FAMILY LAW SUBPOENA Objection public interest immunity where childspsychologist objects tothe production of notes where parents hadpreviously signed a confidentiality agreement which provided informationobtainedin the therapeutic context would be not discoverable infuture Family Court proceedings consideration of publicinterestimmunity no public interest immunity between a child and a psychologist orders made for inspection. Family Law Act 1975 (Cth) ss 10C, 10G, 10D,10E, 60CA, 69ZN Evidence Act 1995 (Cth) ss 131, 135,136 Evidence Act 1929 (SA) ss 67D, 67E Benson &Hughes [1994] FamCA 30; (1994) FLC 92-483 Cooper & Cooper (2012) 38 Fam LR425 D v National Society for the Prevention of Cruelty to Children[1977] UKHL 1; [1977] 1 All ER 589 Fritze & Fritze [2006] FamCA 232 Goldy& Goldy (No 2) [2011] FamCA 418 Hatton v Attorney-Generalof the Commonwealth of Australia [2000] FamCA 892; (2000) FLC 93-038 Hutchings &Clarke [1993] FamCA 22; (1993) FLC 92-373 In the Marriage of Lace (1981) 7 Fam LR631 Jermyn & Carling [2012] FMCAfam 184 National EmployersMutual General Association Ltd v Waind & Hill (1978) 1 NSWLR 372 Rv Young [1999] NSWCCA 166; (1999) 46 NSWLR 681 Sankey & Whitlam [1978] HCA 43; (1978) 142 CLR1 Unitingcare-Unifam Counselling & Mediation & Harkiss and Anor[2011] FamCAFC 159; (2011) 46 Fam LR 12 Zarrow v Australian Securities Commission (1992) 34 FCR 427 APPLICANT: Ms Crawford RESPONDENT: Mr Sisinis INTERVENOR: Ms Dolan INDEPENDENT CHILDRENS LAWYER: Legal Services Commission ofSA FILENUMBER: ADC 1255 of 2012 DATE DELIVERED: 27 October 2014 PLACE DELIVERED: Adelaide PLACE HEARD: Adelaide JUDGMENT OF: Berman J HEARING DATE: 21 October 2014 REPRESENTATION COUNSEL FOR THE APPLICANT: Ms Pyke QC SOLICITOR FOR THE APPLICANT: Adelaide Family Law COUNSEL FOR THE RESPONDENT: Ms Basheer SOLICITOR FOR THE RESPONDENT: Katrina Lind Legal COUNSEL FOR THE OTHER PARTY: Ms Dickson SOLICITOR FOR THE OTHER PARTY: Franklin Legal COUNSELFOR THE INDEPENDENT CHILDRENS LAWYER: MrsWest SOLICITOR FOR THE INDEPENDENT CHILDRENS LAWYER: Legal Services Commission of SA ORDERS (1) Thelegal representatives for the parties including the Independent ChildrensLawyer be at liberty to inspect documents(including those marked confidential)produced by Ms Dolan of Practice B pursuant to subpoena issued on 29 August2014. (2) The parties and their

legal representatives be restrained and an injunctionis hereby granted restraining them from discussingthe contents of the documentsproduced pursuant to the said subpoena with any other person not directlyrelated to the proceedings. IT IS NOTED that publication of this judgment by this Court underthe pseudonym Crawford & Sisinis and Anor has been approved by theChief Justice pursuant to s 121(9)(g) of the Family Law Act 1975(Cth). FAMILY COURT OF AUSTRALIA AT ADELAIDE FILE NUMBER:ADC 1255 of 2012 Ms Crawford Applicant And Mr Sisinis Respondent REASONS FOR JUDGMENT INTRODUCTION On29 September 2014 orders were made that adjourned the trial to 27 October 2014. The proceedings involve a complex parenting disputein respect of the futurecare arrangements for the child E, (the child) born in 2002, inparticular, the extent ofthe time that the child would spend with Mr Sisinis,(the father). Theadjournment of the trial was made necessary by the fathers applicationseeking to file a Further Amended Initiating Applicationwhich now seeks ordersthat in addition to equal shared parental responsibility for the child, sheshall live primarily with thefather and spend four nights a fortnight with MsCrawford, (the mother). The orders sought by the father representa significant change from orders previously pursued by him. Forher part, the mother seeks that in addition to joint parental responsibility forlong term care, welfare and development of thechild, she shall have the soleresponsibility for the day to day care, welfare and development of thechild. Inaddition, the mother seeks orders that would see the child spending relativelylimited time with the father restricted to two hourseach Monday under thesupervision of the paternal grandfather, some time on Fathers Day and onChristmas Day providing thatit is taken at the paternal grandfathershome. Whilstthere are other options put forward by the mother, the constant thread is thatthe fathers time should be supervised. Notwithstandingthe offer of time by the mother (albeit limited), the fathers position isthat she is not encouraging of thechild spending time with him and considersthat the mother is attempting to alienate the child from him. On25 July 2014, the mother issued a subpoena to Ms Dolan of Practice B seekingthat she produce the following documents:- All recordsrelating to the parties [the father], [the mother] and the child [E] born ...2002. On12 August 2014, Ms Dolan filed a Notice of Objection seeking to object to theproduction of some or all of the documents for thefollowingreasons:- Both parties agreed on 14

November 2011 (that) my involvement with [the child]would not be used in future Family Court proceedings.Seecorrespondence. TheNotice of Objection annexes a letter from Ms Dolan which provided somebackground to the childs attendance upon her. Insummary, the parties and the child attended upon Ms Dolan because the child wassad and anxious arising out of her parentsseparation and somecounselling/therapeutic intervention for [the child] wasthought important. Followingapparent discussion between the parties, agreement was reached that thecounselling to be provided by Ms Dolan in so faras it involved the child wouldbe not discoverable in respect of any future Family Courtproceedings. Obviously if the child disclosed a matter that required mandatorynotification,this would be an exception to the confidentiality that wasapparently agreed. Itis clear from the letter that the child understood there were certaincircumstances where complete confidentiality could not beguaranteed, but inparticular Ms Dolan notes the following:- She has also consented tome giving feedback to her parents on outcomes of sessions. Followingthe change in the orders sought by the father, the mother considered that theinteraction between the parties and the childwith Ms Dolan may well now have animportant evidentiary focus. Whereas prior to the fathers revised ordersthe mother didnot press the production of documents by Ms Dolan, that attitudehas now changed. Thisapplication therefore relates to whether the objection of Ms Dolan should beupheld. THE OBJECTION MsDolan clearly takes most seriously the extent to which the parties andthereafter possibly the Court should have access to documentsand informationobtained under the cloak of confidentiality. She was represented by counsel andit was put to me that the mattersraised in this hearing would have wide rangingconsequences in circumstances where psychologists undertake therapeuticinterventionand/or counselling with a child on the understanding that what heor she says will not be disclosed other than in the most unusualofcircumstances. Theobjection of Ms Dolan is supported by an affidavit filed 16 October 2014 whichrecords the circumstances in which she became involvedwith the parties and thechild. She provides a history from the parties that suggests the child wasevidencing significant anxietyprior to going to the fathers home. Theparties had separated earlier in the year and immediately following separationthechild spent approximately half her time with each of the parties. A disputesoon arose in that the father

alleges that the motherunilaterally changed thearrangements. Whatwas agreed however is that the child had not been coping well with theseparation and both parties agreed that therapeutic interventionand assistancewas important for the child. The parties were not agreed as to who shouldshoulder the blame for the childsapparent distress. MsDolan discussed with the parties and ultimately secured their agreement that hersessions with the child would be the subject ofnon-disclosure. She annexes acopy of the guidelines produced by the Australian Psychological Society forworking with young people. Whilst a consideration of the guidelines is notnecessarily determinative of the objection, a recitation of the guidelines inrespectof confidentiality is informative:- 5.2 Psychologistsdisclose confidential information obtained in the course of their provision ofpsychological services only underany one or more of the followingcircumstances:- (a) with the consent of the relevant client or a person with legal authorityto act on behalf of the client; (b) where there is a legal obligation to do so; (c) if there is an immediate and specified risk of harm to an identifiableperson or persons that can be averted only by disclosinginformation; or (d) when consulting colleagues, or in the course of supervision orprofessional training provided the psychologist:- (i) conceals the identity of clients and associated parties involved; or (ii) obtains a clients consent, and gives prior notice to therecipients of the information that they are required to preservetheclients privacy, and obtains an undertaking from the recipient of theinformation that they will preserve the clientsprivacy. Clearly,there are limits to the confidentiality which may include any legaland other limits to confidentiality noting that differentsettings and types of referrals such as mental health, schools, the FamilyCourt, and childrens protectiveservices will have different implicationsfor the limits to confidentiality. Accordingly,and by reference to the guidelines alone, there is no suggestion that there canbe an absolute bar to disclosure. Itis not considered or contemplated in the guidelines that a circumstance canexist where the parties can dictate that informationdisclosed withinthe therapeutic context is not discoverable in respect offuture Family Court proceedings. Theletter of Ms Dolan dated 15 November 2011 seems to suggest that the parties wereseeking to extend the confidentiality of theinformation provided to possiblefuture Court proceedings notwithstanding that it is at least foreshadowed thatCourt proceedingsmay be an

exception to the confidentiality of therapeuticinformation. MsDolan saw the child on 14 November 2011, 1 December 2011 and 9 February2012. Uponreceipt of the subpoena Ms Dolan divided her file into the confidential materialthat presumably involved the child in respectof the therapeutic sessions andthe non-confidential material which presumably involved interaction between theparties and Ms Dolan. SUBPOENA PROCESS Theprinciples for issuing a subpoena to a non-party are:- (1) That therequesting party is only able to obtain a document or documents relevant to anissue in the proceedings; (2) That thesteps to be followed are conveniently set out in the often quoted remarks ofPresident Moffit in National Employers Mutual General Association Ltd v Waind& Hill (1978) 1 NSWLR 372 at 381:- The first is obeying the subpoena, by the witness bringing the documents to theCourt and handing them to the Judge. This step involvesthe determination ofany objections of the witness to the subpoena or to the production of documentsto the Court pursuant to thesubpoena. The second step is the decision of theJudge concerning the preliminary use of the documents, which include whether ornot permission should be given to a party or parties to inspect the documents. The third step is the admission into evidence ofthe document in whole or inpart; or the use of it in the process of evidence being put before the Court bycross examination orotherwise. It is the third step which alone providesmaterial upon which ultimate decisions in the case rests. In these three stepsthe stranger and the parties have different rights, and the function of theJudge differs. InHatton v Attorney-General of the Commonwealth of Australia [2000] FamCA 892; (2000) FLC93-038 the Full Court set out a number of examples where a Court maydetermine that it is proper to set aside a subpoena:- If the subpoenais for an improper purpose namely to obtain discovery against a third party Where it mightbe oppressive to comply with a subpoena Where a partyembarks upon a fishing expedition That thesubpoena should be set aside because it lacks relevance to theproceedings Theobjection to the subpoena is not taken on the basis that it is inappropriatediscovery, oppressive, a fishing exercise or thatthere is a lack of relevance. The objection arises out of the purported statement of confidentiality andtherefore, the non-disclosureof the information. Thefirst step in the subpoena process is satisfied namely in that the documentshave been brought to Court. The objection comeswithin the second step namely,the preliminary use to

which the documents should be put which would include theinability of theparties to inspect those documents. Itseems that the essence of the objection notwithstanding that it is founded uponthe perception of confidentiality, is that as amatter of public interestimmunity the documents and information should be prevented from disclosure andinspection to the parties. STATUTES TheFamily Law Act 1975 (Cth) (the Act) prohibits a familycounsellor from disclosing communications made during family counselling. Evenif the parties consent, a Court cannot compel a family counsellor to disclosecommunications (see Unitingcare-Unifam Counselling and Mediation &Harkness and Anor (2011) 47 Fam LR 12). However, the confidentialityprovisions contained within ss 10D, 10E, 10F and 10J do not apply as Ms Dolan isnot a family counsellor or family dispute resolution practitioner as defined ins 10C or s 10G of the Act. In any event, Ms Dolan acknowledges that she is nota family counsellor as defined. TheAct however does provide specific provisions for non-disclosure in relation toaccredited family counsellors, and in the decisionof In the Marriage ofLace (1981) 7 Fam LR 631 Frederico J held it would be contrary tothe policy of the Act to allow evidence to be given of conversationsbetween the parties and two individuals who, although acting as marriagecounsellors,did not meet the definition of marriage counsellors under s 18 ofthe Act (the equivalent of the present s 10C). Frederico J consideredtheauthorities and found that:- Bona fide negotiations between spouseswith a view to effecting compromise of a matrimonial dispute must be taken to bewithout prejudice. Itis trite to highlight that the decision of his Honour was prior to theintroduction of s 131 of the Evidence Act 1995 (Cth) which has renderedevidence of settlement negotiations between parties generally inadmissible. TheEvidence Act 1995 (Cth) does set out a number of privileged relationshipsoutside of the traditional legal client privilege i.e. protection of journalistsand their sources (s 126H) and religions confessions (s 127), but therelationship between a client and a psychologist or psychiatrist does notreceive the same protection. Section67D and 67E of the Evidence Act 1929 (SA) which by virtue of theJudiciary Act 1903 (Cth) does apply to this Court and provides forcertain communications made in a therapeutic context to be protected by publicinterestsimmunity. The sections however rely upon the communication being forthe purpose of counselling or therapy for a victim or allegedvictim of sexualabuse (see Bowden & Dunn [2003]

FamCA 386). There is however ageneral discretion to exclude evidence in s 135 and s 136 but that relates tothe third step namely, whetheror not evidence should be admitted during thecourse of the trial proceedings. Accordingly, there are no statutory groundsuponwhich a subpoenaed party could object to thesubpoena. PUBLIC INTEREST IMMUNITY InCooper & Cooper (2012) 38 Fam LR 425 at [48], the Court heed thatwhilst it would be ideal if all family counselling services could offer the sameprotection, thereis no basis, founded upon legislativeinterpretation and absent a consideration of public policyconsiderations...which would warrantsuch position being arrivedat. TheHigh Court in Sankey & Whitlam [1978] HCA 43; (1978) 142 CLR 1 established two broadcategories of public interest immunity and at [39] Gibbs ACJsaid:- An objection may be made to the production of a documentbecause it would be against the public interest to disclose its contents,orbecause it belongs to a class of documents which in the public interest oughtnot be produced, whether or not it would be harmfulto disclose the contents ofthe particular document. TheCourt has discretion to examine the documents and see whether they support aclaim for public interest immunity (Zarrow v Australian SecuritiesCommission (1992) 34 FCR 427 at [435]. Thedocuments relating to the therapeutic treatment of the child by Ms Dolan couldonly be considered in respect of the second ofthe category of documents asreferred above. Counselfor Ms Dolan argues that to compel the production of documents between apsychologist and a client (and by necessary implicationthose documents wouldrepresent a particular class of documents) would be against the public interestas it would discourage othersfrom seeking counselling for their children and/orcomprise the therapeutic outcomes. That proposition is relied upon by Ms Dolanin her affidavit at [22] [24]. ChisolmJ as he then was, considered the issue of public interest immunity or privilegein Benson & Hughes [1994] FamCA 30; (1994) FLC 92-483 where a father sought to issue asubpoena to a Chamber Magistrate who the maternal grandparents had consulted inrelation to custodyproceedings. His Honour responded to such an application inthe following manner:- There is a general public interest in theproper administration of justice which is promoted by the principle that; allrelevant evidenceshould be adduced to the Court when it makes its decision.(Baker v Campbell (1983) 153 CLR 52 at 66 per Gibbs CJ) HisHonour held that public interest immunity did exist in this instance

but that itshould be weighed against the interests of thechild. At page 81,045 his Honourdiscussed how a Court should balance the paramountcy principle when consideringcases in whichthere is some clear and important other conflictinginterest and concludes that the law requires the Court totake account of the childs welfare but balance it against the otherinterests or policy. Thepreponderance of social benefit performed by the ChamberMagistrate ultimately meant the evidence was excluded. InHutchings & Clarke [1993] FamCA 22; (1993) FLC 92-373, a failure to disclosesettlement negotiations would have meant that the child would remain inconditions detrimental to his or herwelfare. It was alleged the father toldthe mother that he only wanted custody of the child so that he could claim agovernmentbenefit. In that instance, public policy considerations required theCourt to override the privilege of parties engaged in negotiations. Publicinterest immunity was also used to successfully uphold an objection to asubpoena in Goldy & Goldy (No 2) [2011] FamCA 418 in which aparty sought to subpoena the Kids Help Line. Dawe J consideredthe Court should be very wary about issuing subpoenas to anorganisation which relies upon its confidentiality for its very existence. Thebenefit of the services provided by Kids Help Line to the children and youngpeople who use that service is significant. Dawe J upheld theobjection on grounds of public interest immunity. The father in that case alsosought to subpoena thechild psychologist. Leave was granted for the subpoenabut it was done solely for the purpose of establishing whether the counsellingundertaken by the psychologist would fit within the exceptions found in theEvidence Act 1929 (SA). InD v National Society for the Prevention of Cruelty to Children [1977] UKHL 1; [1977] 1All ER 589, the House of Lords ruled that evidence could not be given ofconfidential information that would disclose the identity of peoplewho reportedsuspected child abuse to a child protection organisation. Lord Diplock at 594said:- The fact that information is being communicated by one personto another person however is not of itself a sufficient ground for protectingfrom disclosure in a Court of law the nature of the information or the identityof the informant if either of these matters wouldassist the Court to ascertainfacts which are relevant to an issue which it is adjudicating (AlfredCrompton Amusement Machines Ltd v Customs and Excise Commissioner (No 2)). The private promise of confidentiality must yield to the general public

interestthat in the administration of justice truth willout, unless by reason of thecharacter of the information to the informant, a more important public interestis served by protectingthe information of the identity of the informant fromdisclosure in a Court of law. LordHailsham at 230 stated that the categories of public interest are notclosed, and must alter from time to time whether by restriction or by extensionassocial conditions and social legislation develop and they shouldnot be limited to the effective functioning of departments or organsof central government. Atpage 612, Lord Simon concluded that while it:- May be a verymaterial consideration to bear in mind when privilege is claimed on the groundsof public interest...I do not thinkmyself that confidentiality itselfestablishes any public interest in the exclusion of relevant evidence. HisLordship opined at 607:- These various classes of excluded relevantevidence may for ease of expedition be presented under different colours. Butin realitythey constitute a spectrum, refractions of a single light of thepublic interest which may outshine that of the desirability thatall relevantevidence should be adduced to a Court of law. Anarrower view of public interest immunity was adopted by R v Young [1999] NSWCCA 166; (1999)46 NSWLR 681 at [54] were Spigelman CJ held that public interest immunityis concerned with, and the terminology should be confined to, theconduct of governmental functions. His Honour went on to note at[93] that while the categories are not closed:- the recognition of a new category of privilege requires the formulation ofpublic policy by the Courts, within the confines of theproper role of Courts. It is only appropriate for the Courts to recognise a category of public policywhich is capable of precisestatement, and which reflects so widely held anopinion, that the Courts reasoning can be described in terms of reasoningrecognition rather than creation. PSYCHOLOGISTS AND PUBLIC INTEREST IMMUNITY InFritze & Fritze [2006] FamCA 232 Watts J consideredthat:- Public interest immunity differs from privilege as itoperates for the benefit of the public interest in general and does not protectprivate relationships or interests. Thatcase concerned a father who had issued a subpoena seeking production of all hismedical records from a health service duringa time in which he was aninvoluntary patient. The health service objected to the subpoena on the groundsof public interest immunity,abuse of process, relevance and s 130 of theEvidence Act 1995 (Cth). HisHonour noted that while a preference had been expressed to narrow claim topublic interest immunity to

situations involving agovernment function it hasalso been said that the categories giving rise to public interestimmunity are not closed and they may be extended by analogy witha knowncategory of public interest exceptions. WattsJ drew a parallel between cases involving involuntary medical treatment ofprisoners, being a recognised class of public interestimmunity and thoseinvolving involuntary mental health patients to uphold the objection on thegrounds of public interest immunity. Following a review of the authorities, hisHonour said at [74] that:- It is clear that the ordinarypsychiatrist/patient relationship does not attract public interest immunity. WattsJ further noted that as the claimed public interest immunity was for the benefitof the public, it could not be waived by theparties (see [54]). InJermyn & Carling [2012] FMCAfam 184 the father issued a subpoena tothe mothers psychologist in relation to her handwritten notes from thetreatment of the mothers experiences of childhood sexual abuse. Themother and the psychologist objected on grounds of relevanceand publicinterest. The Court undertook an extensive review of both Australian andCanadian authorities and concluded that theproduction of previously providedtyped notes would be sufficient. Harman FM (as he then was) stated that torelease the additionalinformation would be to victimise her andinappropriately and in a fashion that would be against the publicinterest. His Honour focused on the significant potentialfor impact upon her psychological and emotional health. It waspossible that the disclosure would cause the mother significant harm. Accordingly, his Honours decision wouldseem to be based upon publicinterest immunity namely, the preservation of the confidentiality of personsdisclosing informationin the context of therapeutic counselling. Thatof course is not the final and only consideration. The information may be ofsuch probative value that the proper administrationof justice outweighs publicinterest immunity. Itis an important consideration that the interaction between the child and MsDolan did not endure beyond three appointments andthat for some years there hasbeen no ongoing involvement. It cannot be said that Ms Dolan and the child arein a therapeutic relationship. Inthe context of the current circumstances, notwithstanding that E is a child, Ido not consider that her involvement with Ms Dolanwould in and of itself fallinto a category different to any person that might seek medical or otherassistance and in doing so iseither given an assurance of privilege orconfidentiality, or from the circumstances reasonably forms that

view. Clearly,the guidelinesreferred to by Ms Dolan contemplate circumstances where theinformation obtained may be required to be disclosed. Ido not consider that the reference in the letter of Ms Dolan which refers tonon-disclosure in the event that Family Court proceedingsare issued, couldelevate the relationship between a child and a psychologist to a status thatwould allow considerations of publicinterest immunity. INTERESTS OF THE CHILD Theconsideration of a subpoena is not to be determined by reference to s 60CAnamely, that a Court must regard the best interestsof the child as theparamount consideration. That is not to suggest that the interests of the childplay no part. Section 69ZNsets out the principles for conducting child relatedproceedings and it is clear from the first principle as set out in s 69ZN (3)that the Court is to consider the needs of the child concerned and the impactthat the conduct of the proceedings may have on thechild in determining theconduct of the proceedings. Ihave also had regard to the general proposition that weight can be given to thewelfare and the interests of the child which mayimpact upon the manner in whichrules of evidence are utilised. Considerationhowever of the impact of the conduct of the proceedings on the child is not anabstract concept. If s 69ZN (3) is applicable,there needs to be evidence as tothe potential effect on the child if the information the subject of theobjection is released. In this case no such evidence has been presented.Counsel for the objecting party was clear that the objection had its foundationin the proposition that the relationship between a child and a psychologistinvolving therapeutic counselling was a category of activitythat would invokepublic interest immunity. Accordingly,whilst there may be cases where it could be argued that an objection should beupheld on the basis of the potential detrimentaleffect on the child, that isnot argued here. Itshould however not be forgotten that the argument is not necessarily always tobe in the negative. It is entirely possible thatnotwithstanding publicinterest immunity, the interests of the child would be served by the informationbeing admitted in circumstanceswhere it might be the only evidence available toassist the Court. That is, far from having a detrimental impact on the child,itmay be advantageous for the evidence to be presented. CONCLUSION Ido not consider that the involvement of Ms Dolan and the child is a relationshipthat should be protected by a claim of public interestimmunity. Therelationship is personal and whilst potentially important to the child, in

thecircumstances of this case, does nothave a wider application. Thereis no evidence as to the effect on the child if any of the information isreleased and there is no basis to assume that giventhe efflux of time, even ifthe child learns of the release of the information, it will necessarily have anadverse impact upon her. Whilstthere is a suspicion that the information is likely to be of peripheralrelevance only taking into account the current informationevidencing thechilds wishes, no point was taken and I have not been asked to considerthe documents to determine whethertheir relevance is so weak that the objectionshould be upheld on that basis alone. Thedocuments have already been produced to step one of the subpoena process, myorder will enable step two to be undertaken and thereremains a consideration asto whether any of the information disclosed in the material provided by Ms Dolanshould be introducedinto evidence. Imake orders as appear as the commencement of these reasons. I certify that the preceding sixty nine (69) paragraphs are a true copy ofthe reasons for judgment of the Honourable Justice Bermandelivered on 27October 2014. Associate: Date: 27 October2014 