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FAMILY COURT OF AUSTRALIA at SYDNEY

In the Marriage of MILLER

Watson J — 28 April 1976

(1976) 25 FLR 328; 9 ALR 613; 1 Fam LR 11,466; [1976] FLC 75,101 (¶90-018)

FAMILY LAW – PRACTICE AND PROCEDURE IN FAMILY LAW JURISDICTION – CONVERSATION EAVESDROPPED WHEN HELD BY CHILD AND THE FATHER – WHETHER EVIDENCE OF CONVERSATION ADMISSIBLE: *FAMILY LAW ACT* 1975, S31; *LISTENING DEVICES ACT* 1969 (NSW); *JUDICIARY ACT* 1903-1973, SS79, 80.

In a custody dispute, H. sought to tender evidence of a phone conversation between the child of a marriage and the mother, such conversation occurring when the child was with the father, and on which the father had eavesdropped on an extension phone. Argued that this evidence was inadmissible by virtue of the *Listening Devices Act* 1969 (NSW).

HELD:
1. First Submission: as to whether an extension phone was a listening device within the meaning of the Act: held to be a listening device.

2. Second submission was that the *Listening Devices Act* provided a rule of evidence not applicable to the present proceedings within the provisions of s79 *Judiciary Act*.

3- Third submission: that as father was a de facto guardian of the child, he, hence, would consent on the child's behalf to the eavesdropping: this argument was rejected.

4. Sections 79 and 80 of the *Judiciary Act* apply to the Family Court of Australia. The effect of these sections is that State laws relating to procedure, evidence, competency of witnesses and modification of the common law govern the Court when it sits in that State. The New South Wales *Listening Devices Act* is such a law. If an application is made to transfer proceedings to another State it may be necessary to consider, in an appropriate case, under the principles outlined in r101(3) and *Van Dusen's case* (1964) 376 US 612, the effect on the rights of the parties of any consequent change of law that may apply. Therefore before a change of venue is ordered it may be necessary that the Court impose conditions to ensure there shall be no effective change in the governing law and procedure.

WATSON J: The second submission raises an important issue. Upon what practice and procedure shall the Family Court of Australia exercise jurisdiction? Clearly the answer must be found in the laws of the Commonwealth of Australia, the *Family Law Act* 1975 (see s31), the *Family Law Regulations* (see s38(1)), and, if necessary, the *Rules of the High Court* (s38(2)). My attention was not drawn to any *Rules of the High Court* that may be relevant to this issue. A cursory examination of them indicates that none are. Where there is a gap there has been attempt to fill it by sections 79 and 80 of the *Judiciary Act* 1903-1973. Section 79 provides —

> "The laws of each State, including the laws relating to procedure, evidence and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding in all Courts exercising federal jurisdiction in that case to which they are applicable.

Section 80 provides:—

> 'So far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies for punishment, the common law as modified by the Constitution and by the statute law in force in the State in which the Court in which the jurisdiction is held shall, so are as it is applicable and not inconsistent with the Constitution and the laws of the Commonwealth, govern all Courts exercising federal jurisdiction in the exercise of their jurisdiction in civil and criminal matters.'

I have underlined the words in both sections I regard as having particular significance.

It appears that these provisions clearly apply to the High Court of Australia when it exercises original jurisdiction (see *Cohen v Cohen* [1929] HCA 15; (1929) 42 CLR 91; *Musgrave v The Commonwealth* [1937] HCA 87; (1936) 37 CLR 514; *Huddart Parker Ltd v Ship Mill Hill* [1950] HCA 43; (1950) 81 CLR 502; *R v Oregan* [1957] HCA 18; (1957) 97 CLR 323). In *Commissioner of Stamp Duties v Owens* [1953] HCA 62; (1953) 88 CLR 168 it was said by the whole Court (at page 170):

> 'The purpose of (section 79) is to adopt the law of the State where federal jurisdiction is exercised as the law by which, except as the Constitution or federal law may otherwise provide the rights of the parties to the *lis* are to be ascertained and the matters of procedure are to be regulated.

In *R v Oregan* [1957] HCA 18; (1957) 97 CLR 323 Webb J raised a problem associated with the fact that the High Court can be a peripatetic court (as can the Family Court of Australia). He said in relation to section 80 (at page 331):

> "It is one thing to hold that the Victorian statute law is not applicable and quite another thing to hold that the common law as modified by the Victorian State law is applicable. If this is an undesirable result of section 80 in a case where there is a difference between the law of the State where the court is sitting and the law of the domicile of the parties in another State, it can be avoided by adjourning the sitting of the court to the latter State.

In pointing out that in *Musgrave v The Commonwealth* [1937] HCA 87; (1936) 57 CLR 514 it had been held that in the administration of section 79 the rule is that the High Court takes the whole law governing the case of the State in which it sits, that is to say, the rules of private international law, as well as the municipal law rules of the State, Dixon CJ said in *Deputy Commissioner of Taxation v Brown* [1958] HCA 2; (1958) 100 CLR 32 (at p39):

> 'Otherwise, you would make nonsense of the provision and change the basis of decision by changing the place of sitting.'

See also *Pederson v Young* [1964] HCA 28; (1964) 110 CLR 162 and *Parker v The Commonwealth* [1965] HCA 12; (1965) 112 CLR 295.

Some guidance on this problem can be gained from the decision of the United States Supreme Court in *Van Dusan v Barrack* (1964) 376 US 612. Section 1404(a) of the United States Judicial Code allows a change of venue within the Federal jurisdictional system and specifically provides that 'for the convenience of parties and witnesses, in the interests of justice a district court may transfer any civil action to any other district or division where it might have been brought'. In delivering the judgment of the Court, Goldberg J said (at pp636-7):

> 'We believe, therefore, that both the history and purposes of s1404(a) indicate that it should be regarded as a federal judicial housekeeping measure, dealing with the placement of litigation in the federal courts and generally intended, on the basis of convenience and fairness, simply to authorise a change of courtroom.'

After further analysis of relevant United States authorities (such as *Erie Railway Co v Tompkins* 304 US 64) which were concerned to ensure that federal courts should be directed to apply the laws of the States in which they sat, Goldberg J went on to say (at p639):

> 'We conclude, therefore, that in cases such as the present, where the defendants seek transfer, the transferee district court must be obligated to apply the state law that would have been applied if there had been no change of venue. A change of venue under s1404(a) generally should be, with respect to state law, but a change of courtrooms.'

On the question of the convenience of parties and witnesses Goldberg J said (at page 612):

> 'The holding that a s1404(a) transfer would not alter the state law to be applied does not dispose of the question of whether the proposed transfer can be justified when measured against the relevant criteria of convenience and fairness. Though the answer to this question does not follow automatically from the determination that the transferred actions will carry with them the transferor's law, that determination may nevertheless make the transfer more – or less – practical and desirable. The matters to be weighed in assessing convenience and fairness are pervasely shaped by the contours of the applicable laws. The legal rules obviously govern what facts will be relevant and irrelevant, what witnesses may be heard what evidence will be most vital, and so on. Not only do the rules thus

> affect the convenience of a given place of trial but they also bear on considerations such as judicial familiarity with the governing laws and the relative ease and practicality of trying the cases in the alternative forums.'

I pause to warn that the basic decision in *Van Dusen's case* – that the transferee court should have imposed upon it the laws governing the transferor court – depends upon an interpretation of Rule 17(b) of the United States Federal *Rules of Civil Procedure* and does not apply in Australia. Where the decision is of assistance is in its analysis of principles where a 'change of courtrooms' is involved.

[Watson J then quoted Reg. 101 of the Family Law Regulations and continued:] ... From the foregoing analysis, I offer the following conclusions and observations:
Sections 79 and 80 apply to the Family Court of Australia. The effect of these sections is that State laws relating to procedure, evidence, competency of witnesses and modification of the common law govern the Court when it sits in that State. The New South Wales *Listening Devices Act* is such a law. If an application is made to transfer proceedings to another State it may be necessary to consider, in an appropriate case, under the principles outlined in r101(3) and *Van Dusen's case*, the effect on the rights of the parties of any consequent change of law that may apply. Therefore before a change of venue is ordered it may be necessary that the Court impose conditions to ensure there shall be no effective change in the governing law and procedure.

I reject the second submission.
