# Case note: when there is family violence in a family law litigation

## The history of family violence

Victoria Legal Aid (VLA) first assisted a mother when she was living in a location unknown to her former partner, having found the courage to leave him after several attempts, and having endured almost fifteen years of family violence.

The definition of family violence in law is broad and encompasses physical, emotional, psychological and economic abuse. During the marriage the mother had suffered all of these. Her then husband had pulled her by the hair so as to ‘not leave a mark’. She had suffered a mental health condition as a result of unrelenting family violence. He had threatened to use this information against her, by claiming she was ‘crazy’ if she ever left and attempted to take the children from the relationship with her.

This threat wasn’t the only barrier to her leaving. The father controlled all of the family’s finances and she didn’t have an ATM card or know their bank account details.

With the support of her family, the mother found the courage to leave her husband. Initially she stayed with family, but both she and her family members quickly had to move due to the father knowing their location and making threats to kill.

The mother obtained a family violence intervention order but was so intimidated by her ex-husband that she agreed to a condition allowing contact in relation to children’s arrangements only. He used the ability to contact her about spending time with the children as an opportunity to bombard her with abusive text messages.

## The family law proceedings

Initially, the mother sought advice from VLA on how the children could safely spend time with their father, which was permitted under the family violence intervention order.

It was clear, though, that the children, if they were to have an ongoing relationship with their father, would be at ongoing risk of family violence. The children had been deeply traumatised by the violence they had witnessed their father perpetrate against their mother. The older children suffered nightmares and were highly anxious. One of the children, who was school age and long had been toilet trained, started soiling themselves.

The father initiated family law proceedings seeking to spend regular time with the children, after the mother refused a request to spend time with the children. In his court material, the father followed through on his threats to the mother during their marriage by painting her as a mother who was alienating the children from him and was mentally unwell.

## Safety planning during the family law proceedings

For the mother and the children’s safety it was important that their location remained secret during the proceedings. The father pointed to the mother’s desire to keep her location undisclosed as evidence of her alienating the children from him, rather than an attempt by her to act protectively.

When the father issued subpoenas, this raised the issue of the subpoenaed material potentially containing information that would reveal the mother and the children’s whereabouts. The subpoenas were objected to on that basis of that risk.

The Court made orders that the father’s solicitor could view the subpoenaed material. These orders kept the mother and the children safe until the father’s solicitor withdrew and he became a self-represented litigant. The father’s status as a self-represented litigant posed a whole new risk to the mother and children’s safety.

As a self-represented litigant, the father had a right to procedural fairness, which meant a right to view the subpoenaed material. Urgent orders were sought allowing the mother’s lawyers to redact the subpoenaed material of any details which could lead to her and the children being located. The Judge was cognisant of the seriousness of the safety risk and granted such orders. Prior to the granting of those orders, the mother’s lawyers alerted the Registry when the father’s lawyer ceased to act for him, and a stop gap order was made in Chambers to deny the father access to the subpoenaed material, until the mother’s application could be dealt with.

The complex safety plan for each court event demonstrated the level of risk to the mother. She could not take the same route to or from court for fear of being followed from the court and her whereabouts being discovered.

## The ongoing impact of the family violence

With each court event in the family law proceedings, the mother was re-traumatised by the violence she had endured.

This was exacerbated by interim family law orders permitting the father to spend supervised time with the children. During one visit, the father took an opportunity to tell one of the children that their mother had been lying to the court and that the children would soon live with him. This was extremely traumatic for both the child and the mother. The children’s anxiety surrounding the visits was high and then worsened, which in turn impacted on the mother’s anxiety and ability to cope with the situation.

The impact of the trauma affected her so deeply that she suffered panic attacks and had to be hospitalised when going through, the seemingly simple process, of providing instructions to her VLA lawyer.

## Preparing for final hearing and the risk of direct cross examination

In advance of the last court mention before the final hearing, the mother’s lawyer had prepared for two possible outcomes: either the father would attend court or he would not.

If he attended court in preparation for the final hearing, the *Family Law Act (1975)* (‘the Act’) provided the mother with little protection. As a result, there was a very real prospect that she could be directly cross examined by the person who had perpetrated family violence against her for almost fifteen years.

This is in contrast to the protections provided to victims in the state family violence jurisdiction. The *Family Violence Protection Act (2008)* provides victims of family violence a number of supports and protections in contested family violence intervention order proceedings. For example, alleged perpetrators of violence are not permitted to directly cross examine their victims, victims can give their evidence via video link, and can rely on evidence given by way of affidavit.

Each of these protections were utilised when, part way through the family law proceedings, the mother’s family violence intervention order neared its expiry date. She was seeking an extension of the family violence intervention order.

The father refused to consent to the extension even though the mother had filed extensive affidavit material in the family law proceedings detailing the substantial and significant family violence she had suffered both during the marriage and post separation including a charge for breach of the family violence intervention to which the father had pleaded guilty.

An affidavit of the mother’s evidence was filed and was relied upon in the contested hearing to minimise the amount of time she would have to spend giving evidence. Further, the mother was able to rely on the provisions preventing a self-represented respondent from directly cross examining an applicant.

Back in the family law proceedings, the mother was faced with the trauma of having to give evidence in court and be directly cross examined by the father at final hearing.

The mother’s lawyer sought to use the measures, albeit limited, available to the mother under the Act to limit (not prevent) how the father could cross examine her.

## Final orders

Ultimately, the father did not attend court and so the court granted leave for the mother to proceed undefended. Final orders were made granting her sole parental responsibility and that the father spend no time and not communicate with the children. These orders were supported by the family report, a psychiatric assessment and the findings made in the State family violence jurisdiction.

## Tips on protecting the safety of family violence victims during family law litigation

### Subpoenas

To protect against release of subpoenaed information that may disclose the whereabouts of victims of family violence to the perpetrator, then from the outset of your case be proactive in applying to court for orders that:

#### Where the perpetrator is legally represented

1. All material produced in response to any subpoena issued in this matter be released to the legal representatives of the parties only, save that the lawyer for the [father] not reveal any information or details concerning the [mother’s] or the children’s current whereabouts, including school, home address, telephone numbers to the [father].

#### Where the perpetrator is self-represented

1. All material produced in response to any subpoena issued in this matter:
2. Be released at first instance to the [mother’s] lawyer [and ICL] only.
3. Within seven days of release, the [mother’s] lawyer have leave to view and redact any information or details contained therein concerning the [mother’s] or the children’s whereabouts, including but not limited to schools, home address and telephone numbers.
4. Be released to the [father] for viewing only eight days after the filing of an appropriate Notice of Request to Inspect Subpoena

Ensure your affidavit in support of these orders contains sufficient evidence of the risk of harm posed by the perpetrator to your client.

If the perpetrator begins as legally represented but subsequently during the litigation becomes self-represented, then upon notification of his lawyer ceasing to act:

1. File an urgent application in a case seeking orders that:
2. The lawyer for the [mother] have leave to review all subpoenaed material released in this matter to date, and to redact all information or details contained therein concerning the [mother] or the children’s current whereabouts, including but not limited to schools, home address and telephone numbers.
3. Any material produced in response to any future subpoenas to be issued in this matter shall be released at first instance to the [mother’s] lawyer [and the ICL] only.
4. Within seven days of release of any such subpoenaed material, the [mother’s] lawyer have leave to view and redact any information or details contained therein concerning the [mother] or the children’s whereabouts as referred to in paragraph (a) above.
5. Any future subpoenaed material produced after the date of this Order shall be released to the [father] for viewing only eight days after the filing of an appropriate Notice of Request to Inspect subpoena.
6. Write urgently to the judge (CC the subpoena clerk) seeking a stop gap restriction on the SRL viewing subpoenaed material pending the hearing of your urgent application in a case.

### Expert reports

If you intend filing a report from any counsellor/psychologist/psychiatrist your client and/or the children are consulting for help, then be alert that the expert’s affidavit does not reveal information that inadvertently assists the perpetrator to identify your client’s whereabouts. This may include the very name and address details of the expert him/herself.

Where this is such a concern, then before filing their affidavit, first apply to court on an application in a case, seeking permission to only file a redacted version, devoid of any details that may lead the other party to your client’s whereabouts. Again, ensure your supporting affidavit contains sufficient evidence of the dangers posed by the perpetrator to your client to justify such a measure.

### Final hearing

The Act includes provisions you can utilise to help minimise the likelihood of your client coming face to face with the other party at the final hearing:

1. Division 2 of Part XI of the Act contains useful provisions about the use of video link, audio link or other appropriate means to give testimony, make appearances and give submissions etc. For example:
* Section 102C can be used to seek that your client give evidence or be cross examined by video link, audio link or other appropriate means.
* Section 102D can be used to seek that your client appear before the court by way of video link, audio link or other appropriate means.
1. Division 12A of Part VII of the Act also includes helpful provisions specifically about the conduct of child related proceedings. In particular:
* Section 69XY(1) empowers the court to control the matters in relation to which the parties are to present evidence and how particular evidence is to be given.
* Section 69XY(2) empowers the court to give directions or make orders limiting, or not allowing, cross examination of a particular witness

Be imaginative in framing orders, based on the above provisions, in an attempt to limit the trauma to a client from cross examination by the self-represented litigant.