



Legal Response Guide

Family violence can affect all aspects of a client's family law case. In some situations, you may also want to make your client aware of legal options outside of family law. This section reviews some of the main options¹¹ that you can explore with your client, as well as additional factors for you and your client to consider. When discussing options, be sure to provide realistic expectations to your client, as you may not be successful in attaining the measures sought to increase their safety and well-being.

Tip: Do not take any action in response to your client's disclosures about being a victim of family violence without their express consent unless you have a legal, professional or ethical obligation to do so. If you have such an obligation, before taking any action make every effort to explain to your client why you are doing so and the result you hope to achieve.

Remember: even though a client may make a disclosure of family violence, this does not necessarily mean that they want to raise the issue in court and related documents.

Remember that this toolkit focuses on representing victims of family violence. Therefore, detailed guidance on representing an alleged abuser is beyond its scope. However, the following document contains some information that may be helpful to you: [Tab #4: Representing a Client Who May Have Engaged in Family Violence](#) and [Tab #13: When Your Family Law Client Is Accused of Family Violence and There Are Concurrent Criminal Proceedings.](#)

LR.1 Dealing with family violence in the family law case

When considering legal responses, it is important to be mindful of how family violence may be impacting your client's ability to participate in discussions and proceedings and to give instructions. For example, your client may be suffering from trauma or fearful of the ex-partner. They may also be anxious to settle things as quickly as possible even if that means agreeing to outcomes that are not in their interests or in the best interests of their children.

LR.1.1 Interim arrangements

When your client discloses that they have been a victim of family violence, you may need to discuss interim arrangements. Talk with your client about where they will live, how they will cover expenses, how they will manage childcare, etc. This information may have an impact on the need to apply for interim orders for child support or a protection or restraining order. For example:

- ▶ Do they wish to stay in the family home or will they live elsewhere, for example with family, friends, an emergency shelter or a transition home, on a temporary basis?
- ▶ Is communication with the ex-partner safe for the client and children?

LR.1.2 Parenting arrangements

The *Divorce Act* states that in determining parenting arrangements for children, judges must take into account the impact of any family violence and give primary consideration to the child's physical, emotional and psychological safety, security and well-being. Similar provisions can be found in many provincial and territorial statutes.

Both IPV and children's exposure to IPV are highly relevant to parenting arrangements. For example:

- ▶ Research indicates that people who engage in IPV are significantly more likely to abuse their children.
- ▶ IPV often continues after separation. Physical abuse, psychological abuse, stalking and harassment continue at significant rates after separation, and may increase in both frequency and severity.
- ▶ In extreme cases, violence following separation is lethal, including for children. Separation increases the risk of intimate partner homicide as well as that of retaliating filicide (killing of a child by a parent to cause harm and suffering to the other parent) and familicide (killing multiple members of the family).
- ▶ Promoting contact between children and an abusive parent may create opportunities for ongoing or new IPV through arrangements for decision-making, parenting time and transfers of children.

- ▶ An ex-partner may pursue parenting responsibilities as a means of maintaining power over a former partner. Similarly, they may use family dispute resolution (FDR)ⁱⁱⁱ or litigation as a form of ongoing control, harassment or punishment.

Many persons who have engaged in IPV parent their children differently than other parents.¹² For instance, patterns of behaviour that are typically associated with IPV, such as manipulation, coercion, control, domination, surveillance, and excessive physical punishment can often be reflected in parenting practices. These parenting practices can first appear following separation or become more apparent because the protective parent is not around, and can cause the children harm.¹³

On the other hand, not every parent who has engaged in IPV will adopt negative parenting behaviours. Despite the IPV, the abusive parent may be an important person to the children and may offer them a beneficial relationship. Some abusive parents will choose to no longer engage in IPV and will try to reduce conflict with the other parent to focus on the children's needs and well-being.

The impacts of family violence on the best interests of a child must be carefully considered for both short- and long-term parenting arrangements. Parenting arrangements need to take into account the effects on the child of past and current family violence as well as the risk to all family members of future harm. This does not necessarily mean that children cannot have a relationship with an abusive parent; it does mean that the arrangement should minimize ongoing risk of harm to both the children and other family members.

Parenting arrangements requiring significant cooperation between the parents may not be safe where family violence is involved. This is especially true in cases of coercive controlling violence. For the safety and well-being of both the child and the victim, it may be appropriate for the non-abusive parent to have primary responsibility for caring and making decisions for the child, to minimize the negative impact of the abuser's control of the client and the child. In very serious cases of family violence, it may not be in the best interests of the child to spend any time with or have any contact with the abuser.

It is important to let your client know, however, that even when there is a history of abuse or violence, the courts may determine for various reasons that making an order for children to spend time with both parents is in the best interests of the child. This may be because the court finds that there is insufficient evidence of the abuse. This may also be the case when the abusive parent is actively involved in the child's life. Discuss potential options that could help to enhance safety. This can include transfers or parenting time in a public location, pick-ups at a day care centre or school rather than at home, or the supervision of parenting time.

ⁱⁱⁱ The term "family dispute resolution" is used in the *Divorce Act* to describe out-of-court processes used by parties to attempt to resolve matters in a family law dispute, including negotiation, mediation and collaborative law.

Children's Views

The best interests of the child test in Section 16(3)(e) of the *Divorce Act* provides that courts must consider children's views and preferences, giving due weight to their age and maturity, unless those views cannot be ascertained. Similarly, provincial and territorial family law statutes in most jurisdictions provide that the views of children must be considered as a factor in determining what is in the best interests of the child.

Parents often do not realize the extent to which their children are exposed to family violence. Therefore, to accurately assess the extent and impact of the family violence, it may be important to obtain information from the children themselves. There are different ways to do this, such as directly with the assistance of counsel who represents the child, a voice of the child report, or a parenting assessment.

In cases involving family violence, if an assessment is ordered, it is important that the professional preparing the assessment have expertise and training in family violence, trauma and risk assessment. They must be able to provide details about the impact of exposure to family violence on the children and connect those impacts to the best interests of the child. Legal advisers who represent children also need specialized knowledge and skills to safely and effectively talk to them about family violence. For more information on working with a child client who has experienced or is at risk of experiencing family violence, see [Tab #14: Talking to a Child Client about Family Violence](#).

Additional considerations for parenting arrangements:¹⁴

- ▶ Clear and detailed parenting arrangements are important. Provisions that lack clarity can provide opportunities for further abuse, particularly by those trying to maintain control over an ex-partner; they can cause confusion and conflict and could result in additional family violence.
- ▶ You may want to consider requesting additional clauses to increase children's safety, such as a non-removal clause (i.e., prohibiting the child's removal from a specific geographic area) and clauses that address issues such as access to information about the child and who will hold important documents, like the child's passport. These additional clauses may be particularly important in cases where there is a flight risk and the ex-partner and children have dual citizenship or nationality.
- ▶ It is important that your client understand that if a parent denies parenting time or appears to be interfering with the child's relationship with another parent, the court will take this very seriously. If the client believes the child is being harmed or is at risk of being harmed during time with the other parent, consider seeking an original or variation order. Avoid encouraging denial of parenting time unless the child is clearly in danger (in which case, the client may want to alert child protection authorities or police, or apply for an emergency protection order).

- ▶ Your client should be aware that abusive ex-partners sometimes claim that they are being unjustly “alienated” from their child. This claim can be used to attempt to deflect allegations of violence and explain why their children feel unsafe around them, or to harass or control their ex-partner. See [Tab #15: Rejection of a Parent by a Child](#).

For more information about parenting arrangements in cases of family violence, you may wish to consult the Department of Justice Canada’s online course on 1) family violence and family law: <http://www.justice.gc.ca/eng/fl-df/cfl-mdf/trai-form/index.html> and 2) parenting under the *Divorce Act*: <http://www.justice.gc.ca/eng/fl-df/cfl-mdf/trai-form/index.html>.

LR.1.3 Protection/restraining orders

Depending on your province or territory, civil protection/restraining orders can be sought under family law or family violence legislation. The remedies available under these orders generally include:

- ▶ emergency protection orders granting the victim temporary exclusive occupation of the home;
- ▶ no-contact/no-communication orders;
- ▶ temporary possession of personal property (including family vehicles or credit cards);
- ▶ temporary care of the children;
- ▶ interim support orders; and
- ▶ specific prohibitions against selling, converting, or damaging property.

Protection orders are also available under the federal *Family Homes on Reserves and Matrimonial Interests or Rights Act*. An Emergency Protection Order allows a designated judge^{iv} to order that a spouse or common-law ex-partner be excluded from the family home on reserve on an urgent basis for up to 90 days in situations of family violence.^v

Your client does not have to have experienced physical violence nor do they have to wait until the violence or the abuse has escalated before applying for a protection/restraining order. However, different statutes have different legal tests, so it is important to familiarize yourself with situations in which a protection order can be made. There are also different rules about whether someone else (e.g. police, victim services) can apply on a victim’s behalf.

^{iv} As of October 2020, Nova Scotia, New Brunswick and Prince Edward Island have authorized persons to act as “designated judges” for the purposes of the *Family Homes on Reserves and Matrimonial Interests or Rights Act*.

^v This period may be extended under s 17 of the Act.

Some factors to consider with protection/restraining order:

- ▶ Can an application be made *ex parte*? For many victims, a without notice application or short-leave application is necessary to keep them safe. However, ensure your client is aware that even when these applications are made *ex parte*, the other party will receive their materials and have an opportunity to respond.
- ▶ If your client is currently living in a safe place, such as a shelter, it may be necessary to provide evidence about why there is still a need for a protection order. For example, you may outline that the shelter will only allow the client to stay for a brief period and that the client will have to leave the shelter to shop, take their children to school, attend appointments, etc.
- ▶ While protection/restraining orders are civil matters, a breach can result in charges for a provincial/territorial or criminal offence, depending on the jurisdiction. Penalties can include both fines and imprisonment. As a result, a protection order generally requires strong evidence to support a claim.
- ▶ Have a discussion with your client about related issues, such as the potential for retaliation, the other party's likelihood of complying with the provisions, and how an order would be enforced.

LR.1.4 Exclusive possession of the family home

Many clients you work with will already have left the family home. You may nonetheless wish to explore with your client whether they wish to seek an interim order for exclusive possession of the family home. It may also be possible to obtain an order for exclusive possession of certain property such as the family vehicle.

An order for exclusive possession does not, on its own, provide the same protections as a protection order/restraining order. For example, an interim order for exclusive possession is unlikely to increase your client's safety if they have concerns about the ex-partner knowing where they live, or harassing (including stalking) them near the family home. There are also financial commitments associated with remaining in the home, which can be an important consideration for your client.

Matrimonial real property on reserves has special considerations.¹⁵

The federal *Family Homes on Reserves and Matrimonial Interests or Rights Act* sets out provisional rules for the division of family property held on First Nations reserves, which apply until a First Nation enacts its own legislation. The Act applies to married or common-law couples living on-reserve, where at least one partner is a First Nation member or Status Indian. Rights and interests vary depending on whether the spouses are First Nations members, and the extent to which the spouses provide care to First Nations members, including children and Elders.

LR.1.5 Child support and spousal support

Being economically secure is key to safety for victims and their children; a lack of financial independence is one reason that a victim may stay with or return to an abuser. Victims of violence, however, may be reluctant to pursue support to which they are entitled.

You will want to help your client understand that children have a right to have financial support from their parents, and you may want to explore whether spousal support would likely be awarded in their case. You may also want to encourage them to find out about government benefits that may be available to them.

LR.1.6 Preservation orders

Preservation orders can provide protection to your client if they are concerned that the abuser will dispose of family property upon separation. Interim orders may be requested to prevent the distribution of property by the other party. This may be a particularly important remedy if the ex-partner has already engaged in financial abuse.

LR.1.7 Other orders

Depending on your province or territory, there may be other types of orders available. For example, conduct orders are available in some jurisdictions and can be used to restrict communication from one or more parties, require parties to attend counselling, prevent the misuse of court processes and require a party to pay for debts or services for the family home.

LR.2 Other considerations for the family law file

As with all family law cases, in cases involving family violence you will need to determine whether your client wants to resolve matters through family dispute resolution (FDR) or through litigation. As you discuss available options with your client, it will be important to help them assess the potential safety risks of both processes and potential outcomes.

LR.2.1 Family dispute resolution

The family justice system strongly encourages out of court FDR processes, such as mediation, collaborative law and negotiation, to promote settlement. This is reflected in the *Divorce Act* as well as provincial/territorial legislation.

While every situation involving family violence needs to be assessed individually, FDR may not be appropriate when there are vulnerabilities that would prevent genuine, respectful and voluntary negotiations. Abusive ex-partners may use FDR as an opportunity to threaten or control their ex-partners. Intimidation and control tactics may make the client feel pressure to settle the case quickly without consideration for long-term implications. Participants need to feel physically and emotionally safe for the process to be fair and effective.

On the other hand, FDR may have benefits in cases involving family violence:¹⁶

- ▶ Some FDR professionals are well trained in family violence and have expertise in addressing power imbalances through the FDR process and promoting safety.
- ▶ FDR can be structured in a way that prevents direct contact between the parties, for example through the use of shuttle mediation in which the parties are in separate rooms and the mediator travels back and forth between them.
- ▶ FDR can be faster, which can be good for all involved, especially the children, where there is family violence.
- ▶ In certain situations, an FDR process can help the victim feel more empowered than in a court process. If the victim feels comfortable and safe, it can be a positive experience.
- ▶ Some victims report that their ex-partners follow a mediated resolution because they feel as though they played a role in creating it, whereas some abusers' refusal to follow court orders may be, in part, because they don't want to do what someone else tells them.

In determining whether a particular FDR process is appropriate in your client's case, you should consider some practical matters. For example:

- ▶ Does your client feel able to express themselves freely and fully, and to assert their views? Are they fearful of or intimidated by the other party? Are they trying to get through the process faster to be free from the other party's control?
- ▶ Does the FDR professional have the training and skills necessary to facilitate a settlement in a case involving family violence?

- ▶ Will it be possible to make arrangements such as having parties in separate rooms or conducting FDR remotely, by either phone or video?
- ▶ Will the victim be able to bring a support person or family violence advocate with them if they want to?

For more information about family dispute resolution in cases of family violence, you may wish to consult the Department of Justice Canada's online course on Family Violence and Family Law for Legal Advisers and the online course on Family Dispute Resolution and Duties for Parties and Legal Advisers under the New *Divorce Act*: <http://www.justice.gc.ca/eng/fl-df/cfl-mdf/trai-form/index.html>.

LR.2.2 Litigation abuse

Some abusers, particularly those who engage in coercive controlling violence, may use the family law process – whether that is the court process or FDR – as a way to control and harass their ex-partner. This is sometimes referred to as legal bullying or litigation abuse and can consist of a wide range of behaviours.

Examples of legal bullying include:

- ▶ abusers representing themselves even if they could have had a legal adviser represent them, so they can exert control over the victim;
- ▶ consulting with all the family law legal advisers in the community so the victim cannot find a legal adviser who is not in a conflict;
- ▶ engaging in stalling tactics, such as cancelling required appointments or requesting repeated postponements of court dates;
- ▶ refusing to complete court documents;
- ▶ refusing to provide complete or timely financial disclosure;
- ▶ repeatedly and unnecessarily changing legal advisers;
- ▶ initiating repeated and frivolous motions;
- ▶ providing false information in court documents;
- ▶ harassing the ex-partner at court and in the days leading up to court appearances;
- ▶ filing unmeritorious complaints about the professionals involved in the case;
- ▶ refusing to follow court orders; and
- ▶ offering to “make a deal” that they won’t fight for shared parenting time if the victim won’t testify against them in criminal court.

For more examples of litigation abuse tactics, you may wish to consult Chapter 7.4 in the CanLII e-book by Linda C. Neilson, entitled *Responding to Domestic Violence in Family Law, Civil Protection & Child Protection Cases* (Ottawa: Canadian Legal Information Institute CanLII, 2020, 2nd edition), online: CanLII <<https://canlii.ca/t/ng>>.

There are ways to curtail legal bullying, such as putting the other party on notice to try to prevent them from engaging in abusive litigation tactics. However, your client may need additional support to be able to continue with the family law case. You can assist by connecting the client to appropriate supports in the community and encouraging them to keep copies of relevant documents, emails and other records that demonstrate what the abuser is doing so those can become part of the evidence of abuse in the case.

LR.2.3 If an abuser is self-represented

Some abusers decide to represent themselves to exert control over the victim, for example, by directly cross-examining the victim in court.

It is important, at the earliest possible opportunity, to develop a plan for how to handle the self-represented individual. For example, you may want to consider:

- ▶ communicating in writing to reduce their ability to make false claims about what has been said;
- ▶ setting limits on how often or quickly you will respond to letters or email to discourage inappropriate contact, avoid running up the client's bill, and prevent the individual from calling your office or coming there in person;
- ▶ developing a plan to ensure the safety of your office staff, including being prepared to call the police if the individual engages in threatening or aggressive behaviour, either in person or over the telephone;
- ▶ involving court security so that both you and your client are safe during and while waiting for court appearances; and
- ▶ documenting all interactions with the self-represented individual in your client's file.

LR.2.4 Evidence in the family law process

Ensuring the court has clear, detailed evidence of family violence is critical to achieving appropriate outcomes. This may be particularly true for non-physical forms of family violence, such as psychological and financial abuse, which may not be as easily understood or recognized as family violence.

Telling the story chronologically makes it easier for the court to understand patterns and escalation. The evidence should focus on the impact of the abuse on your client as well as on the children. The court should be made aware of a child's exposure to the violence, particularly if parenting arrangements are at issue. For example, stating whether the child was in the home when the violence occurred, was aware of their parent's fear, or saw the police or paramedics come to the home, can provide important linkages for the court.

Remember that it can be challenging for victims of family violence to recall the details and chronology of traumatic events. See [Tab #2: The Impacts of Trauma and Trauma- and Violence-Informed Practice](#).

Sources of evidence:

- ▶ A victim may have a recording of abusive incidents or photos of injuries.
- ▶ If the victim has spoken about the family violence with their family doctor or another health professional, a religious leader, an Indigenous healer or Elder, a child protection worker or someone in a community organization, that person may have made notes about the disclosure or be able to provide an oral account.
- ▶ If a victim has been seen at a clinical setting such as a hospital, there may be medical records that support your client's story.
- ▶ Even if the abuser has not been charged, there may be police records of 911 calls or visits to the family home. There may also be reports to child protection authorities.
- ▶ Relatives, friends and co-workers may have observed physical injuries or changes in behaviour, such as self-isolation and withdrawal.
- ▶ Neighbours may have overheard fighting, or children may have fled to the home of a neighbour during an assault.
- ▶ Teachers or daycare workers may have relevant information to share.
- ▶ Previous or subsequent partners of the abuser may be willing to talk about any abuse they have experienced.
- ▶ Text messages, emails and social media posts may all contain usable evidence of abuse.

For more sources of evidence, you may wish to consult Chapter 4.3.5 in Linda C. Neilson's CanLII e-book, entitled *Responding to Domestic Violence in Family Law, Civil Protection & Child Protection Cases* (Ottawa: Canadian Legal Information Institute, CanLII, 2020, 2nd edition), online: CanLII <<https://canlii.ca/t/ng>>.

LR.3 Criminal law responses to family violence

If you think the violence that your client has experienced may constitute a criminal offence, you can advise them of the process for reporting it to the police and the potential for criminal charges to be laid. There will likely be a number of issues your client will need to consider. For example:

- ▶ Has your client called the police in the past about their violent ex-partner? What was the response?
- ▶ Do they feel the police will increase their safety? Note that for many people, the police may be seen as a threat and not a safety provider, based on their own personal experiences or that of their community, particularly racialized and Indigenous communities. Be aware of your client's lived experiences.
- ▶ Does your client have any concerns about the repercussions on their ex-partner? For example, a victim may be reluctant to make a police report for fear that their abuser could lose their job, which may lead to them being unable to pay child support.
- ▶ Can you help your client connect with victim services in your community? Are there websites or other resources that can help them?
- ▶ Is your client at risk of facing consequences themselves, including potential child protection or immigration status repercussions or criminal charges, if they reach out to the police? In particular, recognize the history of Indigenous people's experience with the child protection system, and be sensitive to your Indigenous clients' concerns about the possible removal of their children from their community.

See [Tab #11: What Clients Need to Know about Contacting the Police.](#)

LR.4 Concurrent court proceedings

When you are dealing with a case that involves family violence, it is important that you are informed about any other legal proceedings in which the family is involved. This will help minimize confusion and avoid conflicting orders.¹⁷

Under the *Divorce Act*, in any proceeding where there is a request for a parenting order, or a child or spousal support order, courts are required to consider whether there are any current or pending civil protection, child protection or criminal proceedings or orders relating to the parties. There are similar requirements under provincial legislation in some jurisdictions.

LR.4.1 Concurrent criminal law proceedings

In general, a criminal law proceeding is separate from the family law proceeding, although some jurisdictions have processes in place to coordinate these processes.^{vi} If your family law client is involved in criminal proceedings, you will want to be aware of the timing and steps in the criminal proceeding and any orders made.

See [Tab #13: When Your Family Law Client Is Accused of Family Violence and There Are Concurrent Criminal Proceedings](#) and [Tab #16: When Your Family Law Client Is the Victim of Family Violence and There Are Concurrent Criminal Proceedings](#).

LR.4.2 Concurrent child protection proceedings

Where there are concerns about family violence, a child protection agency (CPA) may become involved with the family to prevent harm to a child. The legal basis for CPA involvement is that a child is in “need of protection” as defined in the applicable legislation. While definitions vary, all child protection statutes in Canada include emotional or psychological harm or abuse as a basis for CPA involvement, and a number of statutes explicitly include exposure to IPV.¹⁸

Approaches to responding to child protection concerns vary across Canada based on legislation, implementation practices, and resources. The most common CPA response is the voluntary provision of supportive services because the child’s caregiver(s) is often willing to work with a CPA worker to address the protection concerns.¹⁹ However, a CPA may commence a child protection proceeding when it believes that a child is in need of protection, and their caregiver(s) fail or refuse to take steps to address the protection concerns. Orders arising from a child protection proceeding may include removal of the child from their caregiver(s) and placement with another caregiver or into foster care, conditions on contact with the child, and conditions or recommendations for the caregiver(s), such as a recommendation for therapy, parent education, or other services to address the protection concerns. Under most child protection legislation, if the protection concerns are not addressed within a set time period, the child may be placed in permanent care or wardship.

^{vi} For example, there is an Integrated Domestic Violence Court in the Ontario Court of Justice in Toronto, Ontario. In certain cases of IPV, the same judge can hear both the related family and criminal cases.

A CPA may be reluctant to intervene in cases where there is an ongoing family law dispute involving parenting arrangements, particularly when the parties are before the court. However, in some jurisdictions, if CPA court proceedings are commenced, family law proceedings relating to parenting arrangements for the child are suspended until the completion of the child protection proceeding. You will need to be aware of any agreement or order reached in the child protection case in order to ensure that it is taken into account in the family law case.

It can be helpful to familiarize yourself with the child protection agencies that operate in your area and the role they play in cases involving family violence. You may also want to reach out to legal advisers who do child protection work to seek their advice on navigating these situations.