidence-in-chief from themselves.

The New South Wales Court of Appeal in *Song v Ying*[9] decided that a witness who was compellable by way of subpoena or other process, may obtain the benefit of a certificate under s 128 by virtue of that compulsion. However, the Court of Appeal considered that when parties

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5 at para 159
6 [2014] FamCA 848
7 (2000) FLC 93-054
8 [2007] HCA 12; (2007) 231 CLR 260
9 [2010] NSWCA 237

gave evidence in answer to questions from their own counsel, the element of compulsion was not present.

Young J in *Aitken & Murphy,*[10] after analysing the authorities including *Ferrall* and *Cornwell*, preferred the reasoning of the New South Wales Court of Appeal in *Song v Ying.* He found that there was compulsion upon the party who sought the benefit of a s 128 certificate by virtue of the disclosure obligations on parties to proceedings involving the division of property, under s 79 or s 90SM, which require the disclosure of all relevant information and documents.

In *Churchill & Reske*, because it was a parenting case, Tree J observed that the obligation of disclosure which attached to property matters did not apply. He also noted that when the Full Court of the Family Court looked at the question of the width or breadth of s 128 in *Jarvis & Pike*[11] and decided that a s 128 certificate could cover evidence-in-chief, it did not refer to *Cornwell*, *Song v Ying* or *Aitken & Murphy*.

Tree J considered that unless and until the High Court determined that decisions of the Full Court such as *Ferrall & Blyton* and *Jarvis & Pike* were incorrect, he was obliged to follow them[12]. If *Song v Ying* was the correct or preferable approach, Tree J raised the possibility that:

> "perhaps statutory reform of s 128 might be necessary, at least in relation to family law proceedings involving children…".[13]

Although he did not want it to be thought that he did not see merit in s 128 certificates being available to evidence-in-chief in parenting proceedings, Tree J considered that the language of s 128 made it a difficult construction to apply s 128 to evidence-in-chief because of the requirement that the witness "object" to giving evidence.

Is the protection absolute?

The decision by Justice Cronin of *Vasilias & Vasilias* [14] is a reminder that s 128 does not provide a "golden ticket" to freedom from prosecution. Cronin J said:

> "I am left with an unusual dilemma which is that the parties have benefited from the Commonwealth unreasonably, inappropriately and presumably, illegally. I find therefore that directly or otherwise, the parties' current financial circumstances are such that they have assets which they may not otherwise have but for that

[10] [2011] FamCA 785
[11] [2013] FamCAFC 196
[12] at para 9
[13] at para 12
[14] [2008] FamCA 34

> inappropriate conduct. Leaving aside any question of criminal conduct and its consequences, I am being asked to divide up the financial resources of the parties including an unquantifiable sum that should not belong to them".[15]

Cronin J was concerned about the conflict between s 128 and the consequence of a certificate potentially precluding the Commonwealth from recovering in any criminal or civil action. He cited cases confirming that the Court had the power to report an offence to the relevant authorities (e.g *Malpas & Malpas*[16]), which, in this case was Centrelink.

Cronin J considered whether there were any options available to him, such as to:

- Quarantine an amount from the pool and direct that it be returned by the parties to Centrelink. Cronin J decided that this was inappropriate as he lacked knowledge of the quantum, including interest and penalties;

- Adjourn the proceedings to enable the issue to be clarified by the relevant Commonwealth authorities. This was impermissible due to s 128(7)(b) which provides that the evidence in respect of which a certificate has been given "cannot be used against the person";

- Report the matter to the relevant authorities in the knowledge that they would be constrained by s 128 in the use it could make of the affidavit.

Cronin J took that last approach and ordered that the Registry Manager refer a copy of the reasons for judgment to the Centrelink Investigations Unit to do the best they could within the constraints imposed by the s 128 certificate.

In this case, Cronin J seemed to regret having granted the s 128 certificate and, although he did not expressly say so, he appeared to be attracted to the approach taken by Young J in *HMP Industries Pty Ltd v Robert Graham*,[17] where Young J was concerned that the issuing of a s 128 certificate would impede criminal proceedings. Young J said:

> "... it seems to me that these orders [in relation to the issuing of a s 128 certificate] should also be brought to the attention of the prosecuting authorities, as it may be they would wish to be heard as to whether it would be better to have no affidavit which might impede the investigation of criminal proceedings. If they take that view then I think that all copies of the affidavit may have to be destroyed. They are not

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[15] at para 60
[16] (2000) FLC 93-061)
[17] [1996] NSWSC 371

> parties to the proceedings, but I think in the public interest I should hear them as amicus curiae".

Other Family Court judges, such as Watts J in *Lambert & Jackson,*[18] have taken a broader view than Cronin J. Watts J considered that a s 128 certificate guaranteed a complete and satisfactory remedy. He also felt himself bound by the Full Court in *Ferrall* and that a certificate was available for evidence-in-chief. His view was that the affidavit should be sworn, but not filed and served, before the certificate was obtained. Until it had been filed, it had not been published.

Conclusion

Due to the uncertainty of the interpretation of s 128, the safest course is probably not to file and serve a sworn affidavit until a certificate has been granted. It is also safer to assume that a certificate cannot be granted with retrospective effect unless an objection to giving evidence without the protection of a certificate has been previously over-ruled.

Lawyers should be wary when applying for a s 128 certificate and give clients appropriate advice. The state of the law is unclear as to the time at which a certificate should be sought, whether it can cover evidence-in-chief (particularly in parenting matters), and the breadth of the protection.

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[18] [2011] FamCA 275