Family Violence And Decisions About Children

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Defining Family Violence

The Family Law Act 1975 (Cth) s 4AB defines family violence as “violent, threatening or other behaviour by a person that coerces or controls a member of the person’s family (the family member), or causes the family member to be fearful.” Family violence is not limited to physical abuse and may also include psychological, economic, sexual, and social abuse. Examples of behaviour that fall within the definition of family violence include:

- Assault
- Sexually abusive behaviour
- Stalking
- Repeated derogatory taunts
- Intentionally damaging or destroying property
- Preventing the family member from keeping connections with family, friends or culture, and more.

Presumption of Equal Shared Parental Responsibility and Family Violence

When making decisions about children in the family court system, the paramount consideration is the child’s best interests. There is a presumption that it is in the best interests of the child for the parents to have equal shared parental responsibility until the child reaches 18 years of age. Note that parental responsibility does not relate to the time spent with the child, but rather relates to all the duties, powers, responsibilities and authority which, by law, parents have in relation to children. Parental responsibility allows parents to make major long-term decisions about their children. For example, parents with parental responsibility can make decisions about a child’s education, religious and cultural upbringing, health, name and living arrangements.

However, section 61DA(2) of the Family Law Act states that the presumption of equal shared parental responsibility does not apply in cases of child abuse or family violence. In these cases, the Court can make an order for sole parental responsibility whereby only one parent has the power to make long-term decisions about the child. Yet not all instances of family violence or child abuse will prevent parents from making decisions about their children. In Hutley & Hutley [2012] FamCA 679, the Court held that the father had engaged in family violence and therefore the presumption did not apply. Notwithstanding, an order for sole parental responsibility in favour of the mother would have exacerbated conflict. Given the parents had demonstrated an ability to communicate constructively and negotiate arrangements amicably, the Court held that the child’s best interests were best served by an order of equal shared parental responsibility. This decision was made separately to the question of who the child should spend time with. It is noted that the Court held the child should live primarily with the mother and spend substantial and significant time with the father.