

The Relevance of Domestic Abuse in Family Law Matters

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Domestic abuse has seen a great deal of attention in the news lately. In a 2007 study, the Australian Institute of Family Studies observed that domestic abuse is alleged in roughly 60% of the Family Law cases brought before the Courts.¹ Consequently, domestic abuse is somewhat of a pertinent issue in the Family Law jurisdiction and one that requires careful consideration in practice so that legal practitioners may best promote the welfare of all parties to proceedings. This article explores domestic abuse in the context of Family Law proceedings, by firstly offering a definition of what in fact constitutes domestic abuse, and secondly how such evidence may be utilised by the Courts to make orders.

What Constitutes Domestic Abuse?

Section 4AB of the *Family Law Act 1975* (Cth) ('the *FLA*') offers a broad definition of domestic abuse,² which includes 'violent, threatening or other behaviour by a person that coerces or controls a member of the person's family ... or causes the family member to be fearful.'³ The *FLA* also provides a non-exhaustive list of examples which would constitute domestic abuse, including:⁴

1. an assault;
2. a sexual assault or other sexually abusive behaviour;
3. stalking;
4. repeated derogatory taunts;
5. intentionally damaging or destroying property;
6. intentionally causing death or injury to an animal;
7. unreasonably denying the family member the financial autonomy that he or she would otherwise have had;
8. unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or his or her child, at a time when the family member is entirely or predominantly dependent on the person for financial support;
9. preventing the family member from making or keeping connections with his or her family, friends or culture; or
10. unlawfully depriving the family member, or any member of their family, of his or her liberty.

¹ Australian Institute of Family Studies, *Allegations of family violence and child abuse in family law children's proceedings: A pre-reform exploratory study*, Report No 15 (2007) ch 5, available at <<https://aifs.gov.au/publications/allegations-family-violence-and-child-abuse-family-l/5-prevalence-and-nature>>

² The *Family Law Act 1975* (Cth) ('*FLA*') uses the term 'family violence', however, for the purpose of this article the terms 'domestic abuse', 'family violence', and 'domestic violence' carry the same meaning.

³ *FLA* s 4AB(1).

⁴ *Ibid* s 4AB(2)(a)-(j).

Additional provisions are included in the *FLA* that deal specifically with domestic abuse in respect of children, which further broaden the definition to include exposure to domestic abuse,⁵ where a child:

1. overhears a threat to another family member;⁶
2. sees an assault occasioned on another family member;⁷
3. is required to comfort or assist another family member who has been assaulted;⁸
4. cleans up damage to property intentionally caused by another family member;⁹ or
5. is present when police or ambulance officers are attending to an incident involving an assault on a family member.¹⁰

This legislative definition casts a large net over what is considered domestic abuse, and rightly so. It recognizes that abuse assumes many different forms, and is not merely restricted to acts or threats of physical violence. The definition acknowledges that abuse may also be emotional or financial in nature. For example, in *In the Marriage of P and S*,¹¹ Moore J accepted the wife's allegations of domestic abuse where she was required to bake bread, make clothes, grow produce, and even do the laundry without hot water or a washing machine, simply because the husband wished to observe a frugal lifestyle.

As a result of such a broad definition, it becomes apparent why domestic abuse is so frequently alleged in Family Law proceedings. The balance of this article is concerned with examining how the Courts deal with proven allegations of domestic abuse in children's matters as well as property proceedings.

Domestic Abuse in Children's Matters

Part VII of the *FLA* deals with matters relating to children, with the objective of promoting the welfare of children.¹² Section 60CA states that in doing so, a Court is to regard the best interests of a child as the paramount consideration. This means that no other factor can take priority over what is in a child's best interests. In *AMS v AIF*,¹³ Kirby J stated that 'the touchstone for the ultimate decision must remain the welfare or best interests of the child and not, as such, the wishes and interests of the parents.'¹⁴ This legislative position is a reflection of the United Nations Convention on the Rights of the Child, which states that in:

"all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."¹⁵

In determining what a child's best interests are, the Court must look to Section 60CC of the *FLA* which sets out a number of relevant considerations. These considerations are divided into primary and additional ones,¹⁶ and of the two primary considerations the second is 'the need to protect the child from physical or psychological harm, from being subjected to, or exposed to, abuse, neglect or family violence.'¹⁷

⁵ Ibid s 4AB(3).

⁶ Ibid s 4AB(4)(a).

⁷ Ibid s 4AB(4)(b).

⁸ Ibid s 4AB(4)(c).

⁹ Ibid s 4AB(4)(d).

¹⁰ Ibid s 4AB(4)(e).

¹¹ (Unreported, Family Court of Australia, Moore J, 3 April 1998).

¹² *FLA* s 60B(1)(a)-(d).

¹³ [1999] HCA 26.

¹⁴ Ibid [145] (Kirby J).

¹⁵ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) Art 3.1

¹⁶ *FLA* s 60CC(2)-(3).

¹⁷ Ibid s 60CC(2)(b).

So in matters relating to children, evidence of domestic abuse is not only admissible by virtue of Section 60CC(2)(b),¹⁸ but it is encouraged that any such evidence be brought to the Court's attention so that Judges are able to make orders which serve a child's best interests. However, as is discussed below, the approach is very much a different one when the Court is deciding on property matters.

Domestic Abuse in Property Matters

Since Australia's matrimonial property laws are not fault-based, evidence of misconduct by either party is generally not relevant to the determination of property matters, and therefore inadmissible. However, this does not render such evidence completely inadmissible, but instead, a party alleging domestic abuse must firstly prove its existence, and secondly demonstrate its impact on the party's contributions to the marriage. The leading authority on this position is *In the Marriage of Kennon*,¹⁹ where the Full Court examined when and how domestic abuse is relevant in property matters. In doing so, Fogarty and Lindenmayer JJ stated that:

"where there is a course of violent conduct by one party towards the other during the marriage which is demonstrated to have had a significant adverse impact upon that party's contributions to the marriage, or, put the other way, to have made his or her contributions significantly more arduous than they ought to have been, that is a fact which a trial judge is entitled to take into account in assessing the parties' respective contributions."²⁰

Therefore domestic abuse, even if proven, of itself is not relevant in property matters, but becomes relevant where the party alleging the abuse can 'show that the conduct occurred in the course of the marriage and had a discernible impact upon the contributions.'²¹ For example, if, as a result of an assault by a husband, a wife is unable to cook and clean, or completing those tasks becomes more arduous or difficult, the Courts are entitled to take into account the husband's abuse in determining what property adjustment to make. However, a party must meet a rather high threshold, as the Courts are cautious to apply the *Kennon* principles outlined above, as there is a 'relatively narrow band of cases to which these considerations apply.'²²

***Birkett & Hemsley* [2014] FCCA 1568**

In *Birkett & Hemsley*,²³ a recent decision of the Federal Circuit Court, Halligan J was required to explore the relevance of domestic abuse in the determination of issues relating to children as well as property, and His Honour's judgment offers a helpful illustration of the principles outlined above.

In this case, the husband and wife married in 2001 and separated in 2011 with two children born of the relationship. Over the course of the marriage, the husband was repeatedly abusive towards the wife, both physically and verbally, and often in the presence of the children.²⁴ On one occasion:

"[a]fter being gone several hours, the wife went downstairs and found that the husband was not watching TV. He returned about four hours later. When she asked him where he went, the husband became very angry and was yelling. The wife asked him to stop as he would wake the children. She moved into the stairwell so the children could not hear, and the husband approached her, grabbed her by the throat and lifted her into the air."²⁵

¹⁸ See also *FLA s 60CG*.

¹⁹ (1997) 22 Fam LR 1; See also *In the Marriage of Doherty* (1995) 20 Fam LR 137.

²⁰ *In the Marriage of Kennon* (1997) 22 Fam LR 1, 24 (Fogarty and Lindemayer JJ).

²¹ *Ibid.*

²² *Ibid.*

²³ [2014] FCCA 1568.

²⁴ *Ibid* [42]-[111] (Halligan J).

²⁵ *Ibid* [55] (Halligan J).

On the issue of parenting, Halligan J acknowledged that the husband's ongoing abuse, which was largely fuelled by his alcohol consumption, was a relevant factor in making orders in respect of the children.²⁶ In directing his attention at Section 60CC(2)(b) of the *FLA*, His Honour noted that the children may be at risk of physical harm from the husband.²⁷ In doing so, His Honour reached the conclusion that the best interests of the children are served by making a sole parental responsibility order in the wife's favour,²⁸ with the husband's contact with the children significantly limited to one day a month between the hours of 9am and 5pm.²⁹

On the issue of property settlement, Halligan J accepted that the wife was the victim of serious and persistent domestic abuse perpetrated by the husband,³⁰ but His Honour did not find that this case fell within the scope of the principles outlined in *Kennon*, and did not consider the husband's abuse to be a relevant factor.³¹ His Honour's reasoning for this conclusion was that the wife had failed to properly demonstrate that her contributions were made more arduous or difficult as a direct result of the husband's abuse, but were made more difficult by matters 'unrelated to the behaviour of the husband'.³²

Conclusion

In summary, the Family Law Courts' approach to domestic abuse is largely dependent on the relief sought. As outlined above, where children are concerned, domestic abuse in any form is treated delicately and the Courts are required to properly explore any evidence alleging domestic abuse so as to serve a child's best interests. However, where property proceedings are concerned, the Courts are able to rely on evidence of domestic abuse in making orders by virtue of the principles in *Kennon*, but as with *Birkett & Hemsley* above, the threshold is a rather high one. This is because the principles in *Kennon* are not punitive or compensatory in nature, but instead are grounded in the understanding that domestic abuse can impact a party's ability to contribute to a relationship, but a causal link between the abuse and the contributions must be made out.

At Diamond Conway, [our experienced Family Lawyers](#) are always astute to the many forms of domestic abuse and the impact it has on our clients, and consequently we are driven to ensure that our clients receive the best representation in such cases. If you require assistance in any Family Law matter, please feel free to contact us on 02 9222 8000.

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²⁶ Ibid [164] (Halligan J).

²⁷ Ibid [165] (Halligan J).

²⁸ Ibid [197] (Halligan J).

²⁹ Ibid [219] (Halligan J).

³⁰ Ibid [270] (Halligan J).

³¹ Ibid [275] (Halligan J).

³² Ibid [274] (Halligan J).