

The Intersection of Family Law and Family Violence Proceedings in Tasmania

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DEFINITIONS:

Family Violence – Section 7 *Family Violence Act 2004 (Tas)*

7. Family violence

(1) In this Act –

family violence means –

(a) any of the following types of conduct committed by a person, **directly or indirectly**, against that person's **spouse or partner**:

- (i) assault, including (but not limited to) sexual assault, indecent assault and aggravated assault;
- (ii) threats, coercion, intimidation or verbal abuse;
- (iii) abduction;
- (iv) stalking and bullying within the meaning of section 192 of the Criminal Code ;
- (v) rape;
- (vi) wounding or bodily harm, including grievous bodily harm and committing an unlawful act intended to cause bodily harm;
- (vii) penetrative sexual abuse of a child, a young person or a person with a mental impairment;
- (viii) any other conduct that causes personal injury;
- (ix) attempting or threatening to commit conduct referred to in subparagraph (i) , (ii) , (iii)
- (iv) , (v) , (vi) , (vii) or (viii) ; or

(b) any of the following:

- (i) economic abuse;
- (ii) emotional abuse or intimidation;

- (iii) contravening an external family violence order, an interim FVO, an FVO or a PFVO; or
 - (c) any damage caused by a person, directly or indirectly, to any property –
 - (i) jointly owned by that person and his or her spouse or partner; or
 - (ii) owned by that person's spouse or partner; or
 - (iii) owned by an affected child; or
 - (d) any conduct committed by a person that causes **the death or neglect of**, or injury to, an animal that, directly or indirectly –
 - (i) intimidates, coerces or controls the person's spouse or partner; or
 - (ii) causes mental harm to, or apprehension or fear in, the person's spouse or partner; or
 - (e) any threats made by a person regarding the potential death or neglect of, or injury to, an animal that, directly or indirectly –
 - (i) intimidates, coerces or controls the person's spouse or partner; or
 - (ii) causes mental harm to, or apprehension or fear in, the person's spouse or partner; or
 - (f) any conduct referred to in paragraph (d) or threats referred to in paragraph (e) by a person that **the person knows, or reasonably ought to know**, is likely to, directly or indirectly –
 - (i) intimidate, coerce or control the person's spouse or partner; or
 - (ii) cause mental harm to, or apprehension or fear in, the person's spouse or partner.
- (2) For the purposes of subsection (1)(d) , (e) or (f) , it is irrelevant whether the animal referred to in the relevant paragraph –
- (a) is owned by a person referred to in the paragraph or another person; or
 - (b) is domesticated or not.

Some observations about Section 7

Family Violence is limited to those actions committed **directly or indirectly** against a **spouse or partner**.

spouse or partner of a person means another person with whom the person is, or has been, in a family relationship.

family relationship means a marriage or a significant relationship within the meaning of the Relationships Act 2003 , and includes a relationship in which one or both of the parties is between the ages of 16 and 18 and would, but for that fact, be a significant relationship within the meaning of that Act;

The definition **does not include family violence committed against children** of the relationship.

This is problematic because Section 7(a) (vii) states that “penetrative sexual abuse of a child, a young person or a person with a mental impairment” is family violence. Conceivably this could only occur in cases where an adult has a significant relationship with a person under age 17 (age of consent), but of or over age 16.

Additionally, section 7(a) (viii) includes “any other conduct that causes personal injury”, personal injury can include psychiatric injury like Post Traumatic Stress Disorder, or an Adjustment Disorder.

Part 2 - Family violence offences *Family Violence Act 2004 (Tas)*

9. Emotional abuse or intimidation

- (1) A person must not pursue a course of conduct that he or she **knows, or ought to know**, is likely to have the effect of **unreasonably** controlling or intimidating, or causing mental harm, apprehension or fear in, his or her spouse or partner.

Penalty: Fine not exceeding 40 penalty units or imprisonment for a term not exceeding 2 years.

- (2) In this section –

a course of conduct includes limiting the freedom of movement of a person's spouse or partner by means of threats or intimidation.

Orr v Geason [2024] TASMC 11

Per Temporary Magistrate Wakeling at [9]-[14]:

9. The decision of Justice McDonald in *Gunes v Pearson* (1996) 89 A Crim R 297 (*'Gunes v Pearson'*) is authority for the proposition:

In order for conduct which is engaged in to be a 'course of conduct' the relevant conduct must be conduct which is protracted or which is engaged in on more than one separate occasion.

10. In *Berlyn v Brouskos* [2002] VSC 377, considering a charge of stalking pursuant to the *Crimes Act 1958* (Vic), Justice Nettle approved Justice McDonalds' decision with respect to that legislation in *Gunes v Pearson*, and observed at paragraph 22:

Section 21A would prohibit a person engaging in a pattern of conduct composed of a series of proscribed acts over a period of time, however short, and whether constituted of one or more occasion, if the acts committed evidenced a continuity of purpose and were committed with proscribed intent.

11. And at paragraph 24:

It is readily conceivable that conduct on two separate occasions may not always constitute a pattern of conduct evidencing a continuity of purpose and it is unlikely that conduct on only one occasion could constitute a pattern of conduct evidencing a continuity of purpose, unless the conduct were protracted. In order to constitute a pattern of conduct there must be something more.

12. And at paragraph 25:

Something additional about the conduct or the surrounding circumstances will need to be shown before it can be said of the conduct that it amounts to a pattern of conduct evidencing a continuity of purpose.

13. The acts comprising the 'course of conduct' pursued are not required to be alike. It is the purpose with which the acts are undertaken which must be continuous. Unlike Section 21A of the *Crimes Act 1958* (Vic), Section 9 of the *Family Violence Act 2004* does not refer to or characterise the particular acts which might contribute to a course of conduct. What is required is that from the proven series of events or protracted event, 'a pattern of conduct evidencing a continuity of purpose' emerges.
14. The determination of the mental element of the offence is to be made by reference to all of the admissible evidence and requires that the court is satisfied (beyond reasonable doubt) that **the accused, at the time of 'pursuing' the course of conduct, either in fact knew, or in all of the circumstances (including those personal to him) ought to have known, the likely effect that it would have upon the complainant in all the circumstances of the complainant (including those personal to her).**

FAMILY LAW ACT 1975 - SECT 4AB

Definition of family violence etc.

- (1) For the purposes of this Act, family violence means 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**.
- (2) Examples of behaviour that may constitute family violence include (but are not limited to):
 - (a) an assault; or
 - (b) a sexual assault or other sexually abusive behaviour; or
 - (c) stalking; or
 - (d) repeated derogatory taunts; or
 - (e) intentionally damaging or destroying property; or
 - (f) intentionally causing death or injury to an animal; or
 - (g) economic or financial abuse; or
 - (i) preventing the family member from making or keeping connections with his or her family, friends or culture; or
 - (j) unlawfully depriving the family member, or any member of the family member's family, of his or her liberty....
- (3) For the purposes of this Act, **a child is exposed to family violence if the child sees or hears family violence or otherwise experiences the effects of family violence.**

Comments on Section 4AB

A greater class of persons and acts constitute family violence in family law proceedings.

Note the greater breadth of conduct that is covered by the Family Law Act.

Pickford & Pickford [2024] FedCFamC1A 249

Per Carew and Aldridge JJ at [48]-[53]:

48. When determining an allegation that a person has engaged in behaviour that coerces or controls a family member, a trial judge will undertake a forensic examination of all relevant evidence to:
- (a) identify the behaviour about which complaint is made;
 - (b) identify the full context of the behaviour including any explanation that may be given by the alleged perpetrator;
 - (c) identify the impact of the behaviour on the alleged victim (mere assertion by the alleged victim that they feel coerced or controlled is insufficient);
 - (d) make all relevant factual findings; and
 - (e) explain why the behaviour in question is or is not family violence that coerces or controls the family member and if the alleged behaviour does not entail a course or pattern of conduct, explain how the behaviour can nevertheless be characterised as behaviour that coerces or controls, if so found.
49. Once such behaviour has been identified it is then a question of what weight is to be given to it and any impact on the orders under consideration.
50. **The definition of family violence is necessarily broad and any interpretation that may be perceived to, or actually, create unnecessary hurdles to an alleged victim proving an allegation of family violence should be avoided.** (Speaker's emphasis)
51. Whilst the key feature of coercion or control is that a person is induced (many other words are also apt here) to do as the other wishes, **the statutory focus is simply on behaviour that coerces or controls and not the intention of the perpetrator.**
52. So understood, **the finding that there is coercive or controlling behaviour is an evaluative one**, having regard to all of the circumstances and all of the evidence before the court. Whilst patterns of behaviour may be particularly illuminative, they are not essential. Importantly, for present purposes, the trial judge does not need to spend time and trouble searching for an inference that there is an intention to coerce or control. It is sufficient simply to apply the words of the statute without embellishment and assess whether there is behaviour that coerces or controls.
53. It must be recognised that, particularly in parenting matters, parents will often disagree. Matters may be seen as proper or as coercive or controlling depending on the circumstances. For example, a proposal that a child be seen by a particular doctor, that changeovers take place in a particular manner or that a certain person not be alone with the children are all capable of being seen as both reasonable and

proper parenting proposals or may also be examples of coercive or controlling behaviour.

JUSTICES RULES 2003 (Tas)
- REG 54O

Defended applications

A respondent to an application who wishes to oppose the application must –

- (a) **as soon as practicable and before the return date of the application, file with the clerk an affidavit** setting out the grounds of his or her **opposition**; and
- (b) cause the affidavit to be served personally on all the other parties to the application as soon as practicable after filing it; and
- (c) after it has been served –
 - (i) endorse a copy of the application with a memorandum stating the day, place and mode of service; and
 - (ii) cause the person who served the affidavit to sign the memorandum; and
 - (iii) as soon as practicable, cause the endorsed copy to be lodged with the clerk for the district in which it is returnable.

JUSTICES RULES 2003
- REG 54P

Hearing of applications

- (1) At the hearing of an application under this Part, evidence may be given by affidavit.
- (2) **A person who makes an affidavit for the purposes of subrule (1) is not required to attend the hearing of the application unless a party to the proceedings, or the justice, so requires.**
- (3) **By notice in writing** given to the person who made an affidavit for the purposes of subrule (1) , a party to the proceedings may require that the person **attend the hearing for cross-examination** and, if the person fails to attend, the court may –

- (a) refuse to allow the affidavit to be used; or
 - (b) allow the affidavit to be used on any conditions the court thinks fit; or
 - (c) adjourn the proceedings until the person attends for cross-examination.
- (4) **Notice** under subrule (3) is to be given **not less than 10 clear working days** before the proceedings.