JURISDICTION	**:**	FAMILY COURT OF WESTERN AUSTRALIA
ACT	**:**	FAMILY LAW ACT 1975
LOCATION	**:**	PERTH
CITATION	**:**	SEVEN NETWORK (OPERATIONS) LIMITED and COCKMAN [2018] FCWA 108
CORAM	**:**	THACKRAY CJ
HEARD	**:**	30 MAY 2018
DELIVERED	**:**	7 JUNE 2018
FILE NO/S	**:**	PTW 6917 of 2014
BETWEEN	**:**	SEVEN NETWORK (OPERATIONS) LIMITED Applicant AND AARON PHILIP COCKMAN Respondent AND ATTORNEY GENERAL OF WESTERN AUSTRALIA Intervener

Catchwords:

PUBLICATION ORDER - Application to publish information concerning Family Court of Western Australia proceedings - Extracts of orders and expert report sought to be published - Coronial and police investigation ongoing -

Consideration of s 121 of the *Family Law Act 1975* (Cth) - Held not in the public interest for publication order to be made - Application dismissed - Redacted version of the judgment to be published.

Legislation:

Family Law Act 1975 (Cth)

Category: Not Reportable

Representation:

Counsel:

Applicant	:	Mr McCarthy
Respondent	:	No appearance
Intervener	:	Mr Leigh
Independent Children's Lawyer	:	Mr Hooper SC

Solicitors:

Applicant	:	Lavan
Respondent	:	No appearance
Intervener	:	State Solicitor's Office
Independent Children's Lawyer	:	Legal Aid WA

Case(s) referred to in decision(s):

Farnell & Anor and Chanbua (2016) FLC 93-700
Harman v Secretary of State for the Home Department [1983] 1 AC 280
Neubert & Neubert [2017] FamCA 903
Sedgwick and Rickards [2013] FCWA 52
West Australian Newspapers Ltd and Channel 7 Perth Pty Ltd and Cuzens (2016) FLC 93-690

1 The Seven Network and affiliated media entities, including *The West Australian,* seek permission to publish an account of proceedings in the Family Court of Western Australia ("FCWA") relating to the family involved in the mass murder near Margaret River.

2 The proceedings between Aaron Cockman ("the father") and Katrina Miles ("the mother") related to living arrangements for their four children following the breakdown of their marriage. Tragically, only the father is now alive and he consents to the order sought.

The order sought

3 The applicants do not wish to publish a full account of the proceedings. Instead they seek permission to publish one snippet from consent orders made in June 2016 and a few snippets from a detailed report prepared by a child psychologist in February 2016. Although the applicants originally sought permission to publish the whole report, it was made clear at the hearing that they wish only to publish the few extracts identified in Exhibit 5.

Background

4 The mother and father were married in 2003 and separated in May 2014. Their four children remained in the care of the mother.

5 In late November 2014, the mother commenced proceedings in the FCWA [redacted]

6 [redacted]

7 The proceedings came before a FCWA Magistrate on circuit in Bunbury on 9 February 2015. The Magistrate made an order requesting the appointment of an independent lawyer for the children and also made a temporary order [redacted]

[redacted] An order was also made for the parties to attend a Case Assessment Conference with a Family Consultant.

8 The parties were also directed to attend a Conciliation Conference with a Registrar in March 2015 to discuss the financial issues. An agreement was reached at that conference resolving all financial issues, and orders were made accordingly.

9 The Family Consultant provided a report after the Case Assessment Conference held in April 2015. The Consultant [redacted] recommended that an expert be appointed to assess the family and provide a report to the Court. [redacted]

10 An Independent Children's Lawyer ("ICL") was arranged by Legal Aid WA in accordance with usual procedure. In June 2015, the ICL issued a variety of subpoenas [redacted] in order to obtain relevant information.

11 [redacted]

12 [redacted]

13 On 3 August 2015, orders were made by consent for the father to spend unsupervised time with the children. Shortly thereafter, the ICL arranged for an experienced child psychologist to prepare a report in accordance with the earlier direction from the Court.

14 There was delay in the preparation of the report (the first interviews had to be abandoned because of the bushfires in the South West). The report was received by the Court on 18 February 2016 and immediately released to the parties and the ICL. As is standard, an injunction had

earlier been granted restraining the parties from providing copies of the report to any person other than their legal advisors without first obtaining leave of the Court.

15 On 27 June 2016, FCWA received a minute of consent orders signed by both parties and the ICL, together with a request for orders to be made in accordance with the minute. Orders by consent were pronounced on the following day, 28 June 2016.

The consent orders of 28 June 2016

16 [redacted]

17 [redacted]

18 [redacted]

19 [redacted]

The subsequent divorce application

20 Once the parenting proceedings were resolved, the FCWA had no further involvement with the family, other than dealing with the mother's divorce application filed on 31 October 2016.

21 The Court is not permitted to grant a divorce unless satisfied that proper arrangements have been made for the children. It is open to the other party to the divorce to dispute the information provided by the applicant concerning the arrangements for the children.

22 

23 The mother's solicitors wrote to the Court in December 2016, prior to the divorce being granted, drawing attention to an error in the divorce application and updating the arrangements in relation to one of the children. The letter was copied to the father.

24 The father did not participate in the divorce proceedings, or respond to the documents filed by the mother setting out what she said were the arrangements for the children. The divorce was granted unopposed in April 2017.

Media involvement

25 I ascertained that the family had been involved in FCWA proceedings soon after the identification of the victims of the murders on 11 May 2018. My examination of the file revealed that the proceedings had been conducted in accordance with usual procedures; that all issues had been resolved by consent; that the children had been separately represented by an experienced lawyer; and that the outcome was largely in accordance with the views of an experienced child psychologist appointed by the Court to provide expert evidence.

26 On 14 May 2018, *The West Australian* published an "edited transcript" of a "press conference" the father had given the previous day. The father was quoted as saying:

- He had been "cut off from my kids" and had "supervised visits".
- "One of the best things was the supervised visit because at the end of each visit you'd have a report done and the reports showed I was an awesome dad".
- "What came out and was the only way I ended up winning in the end, was an independent psychologist's report".
- "I just wish it could have been done without lawyers".

- "I want everyone to see it [the independent psychologist's report] … and I will get it out there somehow. The correct way to do it? I'm not sure. I will be informed, I suppose. But I would love to have 10 or 20 copies here now and give them all out to you". *(I observe that these remarks came after a journalist had asked the father how he felt about "vile rumours that you had anything to do with this".)*

- "Originally when I got that report I was so happy to see my kids again. That report let me get my kids again and I just want to do an aeroplane drop with thousands of them all over Margaret River so everyone could see. Accusations that I was abusive and all that. Not to prove that I wasn't abusive and that. So the kids can keep living a normal life and getting it out there the kids cannot just think Dad was abusive because Dad [sic] says he was and they can't actually remember the occasion when I was abusive".

27 These statements, in combination, led me to believe that many readers would assume that the family had been involved in contested court proceedings about the children.

28 On 14 May 2018, I was informed that a journalist from *The Australian* had contacted the Court's media officer seeking details of the family's involvement in FCWA proceedings. As there was already information in the public domain to suggest such involvement, and in order to avoid any suggestion that the Court had imposed an outcome contrary to the wishes of the parents, I authorised a statement to be made in the following terms:

> The Family Court of Western Australia has confirmed [the father] and [the mother] were involved in proceedings in the Court. All financial and parenting issues were settled in 2016 without a trial in terms of orders proposed by both parties' lawyers and by an independent children's lawyer. The agreement was reached following publication of a report from a court-appointed child psychologist. The court has had no further involvement with the family since 2016, other than dealing with an uncontested divorce in the following year.
>
> No further comment will be made by the Court.

Evidence from the Coroner's office

29 Those representing the Attorney General filed an affidavit of the Principal Registrar of the Coroner's Court of Western Australia. The affidavit revealed that:

- A coronial investigation is underway in relation to the deaths.
- A police investigation is continuing and it is expected that it will be "some considerable time" before the coroner receives the police report.
- It is not possible to predict whether the coroner will hold an inquest, but it is likely an inquest will be held if the police report discloses "matters the investigation of which might be relevant to public health or safety or the administration of justice".
- If a suicide is involved, it would be usual for the coroner to go beyond the immediate circumstances of the death to consider the death longitudinally – in other words, to go back in time to earlier matters which may have contributed to the suicide.
- Accordingly, the FCWA proceedings, including the orders made, the circumstances surrounding the proceedings and the content of the expert's report may all be relevant to the coronial investigation and any subsequent inquest.

30 Importantly, the Principal Registrar went on to say:

> In my experience, a coroner would be gravely concerned by the publication of information which is not currently available and which, if published, may adversely affect both lay and expert witnesses whose evidence may assist a coronial investigation or inquest. This is not an idle or fanciful concern. Widespread publication and discussion of matters relevant to a coronial investigation or inquest carries with it the very real prospect of affecting or influencing the recollections or opinions of those who may be called upon to give evidence in a coronial investigation or inquest.

31 The Principal Registrar also deposed to the fact that it is the usual practice of the Coroner's Court to decline requests from members of the public or other interested people seeking to inspect or obtain copies of documents on the court file, although "senior next of kin" may be given access upon request. He added that the well-established practice was not to allow anyone, including "senior next of kin" to view any psychological reports.

The hearing

32 At the time the applicants filed their application on 23 May 2018, Court staff were advised to inform their legal representatives that I required the documents to be served on:

- the father;
- the mother's former solicitors;
- the firm of solicitors for whom the ICL previously worked; and
- the State Solicitor's Office (given the possible interest of the State Coroner).

33 The mother's former solicitors advised they did not intend to participate in these proceedings. The father also did not participate, having already indicated his consent to the order sought by signing a document to that effect, which was witnessed by the journalist who has already interviewed him for a proposed television program ("the TV program") to be telecast by one of the applicants.

34 The Attorney General for Western Australia sought to intervene just before the hearing and was granted leave to intervene at the hearing, to the extent leave was necessary.

35 I received written submissions and then heard lengthy oral argument from:

- Mr McCarthy, for the applicants;
- Mr Hooper SC, instructed by Legal Aid WA who had chosen and funded the ICL; and
- Mr Leigh representing the Attorney General.

36 At the outset of the hearing, Mr McCarthy handed up a heavily redacted script of the TV program. Having perused the document it became immediately apparent that important context was missing by reason of the redactions. I was then provided with the full script and copies were given to counsel on conditions of confidentiality.

37 I reserved my decision after being informed it was not intended that the TV program be aired in the immediate future and there was accordingly time to reflect on the arguments.

Outline of competing submissions

38 Mr McCarthy made clear that the applicants had no desire to publish information about what had occurred **during** the FCWA proceedings. He submitted there were five matters that demonstrate that it

is in the public interest for the otherwise limited publication proposed. He further argued that once publication occurred it would be legitimate for the father to comment on the information released [redacted]

39 Mr Hooper submitted that the Court had provided sufficient information in the statement already made. If more information was needed, he suggested that I might publish a judgment setting out a concise history of the proceedings as I have done in a previous matter. It was also submitted that, given the few snippets the applicants wish to publish, I could not be satisfied of their intention to give a fair and accurate report. Mr Hooper also drew attention to the lack of any precedent for permitting publication of a confidential expert report. He further submitted that the issue of what had led to the murders was a matter for the coronial inquest.

40 Mr Hooper also argued that quite apart from the provisions of s 121 of the *Family Law Act 1975* (Cth) ("the Act"), it was impermissible for the expert's report to be published without his consent. Relying upon *Harman v Secretary of State for the Home Department* [1983] 1 AC 280, he observed that the report was not a pleading but only an affidavit, and hence was evidence which had never been tested and which had not been given in open court. He advised that the expert was opposed to any part of his confidential report being published, but if it was proposed that snippets be published, then the expert would seek that the whole report be published to ensure a fair account was provided.

41 Although Mr Leigh clarified in oral submissions that the Attorney General was not formally opposing the application, he made many forceful submissions about concerns that would be held by the Attorney General if an order for publication was made. Chief amongst these was the potential for publication to impact adversely upon the coronial enquiry. He also emphasised that there was no suggestion that any aspect of the FCWA process had been deficient in a way which might raise concerns in the community, and he otherwise took issue with the five public interest arguments advanced by Mr McCarthy.

42 Mr Leigh also submitted that the statement previously issued by the Court had not "opened the door" to further publication in the form of

public commentary by the father or others. He also submitted that the fact that there may already have been a breach of s 121 by the media did not mean that it was appropriate to permit further material to be put in the public domain. He said that to permit further publication would be to permit a new wrong and give rise to new damage.

The legislation and policy considerations

43 As I have explained in *West Australian Newspapers Ltd and Channel 7 Perth Pty Ltd and Cuzens* (2016) FLC 93-690 and *Farnell & Anor and Chanbua* (2016) FLC 93-700 it is ordinarily an offence to publish an account of proceedings in the FCWA that identifies parties, or those associated with them. I accept that this is an exception to the principle of open justice, but the exception is one insisted upon by Parliament and not by the Court.

44 The proceedings on this occasion come under the Act because the mother and father were once married; however, the provisions of the Act are the same as those under the State law which applied in the earlier cases mentioned. Section 121 of the Act permits publication of reports of proceedings that are authorised by the Court, but provides no guidance as to the matters to be taken into account in the exercise of the discretion to permit publication. Clearly though some proper basis must be advanced by those seeking to have the Court depart from the statutory prohibition.

45 The underlying policy of s 121 is no doubt to ensure that people do not feel discouraged from coming to the Court for fear of having their private life made public. The law also ensures that children are not held up to ridicule, curiosity or notoriety. However, as counsel for the applicants pointed out, I have previously held that "once the court gives permission for an account to be published, it is open to any official or citizen to comment as they see fit" (*Farnell* at [531]).

46 In *Sedgwick and Rickards* [2013] FCWA 52, Duncanson J considered the relevant statutory provisions and case law in the context of a surrogacy case. Her Honour concluded:

> 48. I accept there is an aspect of public interest to this case. Surrogacy is becoming increasingly prevalent. Unfortunately not all surrogacy arrangements are carried out in accordance with the legislation leading to the exploitation of vulnerable adults and children both in Australia and overseas. The reporting of the arrangements in this case is informative. It may provide an example to others and discourage surrogacy arrangements undertaken contrary to the terms of the legislation. The permission

> to report the account of proceedings will not be inconsistent with the best interests of the child. Had it been so, the best interests of the child would have overridden the public interest.

47 It is important that I repeat here what I said in *Cuzens* after adopting Duncanson J's analysis of the law:

> 27. As the Chief Judge of the court, I would much prefer that the public be given full information concerning what actually happens in the Family Court day-in, day-out. This would help to dispel the many myths and misunderstandings about the work of the court. It would also expose the blatant lies of a small number of litigants who use social media and other means to give their side of their experience in the court and to blacken the name of their ex-partner.

48 The routine presence of the media in Family Courts around Australia, and wide reporting of the activities of a hardworking judiciary at all levels would also assist the public, the press and politicians to critique data about judicial efficiency gathered by bureaucrats and accountants who have no real perception of the work of the courts and what each of their pieces of data represents. To be useful, data requires rigorous analysis by experts without an agenda. Critical public analysis of data requires a well-informed public. And I accept that a well-informed public relies upon a well-informed, free and balanced press.

49 I hope these remarks, and all those I have made in earlier judgments in which I have permitted publication of proceedings, make clear that I approach these applications with a desire to allow the public an insight into the workings of their family law system and with nothing to hide from viewers/readers who rely upon the applicants to keep them informed. That said, my judicial oath requires me to administer the law by reference to the word and spirit of a carefully considered statute, and not by my own preferences as a court administrator exasperated by the ill-informed commentary that often passes for public debate in this area. Instead, I must keep firmly in mind that my wishes as an administrator cannot prevail over the interests of litigants who come before the judges confident in the expectation that their private lives will not be laid bare to the general public.

The reasons why the proposed publication will not be permitted

50 Counsel for the applicants correctly submitted that my task is to balance the public benefit in publishing the relevant material against the public benefit which underpins the general prohibition contained in s 121. It was said there were five matters demonstrating a broad public benefit in

publication being permitted, each of which has been recognised in reported decisions. I will deal with each of those matters in turn.

1. There is no need for an order for publication to "shine a light" on the heinous crimes that gave rise to this application. The person who allegedly perpetrated them was never a party in FCWA proceedings. Furthermore, every opportunity has already been taken by the media to publish details about what they believe occurred, without the need to refer to proceedings that ended long before the crimes were committed. The facts are entirely distinguishable from *Neubert & Neubert* [2017] FamCA 903 where a judge considered that there was a public benefit in "shining a light" on domestic violence. In that case, the proceedings post-dated the murder and were directly related to matters arising from the murder.

2. There is no "myth or misunderstanding" in the community about any relevant legal issues as there was in *Cuzens*. There is nothing in any of the publicity to date which would suggest that there was anything inappropriate in the agreed arrangements formalised by the consent orders. Nothing the father has said in public suggests that he thought there should have been a different outcome to the one to which he agreed. The only "myths and misunderstandings" to which counsel for the applicants referred are those that would arise from comments the applicants wish to publish, but which I am not persuaded constitute permissible comment on information already released.

3. There is no need (out of the ordinary) for the public to be "aware of how the law is applied in these situations", which was a relevant consideration in the very unusual factual circumstances in *Farnell*. While the issues between the mother and the father were difficult, they were not by their nature unusual. It is sufficient for the public to know that the law that was applied was that always applied when parties ask the Court to make consent orders in circumstances where the making of those orders is supported by an ICL and by the recommendations of an independent expert. The Court necessarily relies upon the good sense of parents, their legal advisors, the ICL and the expert unless there is something unusual indicating further enquiry should be made. Indeed, that is consistent with the Court's obligation to have regard to the principle laid down in s 60B(2)(d) of the Act that parents should agree about the future parenting of their children.

4. There is nothing in the public domain to suggest there has been a "cover-up" of any sort, and hence publication is not required to deal with any such concern that might be alleged. In fact, ironically, it is the TV program itself which would promote such a concern by the sensational reference in the proposed script to court documents having been "hidden away" from the viewer. I accept the submission of Mr Leigh that the way the story has been framed would in fact promote unfounded concerns about the administration of justice, rather than reducing them.

5. I do not accept that an order for publication would advance public debate on "whether the devotion of more money to public services could ever prevent such tragedies from occurring" which was one issue raised in *Cuzens*. The argument of the applicants to the contrary here was ingenious, but I have never heard it suggested that after proceedings are completed, the Court should unilaterally make its own enquiries as to whether consent orders are being complied with. Such a proposition ignores the proper function of a court. It is in any event so far removed from potential reality as to render its wider dissemination contrary to the public interest. To the extent that it is said there is a desire to advocate for a system which makes it easier for orders to be enforced, such could readily be discussed by reference to many other cases where parties need not be identified and perhaps where there has been some effort to enforce orders.

51 These reasons are sufficient to dispose of the application, but I propose to provide further reasons why it would not be in the public interest to permit publication. They are not set out in any order of importance.

1. The police investigation is not yet complete. When it has been completed it seems likely there will be a coronial inquest. Section 25 of the *Coroners Act 1996* (WA) requires the coroner, where possible, to identify not only "how death occurred" but also "the cause of death". The TV program speculates about this very issue prior to the coroner even having decided whether to hold an inquest. It is a matter for the media (at least initially) to determine whether such public speculation is appropriate, but I do not consider the speculation should be fuelled by the Court permitting the release of otherwise confidential documents.

2. The court order that the applicants wish to publish, and on which part of the TV program hinges, is just one subparagraph of one order, which in turn is part of a wide range of orders. The specific order has no operation unless conditions laid down in the order are satisfied. The journalist does not refer to that in the TV program, albeit, when pressed, the applicants' counsel said they would publish the conditions "if necessary". The risk of a report being rendered inaccurate by omission is clear.

3. The order in question was operational only for 12 months, and hence expired in June 2017, nearly a year before the murders; [redacted]

4. There is no admissible evidence to establish that the order was not complied with [redacted]

5. [redacted]

6. The obligation to monitor the safety of children in our community falls upon the executive arm of government, in this case the police and DCP; however there is no indication that there was ever any suggestion made to them after the parents reached their agreement that the children were in any danger of physical harm.

7. While very little of the expert report is proposed to be published, the parts sought to be used are largely of sensational value. The psychologist knew nothing of these matters other than what he was told. Their veracity has not been tested. If the "facts" in question are true, they could be established from sources other than the report.

8. The fact that the father consented to the orders is relevant but far from determinative. The fact that all other members of the immediate family are now deceased does not take the argument any further. I accept Mr Leigh's submission that it would be proper to assume that people are concerned about their reputations

and privacy beyond the date of their death, and are sensitive not only to protect their own privacy but also to avoid embarrassment to friends and family. As Mr Leigh pointed out, it would be odd to think that anyone would want their estranged spouse to be the person to decide whether or not confidential information about them should be put into the public domain after their death.

9. I am unaware of what impact reporting of selected parts of the expert's report would have on the extended families such as [redacted] who is specifically mentioned. I draw attention, as I did at the hearing, to the views expressed by Dr Ann O'Neill in an opinion piece attached to the journalist's affidavit concerning the impact that reporting of such crimes can have on those who survive them and on their families. Importantly, the material provided by the applicants contains statements by family asking for their privacy to be respected.

10. Notwithstanding the authorities to which I was referred, I accept that publication of material from the Court file has the potential to impact upon lay witnesses who may be required to give evidence to the coroner. However, the volume of other material and speculation in the public domain leads me to conclude that this is not a significant factor. I discount altogether the possibility that publication of just a few details from the expert's report would have any impact upon any expert witness.

52 I do not propose to discuss the *Harman* argument given the absence of submissions from counsel other than Mr Hooper who raised the proposition only in oral argument. Consideration of that proposition is unnecessary given my other findings.

Breach of the injunction regarding the expert's report

53 It is important that I record that the applicants did not disclose how they came to be in possession of the expert's report although an inference is available. An injunction had been made restraining the parties from releasing the report to third parties and I accept the submission of Mr Leigh that this is a relevant consideration in determining that it is not in the public interest to permit publication of any part of the report.

Publication of this judgment

54 I consider that it would be in the public interest for most of this judgment to be published. It is important for the community to

understand the restrictions on publication of FCWA proceedings and the reasons why the restriction will not be lifted in this matter. I consider it important, and also in the public interest, that any reference to this judgment in a revised version of the TV program or in other media publications should make clear that it is a requirement of Parliament that details of proceedings in the FCWA remain confidential.

55 I will therefore make available a redacted version of my reasons which may be published, and which will be placed on the FCWA website to which links may be provided by media. The full version will be provided to the parties and to the Principal Registrar of the Coroner's Court, but may not be distributed more widely without leave of the Court.

56 I sympathise greatly with the father who is anxious for details of the expert's findings about him to be widely known, especially if it is true that "vile" allegations have been made about him, as was suggested in the media. Ironically, none of the favourable details about the father in the expert's report are mentioned in the TV program, although the balance of the program is sympathetic to him. In fairness to a grieving father, I consider it appropriate to record in this public document that the expert painted a generally favourable opinion of him.

Proposed orders

57 For the reasons set out above, and subject to hearing from counsel, I propose to make the following orders:

1. The application be dismissed.

2. Liberty is granted to the applicants and other media to publish an account of the reasons for decision limited to the material in the redacted copy of the judgment attached to those reasons.

3. The Acting Principal Registrar of the Family Court of Western Australia is requested to provide a copy of the reasons for decision (without redaction) to the Principal Registrar of the Coroner's Court of Western Australia.

4. There be liberty to apply.

I certify that the preceding paragraph(s) comprise the reasons for decision of the Family Court of Western Australia.

LB
ASSOCIATE

7 JUNE 2018