

BEHIND CLOSED DOORS

FAMILY VIOLENCE CASES UNDER THE FAMILY LAW ACT OUTLINED AND ANALYSED

Introduction

Thirty-one years ago, the Royal Commission on Human Relationships concluded that “family violence is common in Australian society”. This remains the case. Children and adults are more likely to be emotionally abused or neglected, physically injured or killed in their homes by another family member than anywhere else or by anyone else.

Family violence or domestic violence covers a broad range of behaviour among family members including physical abuse, sexual abuse, emotional and psychological abuse, threats and damage to property as well as more subtle forms of control, power imbalance and deprivation.

In this article, I do not distinguish violence between adult family members from violence perpetrated on children when I analyse case law. Many cases involve allegations and findings of both forms of abuse.

Family violence occurs across the board and has no barriers in terms of age, ethnicity, geographic areas, religion, race, socio-economic class or occupation. What is clear however is that family violence, including child abuse, is gender-specific. The vast majority of perpetrators are men, and the vast majority of victims or survivors are women and children. According to the Australian Bureau of Statistics (ABS) (1996), 23% of women in Australia were experiencing or had experienced physical or sexual violence in intimate relationships with men. Several years later, 34% of a large sample of Australian women reported experiencing at least one form of violence from a current or former partner (Mouzos and Makkai, 2004).

Family violence is a chronic, costly and far-reaching phenomenon. In 2004 Access Economics reported that about 1.7 million people in Australia have experienced domestic violence at some time in their lives. Domestic violence cost Australian society \$8.1 billion, with almost half of these costs being borne by the victims.

It is a serious health risk. The World Health Organisation (WHO) defines “health” as a state of complete physical, mental and social well-being, and describes domestic violence by male partners as the most common health risk in the world for women (WHO, 2005).

As for child abuse, it is difficult to give reliable figures as national reported incidence figures have only been available since 1991 through the Australian Institute of Health and Social Welfare. Relying on State and national figures from various child protection agencies, the current federal government estimates that more than 309,000 children Australia wide are in need of protection. These children are generally not the same children as those who come to the attention of family law courts. There is very little information about the incidence of child abuse in the context of parental separation, especially where children are the direct or primary victims of physical abuse, sexual abuse, psychological/emotional abuse or neglect. There is however some information about children and teenagers as indirect or secondary victims. In 2006, the ABS reported that 61% of those who had experienced violence from a previous partner, and 49% of those who experienced violence by a current partner, had children in their care during the relationship (Humphreys, 2007). Police figures reflect a similar occurrence. In 2005, Victorian police attended 28,000 incidents of family violence, and reported that there were children present in 48% of these attendances (Humphreys, 2007).

It is recognised that child abuse and family violence are closely linked, and are common causes of parental separation. It is estimated that 66% of all separations involve violence and abuse issues (Williams, 2006). However, the mere fact of separation does not mean that the abuse and/or violence automatically ceases. Often family law proceedings ensue

when a parent seeks protection for herself and/or for a child from the other parent or another household or family member, or when a party raises family violence as a relevant consideration in parenting proposals.

A study in 2001 found that 50% of all children's cases litigated in the Family Court involve adult family violence and/or child abuse allegations (Brown et al, 2001).

In another study by the Australian Institute of Family Studies (AIFS) of 300 randomly-selected files from the Family Court of Australia (FCA) and Federal Magistrates Court (FMC) in proceedings filed in 2003 in the Melbourne, Dandenong and Adelaide registries, more than half contained allegations of adult family violence and/or child abuse (Moloney *et al*, 2007). Across the courts and samples, the allegations were most commonly classified by the research team as "severe". The most common forms of alleged spousal violence were physical abuse (actual or threatened), emotional/verbal abuse and property damage. Allegations of child abuse were almost always accompanied by allegations of adult family violence. Allegations of child abuse largely centred on physical abuse, especially in cases requiring judicial determination in the FCA.

Since the 2006 reforms, it appears that the figures remain that over 50% of children's cases involve allegations of adult family violence and/or child abuse. The challenge is to see if the FCA and FMC treat and interpret family violence, including child abuse, by any different approach given the now elevated importance of family violence in the *Family Law Act 1975* (FLA) as amended.

Legislation

The *Family Law Amendment (Shared Parental Responsibility) Act* was passed in May 2006 and commenced operation in July 2006. The Act introduced several new provisions regarding family violence and child abuse. Relevant sections of the FLA, as amended are listed below.

- s4(1): Definitions of "abuse", "family violence" and "family violence order".

"abuse, in relation to a child, means:

- (a) an assault, including a sexual assault, of the child which is an offence under a law, written or unwritten, in force in the State or Territory in which the act constituting the assault occurs; or
- (b) a person involving the child in a sexual activity with that person or another person in which the child is used, directly or indirectly, as a sexual object by the first-mentioned person or the other person, and where there is an unequal power in the relationship between the child and the first-mentioned person.

family violence means conduct, whether actual or threatened, by a person towards, or towards the property of, a member of the person's family that causes that or any other member of the person's family reasonably to fear for, or reasonably to be apprehensive about, his or her personal wellbeing or safety.

Note: A person reasonably fears for, or reasonably is apprehensive about, his or her personal wellbeing or safety in particular circumstances if a reasonable person in those circumstances would fear for, or be apprehensive about, his or her personal wellbeing or safety."

- s10D: Confidentiality and disclosures of communications in family counselling.
- s60B: Objects and principles underlying Part VII – especially s60B(1)(b).

- s60CC: How a court determines what is in a child’s best interests for s60CA and s65AA with primary and additional considerations – especially s60CC(2)(b) and ss60CC(3)(j) and (k).
- s60CF: Informing the court of relevant family violence orders.
- s60CG: Court to consider risk of family violence in considering what order to make.
- ss60I(9) and 60J: Family dispute resolution not attended because of child abuse or family violence.
- s60K: Court to take prompt action in relation to allegations of child abuse or family violence.
- s61DA: Presumption of equal shared parental responsibility is rebuttable if
 - “(2) there are reasonable grounds to believe that a parent of the child (or a person who lives with a parent of the child) has engaged in:
 - (a) abuse of the child or another child who, at the time, was a member of the parent’s family (or that other person’s family); or
 - (b) family violence.”
- s65DAA: If a parenting order provides for equal shared parental responsibility, then the court must consider the child spending equal time or substantial and significant time with each parent with regard to the best interests of the child and s60CC considerations.
- 67Z, 67ZA and 67ZB: Allegations of child abuse and notifications.
- s68B: Injunctions in relation to children, parents of ex-nuptial children and persons with parenting orders, including injunctions for personal protection.
- s68C: Powers of arrest if s68B injunction is breached.
- ss68N-68T (about consistency and conflict between family violence orders and parenting orders).
- s69ZN: Five principles that a court must give effect to in conducting child-related proceedings including s69ZN
 - “Principle 3”.
 - (5) The third principle is that proceedings are to be conducted in a way that will safeguard:
 - (a) the child concerned against family violence, child abuse and child neglect; and
 - (b) the parties to the proceedings against family violence.”
- s69ZW: Evidence relating to child abuse or family violence from prescribed State or Territory agencies.
- s92A: Intervention in child abuse cases.
- s102A: Restrictions on examination of children in relation to child abuse.

- s114: Injunctions in relation to parties to a marriage including injunctions for personal protection and relating to the use or occupancy of the matrimonial home.
- s114AA: Powers of arrest if s114 injunction is breached.
- s117AB: Court must consider awarding costs where false allegations or statements are knowingly made in the proceedings.

Schedule 8 of the *Family Law Regulations* 1984 has a list of prescribed State or Territory laws for family violence orders.

Before looking at the case law, it is useful to compare the definition of “family violence” in s4(1), FLA (above) with the definition in ss5-7 of the recently passed *Family Violence Protection Act* 2008 (Vic).

“5 Meaning of *family violence*

- (1) For the purposes of this Act, ***family violence*** is –
- (a) behaviour by a person towards a family member of that person if that behaviour –
 - (i) is physically or sexually abusive; or
 - (ii) is emotionally or psychologically abusive; or
 - (iii) is economically abusive; or
 - (iv) is threatening; or
 - (v) is coercive; or
 - (vi) in any other way controls or dominates the family member to feel fear for the safety of wellbeing of that family member or another person; or
 - (b) behaviour by a person that causes a child to hear or witness, or otherwise be exposed to the effects of, behaviour referred to in paragraph (a).

Examples

The following behaviour may constitute a child hearing, witnessing or otherwise being exposed to the effects of behaviour referred to in paragraph (a) –

- overhearing threats of physical abuse by one family member towards another family member;
- seeing or hearing an assault of a family member by another family member;
- comforting or providing assistance to a family member who has been physically abused by another family member;
- cleaning up a site after a family member has intentionally damaged another family member’s property;
- being present when police officers attend an incident involving physical abuse of a family member by another family member.

- (2) Without limiting sub-section (1), **family violence** includes the following behaviour –
- (a) assaulting or causing personal injury to a family member or threatening to do so;
 - (b) sexually assaulting a family member or engaging in another form of sexually coercive behaviour or threatening to engage in such behaviour;
 - (c) intentionally damaging a family member's property, or threatening to do so;
 - (d) unlawfully depriving a family member of the family member's liberty, or threatening to do so;
 - (e) causing or threatening to cause the death of, or injury to, an animal, whether or not the animal belongs to the family member to whom the behaviour is directed so as to control, dominate or coerce the family member.
- (3) To remove doubt, it is declared that behaviour may constitute family violence even if the behaviour would not constitute a criminal offence.

6 Meaning of **economic abuse**

For the purposes of this Act, **economic abuse** is behaviour by a person (the **first person**) that is coercive, deceptive or unreasonably controls another person (the **second person**), without the second person's consent –

- (a) in a way that denies the second person the economic or financial autonomy the second person would have had but for that behaviour; or
- (b) by withholding or threatening to withhold the financial support necessary for meeting the reasonable living expenses of the second person or the second person's child, if the second person is entirely or predominantly dependent on the first person for financial support to meet those living expenses.

Examples –

- coercing a person to relinquish control over assets and income;
- removing or keeping a family member's property without permission, or threatening to do so;
- disposing of property owned by a person, or owned jointly with a person, against the person's wishes and without lawful excuse;
- without lawful excuse, preventing a person from having access to joint financial assets for the purposes of meeting normal household expenses;
- preventing a person from seeking or keeping employment;
- coercing a person to claim social security payments;
- coercing a person to sign a power of attorney that would enable the person's finances to be managed by another person;
- coercing a person to sign a contract for the purchase of goods or services;

- coercing a person to sign a contract for the provision of finance, a loan or credit;
- coercing a person to sign a contract of guarantee;
- coercing a person to sign any legal document for the establishment or operation of a business.

7 Meaning of *emotional or psychological abuse*

For the purposes of this Act, **emotional** or **psychological** abuse means behaviour by a person towards another person that torments, intimidates, harasses or is offensive to the other person. –

Examples –

- repeated derogatory taunts, including racial taunts;
- threatening to disclose a person’s sexual orientation to the person’s friends or family against the person’s wishes;
- threatening to withhold a person’s medication;
- preventing a person from making or keeping connections with the person’s family, friends or culture, including cultural or spiritual ceremonies or practices, or preventing the person from expressing the person’s cultural identity;
- threatening to commit suicide or self-harm with the intention of tormenting or intimidating a family member, or threatening the death or injury of another person.”

This is a broad, inclusive definition of family violence that may well be applicable in family law proceedings of the future!

Case law

It is important to understand family violence in children’s cases from a historical perspective, mapping both the legislative reforms and the evolution of judicial thinking and interpretation. The FLA was silent on the issue of family violence until the major changes introduced in 1996 through the *Family Law Reform Act 1995*. The relevance of family violence was then heightened in the 2006 amendments *inter alia* through inclusion in s60B (objects and principles), in s60CC as a primary consideration, and as a ground for rebuttal of equal shared parental responsibility under s61DA(2).

Cases prior to the 1995 amendments

Family violence (and child abuse) was ignored, or marginalised or quarantined, in many reported cases until the first sign of “enlightenment” in the mid-1990s.

Early cases reflected the “he’s a violent husband but a good father” line of thinking. Even where the court found that a husband had been violent to his wife, this was not deemed relevant to the welfare of children nor to the suitability of the husband as a potential custodial or access parent. These early decisions included *Heidt* (1976), *Dean* (1977), *Cartwright* (1977) and *Chandler* (1981).

By the 1990s the Family Court was recognising that adult family violence was relevant in children’s cases. In cases such as *Merryman* (1994), *Jaeger* (1994), *JG and BG* (1994) and *Patsalou* (1995) the court inquired into the nature of the violence and acknowledged the

deleterious direct and indirect effects upon children. In *Merryman and Patsalou*, the court found that a violent spouse is an inappropriate role model as a parent; and in *Jaeger*, the Full Court held that violence is relevant to a custody application, even if not directed at the child. Again in *JG and BG*, the trial Judge confirmed that the court must consider all admissible evidence in determining children's issues, including the nature of any family violence and its direct and indirect effects upon any children.

Cases after the 1995 amendments

Two co-existing and contradictory judicial interpretations flourished notwithstanding the expanded provisions.

In many cases judges, both at first instance and in the Full Court, found that domestic violence is important in children's cases and is relevant to parenting capacity and the formulation of specific parenting orders and conditions. Cases include *Blanch v Blanch and Crawford* (1998), *A and A* (1998), *M and M* (2000), *T and S* (2001), *T and N* (2003) and *D and D* (2005).

However in two cases – *Bartholomew v Kelly* (2000) and *Grant and Grant* (2001) – the Full Court found that the husband in each case had been seriously violent to the wife yet was still granted shared or sole residence of the children.

In *Blanch* (1998), the Full Court ordered a rehearing of a residence matter concerning three young children where the wife had given detailed evidence of a sustained course of severe domestic violence at the hands of the husband. The Full Court held that domestic violence is an important issue in parenting cases under s68F(2) factors, and the trial Judge had given insufficient weight to the domestic violence and to the relevance of such violence to the overall welfare of the children. The court stated that the trial Judge must consider long term emotional and developmental risks to children flowing from domestic violence other than just the risk of direct future violence.

In *A and A* (1998), the wife gave evidence of serious physical and sexual assaults against her during the marriage and after separation. The Full Court held that there would be an unacceptable risk to three young children if they had unsupervised contact with the husband. At first instance, the trial Judge had stated that it was not the role of the Family Court "to investigate criminal activity" and ordered regular supervised, and then unsupervised, contact. On appeal, the Full Court only allowed supervised full day contact each week, with the conclusion that any change in that pattern was unlikely in the predictable future.

In *M and M* (2000) the trial Judge found that the father's abusive and aggressive behaviour posed a multi-faceted danger to the children, with a risk of injury and fear and a risk that the children will learn from the abusive behaviour and ultimately treat it as acceptable.

Again in *T and S* (2001), the Full Court held that a trial Judge had not sufficiently considered how children are affected by the consequences of violence upon the victimised parent's parenting capacity. The trial Judge did not accept the evidence of a self-represented mother as to domestic violence by her former partner. The judge found her to be erratic, inconsistent, contradictory and prone to exaggerate, and so discounted all her evidence of violence. The Full Court allowed the appeal, and recognised the serious problems where women have suffered serious family violence and have to present their own cases in court.

T and N (2003) is a rare example of raised judicial consciousness. The father had been physically violent to the mother (and allegedly to the older child), causing the mother to relocate to an undisclosed address with the two young children. Both parties were legally represented and proposed unsupervised contact. The child representative also consented. Moore J refused to make consent orders for unsupervised contact, and instead made orders limited to supervised contact. Her Honour referred (pp 204-5) to "the abundance of research from social scientists about the highly detrimental effect upon young children of exposure to

violence and the serious consequences such experiences have for their personality formation”.

Similarly, in *D and D* (2005) the trial Judge found that the father of two girls, then aged 14 and 12 years, refused to accept responsibility for his past violence perpetrated on the wife, some of which was witnessed and experienced by the children. Carmody J concluded that their best interests dictated that the father have no communication or contact at all, save for contact initiated by the children. This order also accorded with the children’s wishes, the opinion of expert witnesses and the recommendations of the child representative.

By contrast, in the two decisions of *Bartholomew and Kelly* (2000) and *Grant and Grant* (2001), the Full Court in each case noted the seriousness of the husband’s physical and sexual violence towards the wife but nonetheless refused to interfere with the trial Judge’s discretionary findings as to the relevance of family violence in parenting orders. In the first case, the husband was granted shared residence of two young girls. In the second case, the husband was granted sole residence of a teenage boy, overturning a long *status quo* in favour of the wife. In both cases, the appellate court upheld the original decision.

In the build up to both the 1995 and the 2006 amendments, there were numerous cases about child abuse (mostly child sexual abuse) and the test of “unacceptable risk” set out by the High Court in *M and M; B and B* (1988) – most notably *B and B* (1993); *K and B* (1994); *N and S and the Separate Representative* (1996); *WK and SR* (1997); *Re David* (1997); *S and S* (2001) (FMC); *Re W and W: Abuse allegations; expert evidence* (2001) and *Re W (Sex abuse: standard of proof)* (2004).

Of course “unacceptable risk” was incorporated into s68F(2) in the 1995 amendments, and then relocated to the current S60CG(1) after the 2006 reforms. I recommend a detailed paper by former Family Court judge John Fogarty entitled “Unacceptable Risk – A return to basics”. Fogarty laments the “virtual industry” of unacceptable risk created by judges, lawyers and social scientists since the 1998 High Court decision, and urges the Family Court to simply apply the original principles and approach enunciated.

Finally there is the excellent English Court of Appeal decision of Butler-Sloss P in *Re L (a child) (Contact: Domestic Violence)* (2001) which encouraged judges “to have a heightened awareness of the existence of and consequences (some long-term) on children of exposure to domestic violence between their parents or other partners ... violence to a partner involves a significant failure in parenting” (pp 272-3).

Cases after 2006 amendments involving family violence and/or child abuse

As listed above, the revamped FLA now contains numerous provisions relating to family violence and/or child abuse. Case law is developing, and is still influenced by pre-2006 decisions.

***Goode and Goode* (2006) FLC 93-286**

This Full Court decision is more often cited as the authority regarding the relevance of *status quo* in parenting orders and the approach to be taken by a court in interim hearings. The case also involved family violence. The wife had alleged violence against her by the husband during cohabitation and during pregnancy. The husband denied the allegations. The trial Judge (Collier J) could not make a finding as to whether the allegations were true or not, but relied on s61DA(3) and held that the presumption of equal shared parental responsibility on an interim basis should be rebutted.

The Full Court agreed, and made further observations about family violence (at p 80,907) that the definition of “family violence” in s4(1) of the Act is “broad” and would undoubtedly encompass the conduct complained of by the wife.

The appeal was allowed on other grounds.

Nawaqaliva and Marshall (2005) FLC 93-296

In this case, Rose J went through the relevant steps under s60B (principles), s60CC(2) (primary considerations) and s60CC(3) (additional considerations). His Honour found that the two children, aged seven and five years, had been exposed to family violence and conflict perpetrated by the husband, and so the presumption of equal shared parental responsibility did not apply. For the purpose of the definition of “family violence,” his Honour held that the meaning of “a reasonable person” is “a person of ordinary prudence and intelligence who would have fear or apprehension in the circumstances of the person who is alleged to have it in a particular case” (p 81,024).

Napier and Hepburn (2006) FLC 93-303

The trial Judge (Benjamin J) granted only supervised contact by the father with his seven year old son because of an unacceptable risk of child sexual abuse. The father appealed. The Full Court allowed the appeal and granted six months of supervised contact and thereafter, unsupervised contact for weekends and school holiday periods.

The Full Court appeared to give priority to the primary objective of the child having a meaningful relationship with his father and only secondary consideration to protecting the child from exposure to abuse, notwithstanding cogent evidence as to the father’s past inappropriate conduct. In respect of the “unacceptable risk” test, Warnick J’s comments in a separate judgment in this case were adopted with approval by the Full Court in *Potter and Potter* (2007).

H and R [2006] FamCA 878

The trial Judge in this case found that the father had been extremely violent to the mother and only granted supervised contact to two children, aged six and ten years, at a contact centre. After nine such visits, the mother and children disappeared for two years. The father then sought to resume contact. The Full Court held that there be no contact whatsoever because the mother was extremely fearful of the father (for good reason) and any contact would be detrimental to her parenting capacity and ability to care for the children.

Colson and Olds [2007] FamCA 668

The husband had subjected the wife and three children to extreme violence and abuse through the marriage and after separation. The husband had convictions for assaulting the wife (and others) and for breach of apprehended violence orders. During the Family Court hearing, he was charged with two counts of contempt in the face of the court. He sought unsupervised time with his thirteen year old son.

Ryan J found that ordering the child to spend time with his father, whether supervised or unsupervised, would expose him to an unacceptable risk of family violence and an inappropriate role model. It would also place pressure on the child’s relationship with the mother, his primary caregiver, and undermine the mother’s ability to maintain a comparatively settled home environment. The presumption of equal shared parental responsibility did not apply, and no contact was granted.

Murphy and Murphy [2007] FamCA 79

In this case Carmody J reviewed at length the case law on the relevance of family violence and child abuse in children’s cases before and after the 2006 amendments. His Honour recognised that it is not always possible to achieve both the objects in s60B of promoting a meaningful relationship between a child and both parents as well as ensuring the child’s safety or welfare. His Honour reviewed the social science research here and in the United

Kingdom and concluded (at para 68) that “there is no empirical evidence for the positive effects of contact *per se*”.

This is an excellent review of cases and research in relation to family violence and child abuse and the overlay between both occurrences in a family unit.

It is also a case that looked at s117AB, which mandates a cost order against a party who knowingly makes a false allegation or statement in the proceedings. His Honour does not apply this section to the case, but states in *obiter dicta* that false denials too, whether made on oath or not, would be a “statement” within the meaning of the section (para 219, footnote 147).

***Johnson and Page* [2007] FamCA 1235**

At trial the mother sought orders that the father spend no time with their six year old daughter on the basis that unsupervised time with the father exposed the child to an unacceptable risk of child abuse. The trial Judge (Rose J) found no unacceptable risk of abuse, and made orders for a gradually increasing regime of unsupervised time on weekends and during school holidays. The independent children’s lawyer had supported unsupervised time.

The mother appealed. The Full Court did not disturb these parenting orders. The court discussed several earlier cases and then agreed with the seven point summary of principles in *M and M; B and B* (1988) as set out by Fogarty in his 2006 paper (para 71).

There have been several cases on family violence, including child abuse, decided in 2008 in both the FCA and FMC. Most are by judges or federal magistrates at first instance. They involve the rebuttal of equal shared parental responsibility; unsupervised or supervised time or no time at all between children and an abusive parent; the relationship between family violence and child abuse; and the “unacceptable risk” test.

These cases include:

Waters and Lane [2008] FamCA 816.
Sony and Hansell (no 2) [2008] FamCA 810.
Laffer and Laffer [2008] FamCA 769.
Rose and Park [2008] FamCA 593.
Stamos and Miriakas [2008] FamCA 727.
Bartlett and Corey [2008] FMCAfam 607.
Abrams and Demars [2008] FMCAfam797.
Wunscher and Licha [2008] FamCAFC 155.

None of these cases take the law any further than those detailed above.

There have also been a few cases about costs under s117AB including:

- *Sharma and Sharma (No 2)* (2007) FamCA 425 (costs awarded against wife for making false statements about child abuse).
- *Conway and Clivery* (2007) FamCA 1306 (costs against mother for denying physical abuse of the child).
- *Hogan and Halverson* (2007) FMCAfam 1131 (costs against mother for knowingly making a false statement that the child was injured in the father’s care).
- *Charles and Charles* (2007) FamCA 276 (no order for costs made).
- *Claringbold and James (Costs)* (2008) FamCA 57 (costs against wife for making false statements of domestic violence against husband).

It is notable that in all but one of these, costs were ordered against the wife/mother and may reflect a disproportionately punitive response from the bench given the research findings as to the very low number of false allegations.

Conclusion

In a public forum on domestic violence in June 2006 on the eve of the introduction of the 2006 amendments, I stated that the then system operating under the FLA did not work well to protect those affected by family violence or child abuse. I predicted that the reforms would only make the situation worse.

I still maintain that some of the changes such as compulsory family dispute resolution reflect a push towards informal privatised decision-making whereby family violence and child abuse are white-washed and largely ignored. However, once a matter is litigated and adjudicated, courts appear to be making careful, sensitive and, for the most part, protective and appropriate orders.