

Legal privilege in family proceedings

Lawyers need to know and understand that conflict will sometimes arise between duties placed on lawyers to disclose to the Court and to opposing parties information received from or about the client and the lawyer's duty to promote and protect fearlessly and by all proper and lawful means his client's interest. This can arise when for instance a client admits causing harm to a child.

If this happens the lawyer cannot be part of presenting a case to a Court that the client did not assault the child. The lawyer has an overriding duty to the Court to act with independence in the interest of justice. Therefore if the client refuses to authorise a lawyer to make some disclosure to the Court the lawyer may be forced to cease acting for that client.

In some circumstances, where for instance a child is at risk, no duty of confidentiality can prohibit the lawyer from disclosing to the appropriate authority the contents of their communication from the client.

Legal advice privilege

This privilege covers communications between a client and his or her legal advisor. It is the client's privilege and can only be waived by the client. Sometimes this is done without realising. It can be done very easily by saying 'my lawyer told me...'.

In some proceedings 'litigation privilege exist'. This covers all discussion between the lawyer and for example potential witnesses or experts. However it has been ruled that this privilege does not apply in family proceedings. This means that if an expert report that is contrary to a party's case, is received by lawyers representing that party that report must still be produced (this would not apply if the report was prepared for the purpose of say criminal proceedings).

The duty to disclose and the duty of confidentiality

Communication received by a lawyer amounts to a crime itself or is intended to further a criminal purpose it is not covered by the duty of confidentiality.

In family proceedings if the communication involves an issue directly relevant to the care and upbringing of a child the legal representative must give full and frank disclosure to the Court and the opposing parties.

Under Section 98(2) of the Children Act 1989 parents in Court proceedings regarding children maybe asked questions, there is no right against self-incrimination, they cannot refuse to answer questions on the grounds that it may incriminate them. It is also right to say that in certain circumstances the Court may give permission for the information obtained in that way to be passed onto the Police or other agency. If a parent chooses not to give evidence or not cooperate with an investigation then of course the Court is likely to draw an inference that the reason he has not done so is because the answer would be contrary to his

criminal interest. The Court can base its findings, in part, upon a parent's refusal to cooperate with an investigation.

Of course in many perhaps the majority of cases it is in the client's best interest that that information and the admissions made are shared with the authorities at an early date.

In family proceedings therefore your lawyer can not help you present a case that the lawyer knows is false, the lawyer cannot lie on your behalf or knowingly assist you to lie to the Court.

The lawyer may well have a duty which overrides any duty of confidentiality, to disclose information that you pass on and may have to withdraw from the case if you do not agree that that should happen.

These points are important for any client to be aware of and here at Alison Fielden our experienced Family Lawyers Heather Weavill and Steven Barratt are very alive to these issues and will ensure that clients are appropriately advised.