

Can I rely on a conversation I have recorded without someone else's consent in my court case?

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Most people would assume the answer to that question is a firm no (and usually they would be right), but a recent NSW Supreme Court decision in *Rathswohl v Court* [2020] NSWSC 1490¹ shows that in particular circumstances a recording can be relied on.

The Facts

The facts of the matter in question were fairly straightforward. Three children disputed their respective entitlements to their late father's estate. Prior to their father passing away, Daughter A claimed that she was heavily involved in caring for him, which was disputed by Daughter B and Son C. In these types of matters, the care and support provided by children is a big factor that the Court must take into consideration, so this was an important issue that may have affected the outcome.

Daughter B secretly recorded a conversation she had with her father before he passed away. He did not give his consent to the conversation being recorded. Daughter B said she recorded the conversation because she was concerned that Daughter A was not as involved in caring for their father as she said was and she wanted to record their father's comments on the issue.

The Law

It is illegal to use a listening device (including a mobile phone, apple watch or any other device) to record a private conversation without the consent of the other participant(s) to that conversation.

There is however an exception where the recording of the conversation is reasonably necessary for the protection of the lawful interests of a participant to the conversation.

The Argument

Daughter B wanted the Court to rule that the conversation could be used in evidence as her father's responses supported her and Son C's argument that Daughter A was not as involved in caring for their father as she claimed she was. She said if she told her father she was recording the conversation, he would most likely have 'clammed up' or avoided the conversation, and if she made a diary note of the conversation, Daughter A would have accused her of making it up.

Daughter A wanted the Court to rule that the conversation could not be used in evidence. She said that at the time the conversation was recorded the dispute wasn't contemplated by the parties, so any previous 'evidence gathering' by Daughter B should not be allowed.

The Outcome

The Court found that the recording was legal, despite their father not consenting to it being recorded, as it was reasonably necessary to protect the lawful interests of Daughter B. Her lawful interests were in ensuring that when her father passed away, her interest in the Estate was not harmed by way of Daughter A enhancing her interest on a false basis (making untruthful claims about the care and support she gave to their father).

Whilst this case demonstrates that there are times where you can rely on a conversation with someone else without their consent, it is limited to very specific circumstances only. Recording a conversation without consent can lead to heavy fines or imprisonment and this decision does not give the green light for all private conversations that might be relevant to a court case to be recorded.

If you require further information on this decision, please contact [Chris Kintis](#) on 02 8235 1251.

¹ *Rathswohl v Court* [2020] NSWSC 1490