FAMILY LAW EVIDENCE Certificate pursuant to section 128 of the Evidence Act 1995(Cth) Where the mother obtained material without authority byaccessing the fathers email account Where suchconduct might beor is an offence under section 478 of the Criminal Code Act 1995 (Cth) Where the Court noted that the law in relation to the giving ofprophylactic certificates to cover evidence-in-chiefunder section 128 of theEvidence Act is in an unsatisfactory state and needs clarity,particularly given the potential for its regular application and the unexpectedcircumstancesin which such applications can arise Where certificategranted. Criminal Code Act 1995 (Cth) s478 Evidence Act 1995 (Cth) s 128 Aitken & Murphy [2011] FamCA785 Cornwell v The Queen [2007] HCA 12; (2007) 231 CLR 260 Ferrall & Blyton (2000) 27 FLR 178 Jarvis & Pike [2013] FamCAFC 196 Songv Ying [2010] NSWCA 237 APPLICANT: Mr Churchill RESPONDENT: Ms Raske INDEPENDENTCHILDRENS LAWYER: Ms Murray FILENUMBER: TVC 1360 of 2011 DATE DELIVERED: 30 September 2014 PLACE DELIVERED: Mackay PLACE HEARD: Mackay JUDGMENT OF: Tree J HEARING DATE: 30 September 2014 REPRESENTATION THE APPLICANT: In Person SOLICITORS FOR THERESPONDENT: J Hamilton & Co COUNSEL FOR THE INDEPENDENT CHILDREN'S LAWYER : Mr Pennell SOLICITORS FOR THE INDEPENDENT CHILDREN'S LAWYER Geraldine Anne Murray ITIS NOTED that publication of this judgment by this Court under the pseudonymChurchill & Raske has been approved by the Chief Justice pursuant tos 121(9)(g) of the Family Law Act 1975 (Cth). FAMILY COURT OF AUSTRALIA AT MACKAY FILE NUMBER:TVC 1360 of 2011 Mr Churchill Applicant And Ms Raske Respondent EX TEMPORE RULING Thismorning, at the commencement of the trial of competing parenting proposals, themother, who is otherwise self-represented, hadthe assistance of her formersolicitor, Ms Hamilton. Ms Hamilton announced that her appearance was for alimited purpose and ona limited basis and was primarily, if not solely, to seekfor her former client a certificate under section 128 of the Evidence Actto cover certain evidence which she wished to give by way of a yet, unfiled,affidavit. Thecontents of that affidavit were said to include material which the mother hadobtained, without authority, by accessing some formof email account, apparentlymaintained by the father, and presumably, diverting or printing or otherwisecopying, emails which shewas able to find stored within

the relevant account. It is said that such conduct might be, or is, an offence under section 478ofthe Criminal Code (Cth) and for the purposes of this ruling, I assumethat indeed, it is such an offence. Thelaw in relation to the giving of prophylactic certificates to coverevidence-in-chief under section 128 of the Evidence Act is in anunsatisfactory state. It is particularly unsatisfactory given the circumstancesin which applications such as this canarise at short notice within a trial, andnot be attended by a reasonable opportunity for a proper argument in relation tothe issueswhich such applications raise. Plainly, this is a matter where thereneeds to be clarity of the law given the potential for itsregular applicationand, as I say, the unexpected circumstances in which such applications canarise. Aconvenient starting point[1] for aconsideration of the authorities is the decision of the Full Court of the FamilyCourt in Ferrall & Blyton (2000) 27 FLR 178. That decision isauthority for the proposition that a section 128 certificate can be given tocover evidence-in-chief given by a party by way of affidavit. If the law had soremained, the task fortrial judges, such as myself, would be much simpler. However, in Cornwell v The Queen [2007] HCA 12; (2007) 231 CLR 260 the High Courtdoubted, without deciding, albeit in the context of criminal proceedings,whether a witness could object to givingevidence when it was part of thematerial they were attempting to adduce by way of evidence-in-chief fromthemselves. TheNew South Wales Court of Appeal in Song v Ying [2010] NSWCA 237 had aslightly different take in relation to the issue and resolved, in substance,that a witness who was compellable by way of subpoenaor other process, mayobtain the benefit of a certificate under section 128 by virtue of thatcompulsion. However, the court made it plain that would not apply to partieswho gave evidence in answer to questionsfrom their own counsel, as the elementof compulsion was not present. YoungJ in Aitken & Murphy [2011] FamCA 785 undertook a helpful analysis ofthe relevant authorities. Whilst mindful of the fact that, firstly, Ferrall& Blyton bound his Honour and, secondly, the High Court had beencritical of that decisions approach in Cornwell v The Queen, hisHonour ultimately concluded that he preferred the reasoning of the New SouthWales Court of Appeal in Song v Ying, and in the circumstances beforehim, found that there was compulsion upon the party who sought the benefit of asection 128 certificate by virtue of the obligation on parties to proceedingsinvolving the division of property, in that case under

section90SM, to discloseall relevant material. Ipause to observe that of course the instant trial is of parenting proceedingsand the obligation of disclosure which attends propertymatters does not applyhere. Notwithstandingthe helpful and extensive analysis of Young J in Aitken & Murphy,when the Full Court of the Family Court next looked at the question of the widthor breadth of section 128 in Jarvis & Pike [2013] FamCAFC 196 thereappears to have been no reference to the court by counsel or the parties thenappearing to either Cornwell v The Queen, Song v Ying or Aitken& Murphy. In Jarvis & Pike the Full Court simply noted thatthe law was clear in relation to the application of section 128 toaffidavits that comprise evidence-in-chief, and referred to Ferrall &Blyton but no other authority. AsI have already noted, I do not have the luxury that attended Young J inAitken & Murphy of being able to identify a compulsion that appliesto the giving of evidence-in-chief by the mother here. Nonetheless, I acceptthat unless and until the High Court determines that the decisions of the FullCourt in Ferrall & Blyton and Jarvis & Pike are incorrect,in my view I am obliged to follow those cases. Myprovisional view, which it is unnecessary for me to conclude, is that if I werenot bound by Ferrall & Blyton and Jarvis & Pike, then likeYoung J, I would adopt the approach of the New South Wales Court of Appeal inSong v Ying. Insaying that, I would not wish it to be thought that I do not see that there ismerit in certificates under section 128 being available to a partysevidence-in-chief in proceedings in this court involving children, however thelanguage of section 128, which specifically refers to the notion of objection,on a plain reading makes that a difficult construction indeed. Ifit be the case that the New South Wales Court of Appeal position in Song vYing is the correct or preferable approach, then perhaps statutory reform ofsection 128 may be necessary, at least in relation to proceedings involvingchildren in this court. Itherefore propose to give a certificate to the mother under section 128 coveringany evidence that she may give, whether by evidence-in-chief or undercross-examination or re-examination, pertaining toher unauthorised access ofthe fathers email accounts. I certify that the precedingthirteen (13) paragraphs are a true copy of the reasons for judgment of theHonourable Justice Tree deliveredon 30 September2014. Associate: Date: 30 September2014 [1]I gratefully acknowledge thecommentary on the relevant authorities contained at [1.3.12840] of Odgers,Uniform Evidence

Law (2014, 11th ed Thomson Reuters) in whichmuch of the following review of the authorities has its genesis. AustLII:Copyright Policy|Disclaimers|Privacy Policy|Feedback URL: http://www.austlii.edu.au/au/cases/cth/FamCA/2014/848.html