WHAT'S NEW IN SUCCESSION LAW

The observer effect – when does a court permit covert recordings in succession law matters?

Rathswohl v Court [2020] NSWSC 1490
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In 1998 the Weizmann Institute of Science published a paper titled 'Quantum Theory Demonstrated: Observation Affects Reality'.

It discussed a phenomenon commonly referred to as the 'observer effect', which has entranced both philosopher and physicist alike. That is, in the very act of watching, the observer affects the observed reality.[1]

This phenomenon has now entered the realm of further provision claims in succession law.

In ***Rathswohl v Court*** [2020] NSWSC 1490 (***Rathswohl***), the New South Wales Supreme Court has considered the admissibility of a covert tape recording in the context of a family provision application (FPA).

This has excited the juices of many a NSW succession lawyer, but its importance in Queensland is equally relevant, even though there are significant statutory differences in our privacy and evidence legislation.

In ***Rathswohl***, the application for further provision was made by the deceased testator's adult son, under section 59 of the ***Succession Act 2006*** (NSW), for provision to be made out of his father's estate for his maintenance and advancement in life.

In issue was a covertly recorded conversation between the deceased testator and one of his daughters. The applicant son sought to tender the recording as a part of his evidence in the FPA proceedings. However, an objection was taken to that on the basis that the recording was improperly or illegally obtained pursuant to section 138, ***Evidence Act 1995*** (NSW).

The issue for determination was whether the recording was reasonably necessary for the protection of the lawful interests of a daughter of the deceased, Mrs Davies, within the meaning of section 7(3)(b)(i) of the ***Surveillance Devices Act 2007*** (NSW) – was it an offence under section 7(1)(b) of that Act to have covertly recorded the conversation? This legislation is in stark difference to the applicable Queensland legislation.

The sequence of events went as follows.

On 25 January 2017 a family argument broke out at their mother's nursing home about the various care roles of each of the children for their parents. Their attempt to resolve the disagreement was to return to the family home where their father was still residing, but now on his own. While there, their dispute gave rise to a search for the father's will. That will could not be found. As a result, a new will for him was procured and executed. Its effect was to provide equally for each of the testator's adult children.

Then, on 15 March 2017, a further new will with differentiated provisions and a power of attorney was executed and copies provided to all the adult children. As a result, a further dispute between the adult children broke out.

A flurry of 'colourful' text messages were exchanged between the adult children about this turn of events and the usual sibling accusations about who does what for a dying parent ensued.

Part of that dispute involved the reasoning behind why the deceased testator's daughter, Mrs Court, had moved into her parents' home to care for the father.

The timing of this was in dispute, and it is at this point that the contested recording enters the scene.

On the evening of 29 April 2017, one of the three siblings, a sister, Mrs Davies, covertly recorded a conversation with her father, claiming that the reason she covertly recorded the conversation was with a view to establishing the date on which Mrs Court moved into their father's property.

The conversation captured by the recording corroborates Mrs Davies' claim as to why the covert recording was undertaken.

Under 7(1)(b), ***Surveillance Devices Act*** 2007 (NSW), it is an offence in NSW to record a conversation if the elements of that provision apply. Relevantly, whether consent of a principal participant in the conversation has been obtained ***and*** it is reasonably necessary for the protection of the lawful interests of that principal party.

While it is the first time the NSW court has been asked to consider the issue of the admissibility of a covert recording in the context of an FPA, the issue has been considered in another succession law decision involving questions of capacity (discussed further below).

Here, the court summarised the test in the NSW legislation of "reasonably necessary" for the protection of the lawful interests. At "[35] …

1. Whether the purpose of the conversation was to obtain admissions in support of a legitimate purpose. The contentious subject matter of the conversation, or the characteristics of the person being recorded, may indicate that it was necessary to make the recording in order to secure the admission. Recording a conversation for the purpose of extracting money, inducing further improper conduct or to blackmail the recorded party will indicate to the contrary.

2. Whether it was important to protect oneself from being accused of fabricating a conversation and recording the conversation was the only practical means of refuting such an allegation. This is more likely to be the case where the conversation concerns a serious criminal matter or the principal party has a genuine concern for their safety or that of their children.

3. Whether there were other practical means of recording the conversation, for example, reporting the matter to police or making a contemporaneous file note.

4. Whether there was a serious dispute on foot between the parties, including where determination of the dispute would vitally depend upon oral evidence and thus, one person's word against another. Recordings of conversations 'just in case' there is a dispute, or for the sake of making an accurate record of what was said, is not enough."

In reaching its conclusions, the court considered the ideology behind the legislation, which was said to be as follows:

"[E]stablish safeguards against the unjustified invasion of privacy that can be occasioned by the use of electronic surveillance. In so doing, it seeks to protect one of the most important aspects of individual freedom – the right of people to enjoy their private lives free from interference by the State or by others … People should not be expected to live in the fear that every word that they speak may be transmitted or recorded and later repeated to the entire world."[2]

In order to ascertain if the recording fitted the exception, the court went through the second reading speeches of the Act and its predecessor. The court found they were not helpful, so went to case law in other areas of law, searching for authorities on the provision: family law, criminal law, and civil law matters.

At [11] the court said "The closest case, factually, is ***Thomas v Nash*** (2010) 107 SASR 309; [2010] SASC 153, considered at [25], where a son recorded conversations with his mother said to bear upon whether she had capacity to make a will."

In that decision the court found that, outside of that decision, the matter sat "…comfortably within the civil claims case law".[3]

Between paragraphs 12-23, the court reviewed the case law as applied in criminal law matters and family law matters – primarily domestic violence applications.

And at paragraphs 23-35, the court reviewed the civil cases.

The most detailed judgment on recordings made 'just in case' there is a dispute was the matter of ***Thomas v Nash***. That matter concerned whether the deceased mother of Mr Nash had capacity to make a will. Mr Nash had recorded conversations with his mother said to bear upon this issue. There the court found this decision had "[25] the most detailed judgment on recordings made 'just in case there is a dispute'," however the court emphasised that each decision is an application of the expression to its particular facts.

And so the court ultimately found:

- "[40]…The evidence here supports the existence of a serious dispute between the children as to their father's Will and care at the time the recording was made. The children were jostling for position."
- "[42]…a 'lawful interest' does not equate with 'legal interests' in the sense of a legal right, title, duty or liability."
- It includes "[42]… an interest in ascertaining whether Ms Court's claim to warrant a greater entitlement to the father's Estate was truthful or exaggerated…"
- "A dispute had crystallised into a real and identifiable concern about the imminent potential for significant harm to Mrs Davies' lawful interests."

Therefore, the court concluded, in this circumstance, the recording was lawful.

Warning

But in reaching its conclusion the court fired off various warnings:

- "[44] This conclusion is referable to the facts of this case."
- "[45]…making a covert recording of a testator will not ordinarily reflect well."
- "[46]… whilst such a recorded conversation may be casual, it might not be particularly accurate as to what the testator truly thought on contentious subjects."

- "[47]…the recording may also contain evidence which is unwittingly damaging to the person who made it."

Queensland difference

But of course, as is the case with many things, Queensland differs in a significant way.

Under our ***Invasion of Privacy Act 1971*** (Qld), it is not an offence to covertly record a conversation so long as a simple condition is present. It is perfectly legal to covertly record a conversation so long as you are a party to the conversation. See:

"43 Prohibition on use of listening devices

(1) A person is guilty of an offence against this Act if the person uses a listening device to overhear, record, monitor or listen to a private conversation and is liable on conviction on indictment to a maximum penalty of 40 penalty units or imprisonment for 2 years.

(2) Subsection (1) does not apply—

(a) where the person using the listening device is a party to the private conversation"

Further, the Queensland ***Evidence Act 1977*** contains an exception to the hearsay rule:

"92 Admissibility of documentary evidence as to facts in issue

(1) In any proceeding (not being a criminal proceeding) where direct oral evidence of a fact would be admissible, any statement contained in a document and tending to establish that fact shall, subject to this part, be admissible as evidence of that fact if—
(a) the maker of the statement had personal knowledge of the matters dealt with by the statement, and is called as a witness in the proceeding; or
(b) the document is or forms part of a record relating to any undertaking and made in the course of that undertaking from information supplied (whether directly or indirectly) by persons who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in the information they supplied, and the person who supplied the information recorded in the statement in question is called as a witness in the proceeding.

(2) The condition in subsection (1) that the maker of the statement or the person who supplied the information, as the case may be, be called as a witness need not be satisfied where—

- the maker or supplier is dead, or unfit by reason of bodily or mental condition to attend as a witness…[4]

'document' includes, in addition to a document in writing—

(e) any disc, tape, soundtrack or other device in which sounds or other data…"

If Queensland is different to NSW, some readers might ask, then why bring this decision to your attention?

Well those things that separate us are not as broad as those things that bring us together. And this is most relevant in the warnings issued by the NSW court as to how covert recordings might be viewed by a court, even if they are found to be legitimate.

To that end, the court noted that parents are not always brutally honest with their adult children. As such, a covert recording may not satisfy a court as to the veracity of the statements made. Further, there is a great risk that the person undertaking the recording may be viewed in a dim light by a court, thereby affecting their credibility.

But notably, in an era where people have assets in other jurisdictions, the difference between the states may impact the decision-making process as to which jurisdiction might benefit the applicant. And as it is almost always the case in succession law matters, much turns on the particular facts of the case itself.

The takeaway for practitioners is that, while your client may think that a covert recording may be their silver bullet, it may also lead to their credibility being impeached, so tread lightly when considering whether to load that particular piece of evidence before the court, for "sometimes it is the quiet observer who sees the most".[5]

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Footnotes

[1] *Weizmann Institute of Science, 'Quantum Theory Demonstrated: Observation Affects Reality.' ScienceDaily, 27 February 1998, sciencedaily.com/releases/1998/02/980227055013.htm.*

[2] *At [10]… "described in the second reading speech of the Listening Devices Bill 1984 by the then Attorney-General of New South Wales (extracted by Branson J in, Violi v Berrivale Orchards Ltd (2000) 99 FCR 580; (2000) 173 ALR 518; [2000] FCA 797 at [21])."*

[3] *[11].*

[4] *See also Hughes v National Trustees Executors and Agency Co Ltd (1979) 143 CLR 134 at 150, Manly v. Public Trustee of Queensland (2007) QSC 388 at [36].*

[5] *Author Kathryn L. Nelson.*