***Saska & Radavich* [2016] FamCAFC 179 (1 September 2016) – Full Court of the Family Court of Australia**

'Definition of family violence in section 4ab' – 'Key statutory provisions in the family law act' – 'Meaning of 'family violence'' – 'Mother a family member by operation of section 4(1ab)' – 'Parenting orders' – 'Presumption of equal shared parental responsibility' – 'Section 61da' – 'Whether mother a member of the family of the father within the meaning of section 4ab'

Proceedings: Appeal - parenting orders.

Facts: The trial judge made final parenting orders which included an order that the mother have sole parental responsibility for the child of the mother and the father. In making these orders, the trial judge found that the father's behaviour towards the mother amounted to 'family violence' within the meaning of s 4AB of the *Family Law Act*. As a result of this family violence, the presumption of equal shared parental responsibility for the child in s 61DA of the Act did not apply: s 61DA(1). Further, even if the presumption had applied, the trial judge held that it would still not have been in the best interests of the child for the parents to have equal shared parental responsibility: s 61DA(4). The father appealed against these orders.

Issue/s: Some of the grounds of appeal included –

- The trial judge erred in finding that the father's behaviour towards the mother constituted family violence within the meaning of s 4AB(1) because the mother was not 'a member of the [father's] family' as defined in s 4(1AB). Accordingly, the trial judge erred in finding that the presumption of equal shared parental responsibility was rebutted because the father had not engaged in family violence: s 61DA(2)(b).
- The trial judge erred in finding in the alternative that the presumption was rebutted because equal shared parental responsibility was not in the best interests of the child: s 61DA(4).

Reasoning/Decision: The appeal was dismissed. The Full Court held that the father's appeal was always doomed to fail because it rested on a misconceived interpretation of s 4(1AB) of the Act. Relevant to the proceedings, the combined effect of s 4(1AB)(e) and s 4(1AC) was that the child was a member of the father's and a member of the mother's family. It was never in issue in the proceedings that the mother resided with the child at the material times, the child being a member of the father's family. Thus, by operation of subparagraph (h) of s 4(1AB), the mother was a member of the father's family. Further, within the meaning of subparagraph (i) of s 4(1AB) each of the mother and the father, respectively and alternatively, 'is or has been a member of the family of a child of [the other]'. Accordingly, the father had engaged in family violence against 'a member of his family' (see [17]-[24]).

The father's contention that the trial judge erred in rebutting the presumption of equal shared parental responsibility because the father had committed family violence was therefore dismissed. As demonstrated above, the contention that there was no family violence in this case because the mother was not a member of the father's family was based on an erroneous reading of the Act.

Additionally, while the trial judge was correct to apply s 61DA(2) and conclude that the presumption did not apply, it was also well within her discretion to conclude that even if the presumption had applied, it would have been rebutted in the child's best interests: s 61DA(4).

The father also argued that the mother wasn't fearful, and so the finding of family violence was erroneous. For this argument to be effective, the words of s 4AB(1) would need to be read conjunctively, not disjunctively, as the section is worded. The family member being 'fearful' is one possible manifestation of family violence, but is not necessary to make a finding of family violence.