

**SOME USEFUL PROVISIONS IN THE EVIDENCE ACT(S) 1995
RELEVANT TO FAMILY LAW PROCEEDINGS (Feb 2015)**

By Richard Maurice, Barrister-at-Law

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Agreed Facts

191(1) In this section:

"agreed fact" means a fact that the parties to a proceeding have agreed is not, for the purposes of the proceeding, to be disputed.

191(2) **[Evidence proving or contradicting agreed fact]**

In a proceeding:

- (a) evidence is not required to prove the existence of an agreed fact; and
- (b) evidence may not be adduced to contradict or qualify an agreed fact; unless the court gives leave.

191(3) **[Statement of agreed fact]**

Subsection

(2) does not apply unless the agreed fact:

- (a) is stated in an agreement in writing signed by the parties or by lawyers representing the parties and adduced in evidence in the proceeding; or
- (b) with the leave of the court, is stated by a party before the court with the agreement of all other parties.

Child-Related proceedings

69ZT Rules of evidence not to apply unless court decides

- (1) These provisions of the *Evidence Act 1995* do not apply to child-related proceedings:
 - (a) Divisions 3, 4 and 5 of Part 2.1 (which deal with general rules about giving evidence, examination in chief, re-examination and cross-examination), other than sections 26, 30, 36 and 41;
Note: Section 26 is about the court's control over questioning of witnesses. Section 30 is about interpreters. Section 36 relates to examination of a person without subpoena or other process. Section 41 is about improper questions.
 - (b) Parts 2.2 and 2.3 (which deal with documents and other evidence including demonstrations, experiments and inspections);
 - (c) Parts 3.2 to 3.8 (which deal with hearsay, opinion, admissions, evidence of judgments and convictions, tendency and coincidence, credibility and character).
- (2) The court may give such weight (if any) as it thinks fit to evidence admitted as a consequence of a provision of the *Evidence Act 1995* not applying because of subsection (1).
- (3) Despite subsection (1), the court may decide to apply one or more of the provisions of a Division or Part mentioned in that subsection to an issue in the proceedings, if:
 - (a) the court is satisfied that the circumstances are exceptional; and
 - (b) the court has taken into account (in addition to any other matters the court thinks relevant):
 - (i) the importance of the evidence in the proceedings; and
 - (ii) the nature of the subject matter of the proceedings; and
 - (iii) the probative value of the evidence; and
 - (iv) the powers of the court (if any) to adjourn the hearing, to make another order or to give a direction in relation to the evidence.
- (4) If the court decides to apply a provision of a Division or Part mentioned in subsection (1) to an issue in the proceedings, the court may give such weight (if any) as it thinks fit to evidence admitted as a consequence of the provision applying.
- (5) Subsection (1) does not revive the operation of:
 - (a) a rule of common law; or
 - (b) a law of a State or a Territory;that, but for subsection (1), would have been prevented from operating because of a provision of a Division or Part mentioned in that subsection.

Cross-examination - control of

Section 26: Court may control the order of witnesses, cross examination, production and use of documents and the order of cross examination. It would, for example, permit a party faced with an intervenor sympathetic to the opposition in the interests of fairness to apply to the Court to cross examine the intervenor's witnesses last.

Section 41: The Court may disallow questions in cross examination which are misleading, unduly annoying, harassing, intimidating, offensive, oppressive or repetitive.

Sympathetic witnesses

Section 42: The Court may also disallow leading questions in cross examination; if:

- (a) The witness gave unfavorable evidence to the party calling them;
- (b) The witness and cross examining party have consistent interests;
- (c) The witness is sympathetic to the cross examining party.

Prior inconsistent statements

Section 43: A witness may be cross examined about prior inconsistent statements without full particulars being given or a copy shown. If evidence of the statement is to be adduced otherwise than from the witness (eg: by re-opening a case) then:

- a) the witness must be given sufficient information in order to identify the statement and;
- b) the witness must have had the inconsistent parts of the statement drawn to his or her attention.

Section 44: A cross examiner must not question a witness about a previous representation made by another person except where the evidence has been admitted or the Court is satisfied that it will be admitted.

Otherwise if the representation is contained in a document, there are four steps to be followed before it may be marked and later tendered:

- a) The document is produced to the witness;
- b) If recorded, the witness must be permitted to hear the contents privately;
- c) The witness is asked whether he or she stands by their evidence notwithstanding the document;
- d) Neither witness nor cross examiner identify the document nor reveal its contents

Browne v Dunn

LC v. TC (1998) FLC ¶ 92-803 is authority for the following proposition:

"The rule in Browne v Dunn provides that unless notice has already clearly been given of a cross-examiner's intention to rely upon such matters it is necessary to put to an opponent's witness in cross-examination the nature of the case upon which it is proposed to rely in contradiction of the witness's evidence. It does not apply where the witness is on notice that the witness's version of events is in contest, that notice may come from the pleadings or the other side's evidence or opening. Here both parties filed extensive affidavits in the course of the proceedings, each knew what the other's case was and what allegations of fact were being made in support of them. Neither party was caught by surprise and in any event the husband, pursuant to procedural orders of the trial Judge, could have filed affidavit material in response to that of the wife had he chosen to do so.."

Documents – proving authenticity

Section 58: Allows a Court to examine a document and draw inferences as to its relevance.

Section 183: Allows a Court to examine a document and draw reasonable inferences generally.

Section 147: Makes admissible copies of business records.

Sections 149-155: Provides presumptions relating to attestation of documents, seals and signatories, gazettes and other government documents.

Sections 166-169: provides procedures to allow a party to call the person who made the representation or person who produced or maintained the records and for the evidence to be excluded if such request is not complied with except with reasonable cause.

See also above Section 48(1) adducing evidence of contents of documents.

Documents - calling for

Section 35: A party is not required to tender a document only because they called for it to be produced and inspected it. The party producing the document is not entitled to tender it simply because the other party failed to do so.

Documents - evidence of contents

Section 48(1): Evidence of the contents of a document can be adduced by either tendering the document or any of the following:

- a) adducing evidence of an admission made by another party to the proceedings as to the contents of the document;
- b) (see: sec 48(3) below)
- c) tendering a copy of the document produced by a device that copies documents;
- d) tendering a transcript of words recorded as sound or in a code (eg: shorthand);
- e) if in the form of electronic data, tendering the output of that data as produced by a computer;
- f) tendering a document forming part of a business record which is or purports to be a summary or copy;
- g) if it is a public document - tendering an authorised re- print.

Section 48(3): Limits reliance on the admission to the party making the admission or who adduced the admission.

Section 48(4): If a document is not available or its contents are not in issue, evidence may be adduced by tendering a copy or summary or adducing oral evidence of its contents.

Summaries and charts

Section 29: Permits evidence to be given in the form of summaries, charts etc if the Court considers it would aid its comprehension of other material. It does not do away with the need to tender the individual documents, but does however provide a method of tendering summaries as well.

Voluminous or complex documents

Section 50: Provides a procedure to adduce evidence of the contents of two or more documents by tendering a summary in place of those documents and which summary need not be prepared by an expert. This is in contrast to section 29.

The party seeking to rely on the summary must:

- serve on each other party a copy of the summary that discloses the name and address of the person who prepared the summary; and

- give each other party a reasonable opportunity to examine or copy the documents in question.

Business records

Section 69: To be admissible as a "**business record**" a document must:

- form part of the records belonging to a person, body or organisation in the course of or for the purposes of a business; or
- at any time formed part of such records and contains a previous representation made or recorded in the course of or for the purposes of a business.

Section 69(3): **Excludes documents** prepared for or in contemplation of legal proceedings or an investigation relating to or leading to **criminal proceedings**.

Non-business records

[admissible by dispensing with notice – sec 67(4)]

SECTION 63 HEARSAY EXCEPTION CIVIL PROCEEDINGS IF MAKER NOT AVAILABLE

63(1) [Application of section]

This section applies in a civil proceeding if a person who made a previous representation is not available to give evidence about an asserted fact.

63(2) [Application of hearsay rule]

The hearsay rule does not apply to:

- evidence of the representation that is given by a person who saw, heard or otherwise perceived the representation being made; or
- a document so far as it contains the representation, or another representation to which it is reasonably necessary to refer in order to understand the representation.

SECTION 67 NOTICE OF HEARSAY TO BE GIVEN

67(1) [Requirement of reasonable notice] Subsections 63(2) , 64(2) and 65(2) , (3) and (8) do not apply to evidence adduced by a party unless that party has given reasonable notice in writing to each other party of the party's intention to adduce the evidence.

67(2) [Manner of giving notice] Notices given under subsection (1) are to be given in accordance with any regulations or rules of court made for the purposes of this section.

67(3) [Contents of notice] **The notice must state:**

- (a) the particular provisions of this Division on which the party intends to rely in arguing that the hearsay rule does not apply to the evidence; and
- (b) if subsection 64(2) is such a provision the grounds, specified in that provision, on which the party intends to rely.

67(4) **[BUT Notice can be dispensed with by direction of Court]**

Despite subsection (1) , if notice has not been given, the court may, on the application of a party, direct that one or more of those subsections is to apply despite the party's failure to give notice.

67(5) [Conditions of direction] The direction:

- a) is subject to such conditions (if any) as the court thinks fit; and
- b) in particular, may provide that, in relation to specified evidence, the subsection or subsections concerned apply with such modifications as the court specifies.

Exclusion of evidence

Section 135: The Court may exclude evidence if its probative value is substantially outweighed by the danger that it might:

- (a) be unfairly prejudicial;
- (b) be misleading or confusing; or
- (c) unduly waste the court's time.

Section 136:

- a. be unfairly prejudicial to a party; or
- b. be misleading or confusing

Expert evidence

Section 177: Expert evidence may be adduced by tendering an "expert certificate" signed by the person stating their name, specialised knowledge and the opinion held said to wholly or partly based upon that knowledge.

Evidence of Family Consultants

69ZU Evidence of family consultants

The court must not, without the consent of the parties to the proceedings, take into account an opinion expressed by a family consultant, unless the consultant gave the opinion as sworn evidence.

Evidence of Children

69ZV Evidence of children

- (1) This section applies if the court applies the law against hearsay under subsection 69ZT(2) to child-related proceedings.
- (2) Evidence of a representation made by a child about a matter that is relevant to the welfare of the child or another child, which would not otherwise be admissible as evidence because of the law against hearsay, is not inadmissible in the proceedings solely because of the law against hearsay.
- (3) The court may give such weight (if any) as it thinks fit to evidence admitted under subsection (2).
- (4) This section applies despite any other Act or rule of law.
- (5) In this section:

child means a person under 18.

representation includes an express or implied representation, whether oral or in writing, and a representation inferred from conduct.

Foreign Law - proof of

Sections 174-175: Provides methods of proving the laws and the law reports of a foreign country.

Hearsay rule

Section 59: Defines the rule against hearsay.

Hearsay rule - some exceptions

- a) Section 60: evidence relevant for a non hearsay purpose.
- b) Section 63: in civil proceedings, first hand hearsay if the maker is not available.
- c) Section 64: in civil proceedings, first hand hearsay if the maker is available.
- d) Section 67: requires reasonable notice in a specified form to be given in writing to the other party of the intention to adduce hearsay evidence.

- e) Section 68: provides the method of objecting to notice of an intention to adduce hearsay evidence.
- f) Section 69: business records (see 20.2)
- g) Section 70: tags and labels.
- h) Section 71: telecommunications and electronic mail.
- i) Section 72: contemporaneous statements about a person's health.
- j) Section 73: marriage, family history or relationships.
- k) Section 74: public or general rights.
- l) Section 75: interlocutory proceedings.
- m) Section 78: lay opinions of what a person saw, heard or otherwise perceived which is necessary to obtain an adequate understanding of their perception.
- n) Section 81: admissions.
- o) Section 87(2): representations about employment or authority.
- p) Section 91: sets out a general rule to exclude evidence of a decision or finding of fact in prior proceedings. This evidence is not admissible to prove a fact that was in issue in those proceedings.
- q) Section 92(3): creates exceptions relating to evidence of some judgements (eg: grants of probate) or convictions in civil proceedings.
- r) Section 93: creates further exceptions as to defamation, a judgement in rem, res judicata or issue estoppel.

Interim judgements

The effect of Part 3.5 of the Act (see ss: 91-93 above) is to render inadmissible the reasons for judgement or findings of fact of the Court hearing interlocutory proceedings except where threshold arguments (eg: issue estoppel) are being raised.

Sec 75: provides that in an interlocutory hearing, the hearsay rule does not apply to evidence if the party who adduces it also adduces evidence of its source.

Information and belief

Section 172: Permits evidence to be given by way of affidavit on knowledge and belief. This appears to extend the application of this type of evidence in Family Law proceedings to final as well as interlocutory hearings. However, one would expect its

use to be limited by the Court to peripheral or non-contentious issues only in proceedings other than interlocutory proceedings.

Interpreters

Section 30: Permits a witness to rely upon an interpreter periodically as the need may arise without being required to give all of his or her evidence via interpreter.

Questions - leading

Section 37: Leading questions may be asked in chief if:

- (a) the Court gives leave;
- (b) it is an introductory matter;
- (c) no objection is taken;
- (d) the matter is not in dispute; or
- (e) to put a hypothetical statement of facts to a person with expert or specialised knowledge.

Memory - Revival of

Section 32: The Court may permit a witness to revive his memory in Court from a document if he will be unable adequately to recall a fact or opinion without it and the document came into existence at a time when the events recorded were fresh in his mind. The witness need not be the author of the document and the part relied upon may come into evidence.

Privilege

Section 118: Provides for the exclusion of evidence if on objection by a client, the Court finds that there would be disclosure of any of:

- a) confidential communications between a lawyer and client;
- b) confidential communications between 2 or more lawyers acting for the client;
- c) contents of a confidential document prepared by lawyers providing legal advice (even if not delivered);

for the dominant purpose of the lawyer or lawyers providing legal advice to the client; [cf: "sole purpose test" in GRANT v. DOWNS (1976) 135 CLR]

Section 119: Provides for privilege relating to the provision of professional legal services to litigation and extends the privilege to confidential communications between client, lawyers and certain third parties and includes anticipated proceedings.

Section 120: Provides for unrepresented parties to claim privilege relating to documents prepared by another person for the dominant purpose of preparing for or conducting those proceedings

Section 121: Provides for the admissibility of the intentions or competence in law of a client or party who has died.

Privilege - waiver

Section 122: Privilege can be waived if a client or party has voluntarily disclosed to another person the substance of evidence which was not made:

- a) involving the course of making or preparing a confidential communication or document;
- b) as a result of duress or deception;
- c) under the compulsion of law;
- d) between a Minister and a client who is body established by or holding office under an Australian law.

Section 124: Joint clients in civil proceedings may waive privilege in relation to themselves.

Section 125: Privilege does not attach to communications or documents made in furtherance of a fraud, an offence or acts liable to civil penalties or deliberate abuse of statutory power.

Section 126: Makes admissible other documents related to those admitted where privilege is lost and which are necessary for the proper understanding of those documents.

Privilege - self incrimination

Section 128: Witnesses may object to giving evidence if it would tend to prove that they:

- (a) have committed an offence against the law or Australia or a foreign country; or

(b) are liable to a civil penalty.

There are 3 situations where a witness may give self incriminating evidence despite making an objection:

- i. Evidence is given willingly after being informed that the Court will issue a certificate under sec 128(2);
- ii. Objection is overruled but later found to have been taken on reasonable grounds;
- iii. The offence incurs only a civil penalty under Australian Law and the Court requires the evidence in the interests of justice. (This would appear to override the traditional "right to silence" of a respondent to an application under sec 112AD of the Family Law Act.)

In each case the witness will receive a certificate the effect of which generally will be to provide immunity from prosecution over the offence related to the subject matter of the evidence.

Privilege - negotiations

- a) Section 131: Provides for a general exclusion of evidence of settlement negotiations with exceptions including for example:
- b) 131(2)(f): Evidence of an agreement to settle when proceedings are brought to enforce that agreement.
- c) 131(2)(h): Communications relevant to cost applications;
- d) 131(2)(j): Communications in furtherance of fraud or another criminal or civil offence.

Privilege overridden

131(1) Evidence is not to be adduced of:

- a) a communication that is made between persons in dispute, or between one or more persons in dispute and a third party, in connection with an attempt to negotiate a settlement of the dispute; or
- b) a document (whether delivered or not) that has been prepared in connection with an attempt to negotiate a settlement of a dispute.

sec 131(1) does not apply if:

131(2) (g) evidence that has been adduced in the proceeding, or an inference from evidence that has been adduced in the proceeding, is likely to mislead the court unless evidence of the communication or document is adduced to contradict or to qualify that evidence;

See also **Hutchings v Clarke** (1993) FLC ¶ 92-373 (Full Court)

Where evidence of settlement negotiations involving property and children was admitted as it was inconsistent with his application and suggested an ulterior motive. There was a greater public interest embodied in sec 64(1)(a) of the Family Law Act which in this case overrode the usual privilege from disclosure.

Relevance

SECTION 55

55(1) [Rule for determining relevance]

The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.

55(2) [Particular circumstances]

In particular, evidence is not taken to be irrelevant only because it relates only to:

- a) the credibility of a witness; or
- b) the admissibility of other evidence; or
- c) a failure to adduce evidence.

56(1) [Admissible evidence]

Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding.

56(2) [Inadmissible evidence]

Evidence that is not relevant in the proceeding is not admissible.

Relevance - Provisional

Section 57: Permits evidence dependent upon other findings to be admitted subject to satisfying the court:

- (a) that it is reasonably open to make that finding; or

(b) subject to the admission of further evidence that will make it reasonably open to make that finding.

Re-examination

Section 39: Limits re-examination to matters arising out of cross examination unless Court grants leave.

Standard of Proof

Section 140: Provides a definition of the civil standard of proof - namely the balance of probabilities.

Section 141: Provides a definition of the criminal standard of proof - namely beyond reasonable doubt.

It has been held that the effect of the dictionary definitions of the Act is that all proceedings under the Family Law Act are to be determined at the civil standard. [see: Halligan J.R. in Reilly and Reilly (18.5.95 unreported)]. This includes proceedings under section 112AD, 112AP or contempt which previously were regarded as attracting the criminal standard.

Telephone interception

Miller and Miller (No.4) (1978) FLC ¶ 90-506 (High Court)

See also Parker and Williams (1993) FLC ¶ 92-394

Voir dire

Section 189: Defines the procedures for hearings on the voir dire as to facts ("preliminary questions") upon which depends a question of whether evidence should be admitted, used against a person or a witness is competent or compellable.

Waiver of Rules of Evidence

190(1) [Consent]

The court may, if the parties consent, by order dispense with the application of any one or more of the provisions of:

(a) Division 3, 4 or 5 of Part 2.1; or (b) Part 2.2 or 2.3; or (c) Parts 3.2 to 3.8; in relation to particular evidence or generally.

Note: Matters related to evidence in child-related proceedings (within the meaning of section

69ZM of the *Family Law Act 1975*) are dealt with by that Act.

190(3) [Civil proceeding]

In a civil proceeding, the court may order that any one or more of the provisions mentioned in subsection

(1) do not apply in relation to evidence if:

(a) the matter to which the evidence relates is not genuinely in dispute; or

(b) the application of those provisions would cause or involve unnecessary expense or delay.

190(4) [Matters to be taken into account]

Without limiting the matters that the court may take into account in deciding whether to exercise the power conferred by subsection

(3), it is to take into account:

(a) the importance of the evidence in the proceeding; and

(b) the nature of the cause of action or defence and the nature of the subject matter of the proceeding; and

(c) the probative value of the evidence; and

(d) the powers of the court (if any) to adjourn the hearing, to make another order or to give a direction in relation to the evidence.

Witnesses - calling for in Court

Section 36: A party may compel a witness to give evidence if they are present "at the hearing of a proceeding".

Witnesses - credibility rule

Section 102: Evidence relevant only to a witness's credibility is not admissible.

19.3 Witnesses - credibility rule - exceptions

Section 103: if the evidence has "substantial probative value" as defined in the section;

Section 106: if the evidence tends to establish that the witness:

- (a) is biased or has a motive for being untruthful;
- (b) has been convicted of an offence anywhere;
- (c) has made a prior inconsistent statement.
- (d) is or was unable to be aware of matters to which his or her evidence relates; or
- (e) knowingly or recklessly made a false representation whilst under oath or on affirmation and has denied material parts of that evidence.

Section 108: permits evidence to be adduced in re- examination if the Court grants leave to adduce evidence contradicting or explaining evidence relating to credibility otherwise admitted and where there is evidence of a prior inconsistent statement or a suggestion that the evidence has been fabricated.

Witnesses - hostile (unfavorable)

Section 38: Hostile witnesses are called "unfavorable witnesses". A party may obtain leave to cross examine a witness called in chief as to matters of credit where the evidence of that witness is:

- a) Unfavorable to the party; or
- b) Where the Court considers the witness is not making a genuine effort to give evidence about a matter about which the witness may reasonably be supposed to have knowledge; or
- c) Where the witness has made a prior inconsistent statement (see sections 43 and 106 above).

Appendix "A"

Summary of the effect of sec 69ZT of the Family Law Act on the Rules of Evidence

Pursuant to sec 69ZT(1) the following parts of the Evidence Act do not apply in parenting cases .¹

Part 2.1

- a. Parties being able to question any witness.
- b. The order of examination-in-chief, cross examination and re-examination.
- c. Manner and form of questioning witnesses and their responses.
- d. Attempts to revive memory in court (being limitations on a witness's ability to rely on a document when answering questions).
- e. The effect of calling for production of documents in court.
- f. Compelling someone in Court to be examined without subpoena or other process.
- g. Rules against leading questions.
- h. Rules about cross examining unfavourable (hostile) witnesses.
- i. Usual limits on re-examination.
- j. Rules about prior inconsistent statements of witnesses.
- k. Rules about previous representations (statements) of other persons.
- l. Production of documents relating to prior inconsistent statements or previous representations.

¹ I have excluded sections not relevant to Family Law cases

Part 2.2

- m. Strict method for proving the contents of documents including voluminous or complex documents and foreign documents.
- n. Rules when judge conducts a view.

Note: Portions of sec 69ZT(1) are the most relevant subsections to take into account when to drafting an affidavit. The most significant exemptions the rules of evidence (from the point of view of drafting) are found in Part 3:

Part 3.2

- o. Rules against Hearsay including all the exceptions.

Part 3.3

- p. Rules about Opinion evidence including all the exceptions.
- q. Rules concerning admissions particularly as they relate to the rules against hearsay and opinions.

Part 3.5

- r. Rules excluding the use of judgments and convictions to prove facts.

Part 3.6

- s. Rules limiting tendency and coincidence evidence.

Part 3.7

- t. Credibility Rule and exceptions (ie: that evidence that is relevant only to a witness's credibility is not admissible).

About the Author

Richard Maurice holds degrees in Law and Economics from Sydney University.

He was admitted in 1984 and worked in private practice as an employed solicitor in a general practice and later for the Federal Attorney General's Office representing disadvantaged clients and as a duty solicitor in the Family Court, in NSW State Children's Courts and in many NSW Local Courts.

In 1988, he was called to the private bar. Since then he has practiced mainly in the areas of Family Law, De facto relationships and Child Support, together with Wills and Probate. He also works as a Mediator in Family Law financial and parenting matters.

He has appeared in a number of significant Family Law cases including seminal cases on Family Law and De Facto property division like *Pierce and Pierce* (1999) FLC 92-844 and *Black v. Black* (1991) DFC ¶ 95-113 and *Jonah & White* [2011] FamCA 221 and more recently *Sand & Sand* [2012] FamCAFC 179.

www.richardmaurice.com

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