

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

AB 2391 (Cunningham)
Version: May 27, 2022
Hearing Date: June 8, 2022
Fiscal: No
Urgency: No
AWM

SUBJECT

Civil actions: vexatious litigants

DIGEST

This bill would allow a person protected by a domestic violence protective order to seek an order declaring the restrained person a vexatious litigant and imposing financial security requirements on that person when the restrained person has filed at least one meritless action against the protected person that harassed or intimidated the protected person.

EXECUTIVE SUMMARY

A growing body of academic evidence discusses the tragic phenomenon of “abuse by litigation,” wherein abusers perpetuate the abuse of their victims through the judicial system. Where the abuser and the victim were married and/or have children together, the open-ended nature of some family law matters provides a particular opportunity for the abuser to prolong their victim’s suffering by seeking numerous changes to divorce or custody matters. Although continued access to family law proceedings is necessary to protect due process, our judicial system need not tolerate being used as a tool by abusers who file meritless suits in order to continue harassing and frightening their victims.

To prevent the continued abuse of both victims and the judicial system, this bill would add to the existing vexatious litigant provisions to permit a person protected by a restraining order to have a person subject to a domestic violence restraining order deemed a vexatious litigant with respect to the protected person. Specifically, the bill provides that when a restrained person has filed one or more meritless suits that had the effect of harassing or intimidating the protected person, the protected person may file for an order requiring the abuser to furnish security or for an order dismissing the litigation for failure to do so. This bill thus does not bar abusers deemed vexatious litigants from the courts entirely, but requires, with respect to their victims, an added

level of security as protection against meritless suits intended only to perpetuate their abuse.

This bill is sponsored by the author. There is no known opposition.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Defines a “vexatious litigant,” for purposes of civil actions, as a person who does any of the following:
 - a) In the immediately preceding seven-year period has commenced, prosecuted, or maintained in propria persona¹ at least five litigations other than in a small claims court that have been (i) finally determined adversely to the person or (ii) unjustifiably permitted to remain pending at least two years without having been brought to a trial or hearing.
 - b) After a litigation has been finally determined against the person, repeatedly relitigates or attempts to relitigate, in propria persona, either (i) the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined or (ii) the cause of action, claim, controversy, or any of the issues of fact or law, determined or concluded by the final determination against the same defendant or defendants as to whom the litigation was finally determined.
 - c) In any litigation while acting in propria persona, repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay.
 - d) Has previously been declared to be a vexatious litigant by any state or federal court in any action or proceeding based upon the same or substantially similar facts, transaction, or occurrence. (Code Civ. Proc., § 391(b).)
- 2) Permits, in any litigation pending in any court of this state, at any time until a final judgment is entered, a defendant to move the court, upon notice and hearing, for an order requiring the plaintiff to furnish security or for an order dismissing the litigation. (Code Civ. Proc., § 391.1.)
 - a) The motion for an order requiring the plaintiff to furnish security must be based on the ground, and supported by a showing, that the plaintiff is a vexatious litigant and that there is no reasonable probability that they will prevail in the litigation against the moving defendant. (Code Civ. Proc., § 391.1.)

¹ A litigant appears in or maintains an action “in propria persona” – often shortened to “pro per” – when they are self-represented rather than represented by counsel.

- b) The court may order the action dismissed if the plaintiff is the subject of a prefiling requirement pursuant to 3) and, after hearing evidence on the motion, the court determines that the litigation has no merit and has been filed for the purposes of harassment or delay. (Code Civ. Proc., § 391.3.)
- 3) Authorizes a court, on its own motion or the motion of any party, to enter a prefiling order that prohibits a vexatious litigant from filing any new litigation in the courts of this state in propria persona without first obtaining leave of the presiding justice or presiding judge of the court where the litigation is proposed to be filed.
 - a) A litigant subjected to a prefiling order may file a new litigation only if the presiding justice or judge, or their designee, determines that the litigation has merit and has not been filed for the purposes of harassment or delay, and the filing may be conditioned upon the plaintiff furnishing a security for the benefit of the defendants.
 - b) A clerk may not file any litigation presented by a vexatious litigant subject to a prefiling order unless the vexatious litigant first obtains an order permitting the litigation to be filed pursuant to 3)(a). If the clerk mistakenly files the litigation without the order, any party may notify the court of the error; the filing automatically stays the action, and the action must be dismissed unless the plaintiff, within ten days, obtains the order permitting the litigation to be filed.
 - c) Disobedience of a prefiling order may be punished as a contempt of court. (Code Civ. Proc., § 391.7.)
- 4) Requires, where a security has been ordered to be furnished by a litigant and the security was not furnished as ordered, the litigation to be dismissed as to the benefit for whose benefit the security was ordered furnished. (Code Civ. Proc., § 391.4.)
- 5) Creates a procedure by which a vexatious litigant subject to a prefiling order may apply to vacate the prefiling order and remove their name from the Judicial Council of California's list of vexatious litigants subject to prefiling orders. (Code Civ. Proc., § 391.8.)
- 6) Provides, under the Domestic Violence Protection Act (DVPA) that an order may be issued after a hearing to retain a person from acts of domestic violence, abuse, and sexual abuse and to provide for a separation of the persons involved in the domestic violence for a period sufficient to enable these persons to seek a resolution of the causes of the violence. (Fam. Code, § 6300.)

This bill:

- 1) Adds to the definition of "vexatious litigant" a person who, after being restrained pursuant to a restraining order issued after a hearing pursuant to the DVPA, and while the restraining order is still in place, commenced, prosecuted, or maintained

one or more litigations against a person protected by the restraining order in this or any other court or jurisdiction that (i) is or are determined to be meritless and (ii) caused the person protected by the order to be harassed or intimidated.

- 2) Provides that a motion to require a person furnish a security or for an order dismissing the litigation on the grounds that the person is a vexatious litigant pursuant to 1) may be brought only by a person protected by the restraining order.
- 3) Provides that a person filing a motion under 2) shall not be required to pay a filing fee for the motion.

COMMENTS

1. Author's comment

According to the author:

Often times, victims of domestic abuse experience harassment and intimidation from their abusers through the court system. AB 2391 would allow a victim who has obtained a domestic violence restraining order to more easily declare their abuser as a vexatious litigant. By expanding the existing criteria to better capture the circumstances domestic violence victims experience from their abusers, this bill will help protect survivors from continued abuse through the court system.

2. This bill allows persons protected by a restraining order and the courts to take steps against abusers who use the judicial system as a tool for abuse

Domestic violence frequently evolves into a cyclic pattern of behavior that even if broken by the victim is difficult for the perpetrators to give up.² Merely ending the relationship does not protect the victim: victims of domestic violence are six times more likely to be killed by their abuser after physical separation than before.³ And even when the victim breaks off physical contact with an abuser and manages to escape further violence, abusers frequently seek to continue asserting their control using coercive tactics to limit the victim's individual liberty.⁴

Due to the relentless efforts of many perpetrators of domestic violence to inflict continued physical and mental abuse, many victims are forced to seek domestic violence restraining orders. The DVPA permits an abuse victim to seek a restraining order in order to separate the parties until additional legal remedies can be obtained to

² Przekop, *One More Battleground: Domestic Violence, Child Custody, and the Batterers' Relentless Pursuit of their Victims Through the Courts* (2011) 9 *Seattle Journal for Social Justice* 1053, 1058.

³ Campbell, *How Domestic Violence Batterers Use Custody Proceedings in Family Courts to Abuse Victims and How Can Put a Stop to It* (2017) 24 *UCLA Women's L.J.* 41, 42.

⁴ Przekop, *supra*, at p. 1058.

stop the violence.⁵ But a restraining order does not prevent an abuser from forcing the victim to interact with them through the judicial system. Litigation abuse – also known as “paper abuse” – is abuse through repeat, generally frivolous litigation filed by the abuser that perpetuates numerous horrors against the victim: the victim has to appear in court with the abuser, and take time from work, taking care of children, or their daily lives to do so; the victim has to serve papers and accept papers from the abuser, which can require the victim to disclose their address to the abuser; and the victim has to deplete their own finances to defend against the abuser’s claims.⁶

Unfortunately, proceedings in the family courts are particularly susceptible to litigation abuse. The long-term, often ongoing nature of certain marriage dissolutions and child custody cases provide abusers a legal means to force victims of domestic violence to continue to interact with their abusers. For example, if a marriage is dissolved when a child is young, changing life circumstances frequently result in the parties returning to court to relitigate custody arrangements or child support for years until the child reaches adulthood. Although the ability for a family court to revisit these issues is essential to protect the best interests of the child or children involved, the tragic side effect is that the judicial system can be, and is being, weaponized by abusers against their victims.

Indeed, legal scholars note that the family law system may be “one of the few remaining ways that [an abuser] can control a victim after separation.”⁷ By repeatedly seeking to adjudicate minor issues, abusers can force domestic violence victims to continue to confront them in court. Furthermore, for particularly vindictive abusers, the family law system can be utilized as a means of draining the financial resources of victims by requiring them to return to court time after time to litigate issues after relatively minor changes in life circumstances.⁸ “Some research has found that when victims have limited resources to pay for legal representation, they may return to their abusers at a rate of around 50 percent.”⁹ Victims’ attorneys also note that for perpetrators who have attempted to stalk their victims, court is a means of forcing contact.¹⁰ In recognition of the growing problem of litigation abuse, some states have recently adopted legislation to deter abusers from using the courts as a tool of abuse.¹¹

This bill seeks to provide victims with some protection against litigation abuse, as well as to prevent the judicial system and the resources of the courts being used for such an

⁵ See Fam. Code, div. 10, §§ 6200 et seq.

⁶ See, e.g., Klein, *How Domestic Abusers Weaponize the Courts*, The Atlantic (Jul. 18, 2019), available at <https://www.theatlantic.com/family/archive/2019/07/how-abusers-use-courts-against-their-victims/593086/> (last visited May 25, 2022).

⁷ Campbell, *supra*, at p. 53.

⁸ *Id.* at pp. 53-54.

⁹ *Id.* at p. 54.

¹⁰ Klein, *supra* (one attorney noted of her client’s abuser, “at this point he knows that the only way he’s going to see her or be able to talk to her is through the court system”).

¹¹ E.g., Wash. Rev. Code, §§ 26.51.010-26.51.901.

improper purpose. Specifically, the bill adds to the definition of “vexatious litigant” a person who is restrained by a DVPA protective order issued after hearing and who has filed at least one meritless suit against the protected person that caused the protected person to be harassed or intimidated. When a restrained person satisfies this definition, either the person protected by the order can file a motion for, or the court on its own motion can enter, an order declaring the restrained person to be a vexatious litigant and requiring the restrained person to furnish financial security for the action. Failure to comply could result in the dismissal of the action.

These provisions will function slightly differently than the existing vexatious litigant provisions insofar as only the protected person can seek an order requiring the restrained person to furnish financial security – the bill thus imposes no barrier to the restrained person pursuing litigation against third parties, but rather requires added security only when the restrained person seeks to litigate against the protected person. Moreover – as with the existing vexatious litigant scheme – the bill does not entirely prohibit a restrained person from filing a case against the protected person, but rather requires only added protection against meritless suits when the restrained person already has a history of filing meritless suits against the protected person. The bill thus balances the interests in protecting the protected person from further abuse and preventing the state’s judicial resources from being coopted to perpetuate abuse, while also protecting the due process rights of the restrained person.

SUPPORT

None known

OPPOSITION

None known

RELATED LEGISLATION

Pending legislation: None known.

Prior legislation: None known.

PRIOR VOTES:

Assembly Floor (Ayes 68, Noes 0)

Assembly Judiciary Committee (Ayes 9, Noes 0)
