

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

AB 2369 (Salas)
Version: June 9, 2022
Hearing Date: June 21, 2022
Fiscal: No
Urgency: No
AWM

SUBJECT

Domestic Violence Prevention Act: attorney's fees and costs

DIGEST

This bill modifies the fee-shifting statute under the Domestic Violence Prevention Act (DVPA) to require a court to award attorney fees and costs to a prevailing protected party and permit a court to award attorney fees and costs to a prevailing party who was sought to be restrained if the court finds the petition was brought in bad faith.

EXECUTIVE SUMMARY

As a general rule in the United States, parties in civil cases are responsible for paying their own attorney fees and costs, win or lose. This rule can be, and often is, changed by statute, however. In the context of actions relating to dissolution of marriage, custody, and orders of support arising under the Family Code, the fee-shifting provisions try to level the playing field in an area where most parties are unrepresented. To accomplish this goal, these attorney fee statutes consider the ability of each party to afford attorney fees and usually only award them if one party can afford to pay both parties' fees.

The DVPA, which protects victims of domestic violence from harassment and abuse, also falls under the Family Code, but its purpose is starkly different. A party seeking a DVPA protective order is seeking distance from their abuser, not continued cooperation with an ex-spouse or co-parent on the basis of an ongoing financial or parenting relationship. Despite these differences, the attorney fee provision for the DVPA is similar to the ones in custody and support cases: a court can award fees to a prevailing protected person only where warranted by a disparity in the parties' abilities to pay fees and the protected person cannot otherwise afford their fees.

This bill, recognizing that the considerations for other family court cases do not apply in DVPA cases, modifies the DVPA's fee-shifting statute. Specifically, the bill requires the court, after a noticed hearing, to order the respondent to pay the attorney fees and costs

of the prevailing protected party and permits a court to order the petitioner to pay the prevailing respondent's attorney fees and costs if the court finds that the petition was frivolous or brought to harass, intimidate, or delay. The court's authorization to order either type of fee and costs award is conditioned on a finding that the party to be ordered to pay can pay, or has the ability to pay, the fees and costs, which is consistent with the existing requirement for all attorney fee and cost orders under the Family Code.

This bill is sponsored by the Family Violence Appellate Project and is supported by Advocates for Child Empowerment and Safety, the California Partnership to End Domestic Violence, the Coalition of California Welfare Rights Organizations, Community Overcoming Relationship Abuse, Desert Sanctuary, Inc., Interface Children & Family Services, Jewish Family Service LA, Legislative Coalition to Prevent Child Abuse, Public Counsel, Rainbow Services. There is no known opposition.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Establishes the DVPA (Fam. Code, §§ 6200 et seq.) which sets forth procedural and substantive requirements for the issuance of a protective order to, among other things, enjoin specific acts of abuse or prohibit the abuser from coming within a specified distance of the abused person. (Fam. Code, §§ 6218, 6300 et seq.)
- 2) Permits a court to issue a short-term, ex parte domestic violence protective order enjoining a party from, among other things, molesting, attacking, striking, stalking, threatening, sexually assaulting, battering, credibly impersonating, falsely personating, harassing, telephoning, destroying personal property, contacting, coming within a specified distance of, or disturbing the peace of the other party, and, in the discretion of the court, on a showing of good cause, of other named family or household members. (Fam. Code §§ 6320 et seq.)
- 3) Permits a court, after notice and a hearing, to issue any domestic violence restraining order that could be issued ex parte. The order can last up to five years, at which point it can be renewed for successive five-year terms or permanently. (Fam. Code, § 6340.)
- 4) Permits a court, after a noticed hearing pursuant to 3), to issue an award for the payment of attorney fees and costs to the prevailing party. (Fam. Code, § 6344(a).)
- 5) Provides that, where the petitioner is the prevailing party and cannot afford to pay for attorney fees and costs, the court shall, if appropriate based on the parties' abilities to pay, order that the respondent pay the petitioner's attorney fees and costs

for commencing and maintaining the proceeding. This determination shall be based on:

- a) The respective incomes and needs of the parties; and
 - b) Any factors affecting the parties' respective abilities to pay. (Fam. Code, § 6344(b).)
- 6) Requires, if a court orders a party to pay attorney fees or costs under the Family Code, the court shall first determine that the party is or is reasonably likely to have the ability to pay. (Fam. Code, § 270.)

This bill:

- 1) Repeals the existing attorney fee statute set forth in Family Code section 6344.
- 2) Adds a new Family Code section 6344, which provides:
 - a) After notice and a hearing, a court shall issue an order for the payment of attorney fees and costs for the prevailing petitioner.
 - b) After a notice and hearing, the court may issue an order for the payment of attorney fees and costs for the prevailing respondent only if the respondent establishes by a preponderance of the evidence that the petition or request is frivolous or solely intended to abuse, intimidate, or cause unnecessary delay.
 - c) A court cannot issue an order for attorney fees and costs under 2)(a) or (b) unless it first determines that the party ordered to pay has, or is reasonably likely to have, the ability to pay.

COMMENTS

1. Author's comment

According to the author:

We must strengthen our laws to better protect domestic violence survivors and incentivize attorneys to take petitioners' cases for Domestic Violence Restraining Orders. AB 2369 changes statute to reflect the state's public policy of supporting survivors, ending abuse, and not requiring survivors to fund their abusers.

2. Attorney fee awards in general and in Family Court matters

The so-called "American Rule" – followed by California – provides that, in general, each party is responsible for their own attorney fees.¹ The American Rule is simply a default rule, however, and the Legislature has frequently authorized fee-shifting where

¹ See Code Civ. Proc., § 1021.

doing so reflects sound public policy.² The precise structure of fee-shifting statutes varies – some statutes authorize a prevailing party to recover fees as a matter of course, while others require a showing of bad faith by the opposing party. Moreover, some fee-shifting statutes operate in only one direction – generally allowing the plaintiff to recover against the defendant, but not vice versa – while some allow the prevailing party to recover regardless of whether they brought the suit or defended against it.

The Family Code similarly provides for fee-shifting in some actions, though the nature of family court cases makes fee-shifting less common. The Judicial Council estimates that up to 90 percent of family law cases involve unrepresented litigants, including contested custody cases and domestic violence cases.³ This creates multiple difficulties for family court litigants: trying to navigate the courts is generally difficult for unrepresented litigants; and when one party is represented and the other is not, there is an even greater likelihood that the unrepresented party will be disadvantaged.

Family court proceedings are also unusual in that, generally speaking, the goal is to have parties reach a resolution without a “winner” and “loser” or identifying culpable parties. This consideration, along with the concern about inequality of representation, has resulted in many family law fee-shifting statutes that look at the parties’ ability to pay and whether there is a disparity in income as well as whether a fee award is generally appropriate. All fee orders arising under the Family Code are subject to the requirement that the court, before ordering fees and costs, determine that the person subject to the order has the ability or is reasonably likely to pay the court-ordered fees and costs.⁴ In cases brought under dissolution, separation, and child custody matters, a court generally must order a fee award to one party if the court determines that there is need on behalf of one party and the other party has the ability to pay.⁵ In a child or spousal support case the court is required to award fees to the custodial parent or supported spouse in an action to enforce the other party’s obligations if the court determines that (1) an award of fees is appropriate, (2) there is a disparity in access to funds to retain counsel, and (3) one party is able to pay for legal representation for both parties.⁶

The DVPA – though it resides in the Family Code – has its own fee-shifting structure. Current law allows the court to order fees and costs for the party who petitioned for the protective order when: the petitioner is the prevailing party; the petitioner cannot afford to pay fees and costs; and the award is appropriate based on the parties’ respective

² See, e.g., Civ. Code, § 1794(e)(1) (authorizing a prevailing consumer to recover reasonable attorney fees against a manufacturer that violated an express warranty to repair goods).

³ Budget Change Proposal 0250-114-BCP-2018-GB; Judge Mark Juhas, *A Judge’s View on the Benefits of Unbundling*, California Bar Journal (July 2015) (estimated figure).

⁴ Fam. Code, § 270.

⁵ See Fam. Code, §§ 2030, 3121.

⁶ *Id.*, § 3557.

abilities to pay.⁷ In deciding whether to issue a fee and costs order, and determining the amount of such an order, the order must be based on (1) the respective incomes and needs of the parties, and (2) any factors affecting the parties' respective abilities to pay.⁸

3. This bill modifies the fee-shifting provisions under the DVPA

Domestic violence is a rampant justice and mental health problem for survivors and disproportionately affects women. According to the Center for Disease Control's (CDC) most recent National Intimate Partner and Sexual Violence Survey on experiences in the United States:

- An estimated 37.3 percent of women and 30.9 percent of men experience intimate partner contact sexual violence, physical violence, and/or stalking.
- About 1 in 6 women and 1 in 19 men have experienced stalking victimization that caused them to be fearful of physical harm or death. Of the stalking victims, 6 in 10 female victims and 4 in 10 male victims were stalked by a current or former intimate partner.
- Physical violence by an intimate partner is experienced by 32.4 percent of women and 28.3 percent of men. Severe physical violence was experienced by 23.2 percent of women and 13.9 percent of men.
- Approximately 51.8 percent of women and 16.7 percent of men who experience intimate partner contact sexual violence, physical violence, and/or stalking report symptoms of post-traumatic stress disorder.⁹

For victims of domestic violence, a protective order under the DVPA can be a powerful tool in ending the all-too-common cycle of abuse. But because a DVPA protective order requires the victim to go to court to obtain it; for some victims, the judicial system might not feel manageable without an attorney. The current fee-shifting statute under the DVPA, which allows the court to order a restrained person to pay the attorney fees and costs of the prevailing plaintiff upon a determination that the order is warranted in light of the parties' ability to pay, provides some victims with the opportunity to retain counsel who are willing to work on a contingency.¹⁰ But the current restrictions on when a court may order fees and costs for the prevailing victim, which require the court to consider the parties' relative ability to pay and the respective incomes and needs of the parties, appear to preclude fee awards in many cases where the court awards a protective order. Thus, many victims who prevail against their abuser may nevertheless be denied an order for their attorney fees.

⁷ *Id.*, § 6344.

⁸ *Ibid.*

⁹ CDC, National Center for Injury and Prevention and Control, National Intimate Partner and Sexual Violence Survey, 2010-2012 State Report (Apr. 2017) at pp. 2-3. The report did not provide data for nonbinary or gender-expansive individuals.

¹⁰ Fam. Code, § 6344.

This bill is intended to move the DVPA attorney fee provision away from the pure family law model – which is predicated on the parties working together to reach solutions – to be more of a hybrid between the family law model and the general civil law model. The bill deletes the existing DVPA fee statute provides for an award of fees and costs following a noticed hearing as follows:

1. A prevailing petitioner is automatically entitled to an order for fees and costs, subject to 3.
2. A prevailing respondent is entitled to an order for fees and costs at the discretion of the court, only in circumstances where the respondent establishes, by a preponderance of the evidence, that the petition or request was frivolous or intended to abuse, intimidate, or cause unnecessary delay, subject to 3.
3. In order to award fees and costs under 1. or 2., the court must first find that the party ordered to pay has, or is reasonably likely to have, the ability to pay, pursuant to the general requirement of an ability-to-pay finding in fee and cost orders in the Family Code.

These changes to the fee statute recognize several things. First, that the equities in a DVPA case weigh in favor of a fee award to the prevailing plaintiff without – as the current statute requires – a balancing of the parties’ relative abilities to pay. Second, the bill recognizes the sad fact that some individuals petition for protective orders as a tool to *perpetrate* abuse, rather than prevent it. The bill accounts for this bleak reality by giving the court discretion to award fees to a prevailing respondent, but only where the respondent establishes, by a preponderance of the evidence, that the petition or request was frivolous or filed solely to abuse, intimidate, or cause unnecessary delay. These provisions strike a balance between ensuring that individuals with meritorious petitions are not deterred by the possibility of having to pay attorney fees if they lose and ensuring that respondents who are the victims of bad-faith petitions can be compensated for their fees.

Finally, the bill recognizes that a fee award can be financially crippling for an individual and there is little benefit to ordering an award of fees and costs that will be uncollectable. While the bill removes the requirement that a court award fees only where there is a gap in the parties’ *relative* ability to pay, the bill prohibits a fee order unless the court finds that the party can pay or has the ability to pay the order.

4. Argument in support

According to the bill’s sponsor, the Family Violence Appellate Project:

AB 2369 would help to promote these legislative policies that are not currently being realized; and would reduce the chilling effect under the current law, which has led survivors [of domestic violence] having to pay the other side’s fees, even if the court finds abuse has occurred, just because the survivor could not overcome some evidentiary or procedural barriers to fully present their case.

As an example of how the current law could play out against survivors, say a survivor is of moderate income and can afford to pay for their own attorney – not all that common, but it happens – or, perhaps more commonly, say a survivor is of low or no income and they somehow are able to scrounge up enough to pay for an attorney. If they win and get a restraining order, under Family Code section 6344 as currently written...the court could still refuse to give them attorney's fees simply because the statute gives them that discretion, for almost any reason. And, in fact...some courts interpret to mean the court should always consider the survivor's needs and ability to pay, and will deny them attorney's fees on that basis, even if they win.

With the current law, then, the court could say, for instance, that the survivor could afford to pay for their attorney on their own, because they had in fact already retained the attorney. In these situations, survivors essentially mist fund their own abuse. If passed, AB 2369 would change the outcome. In this kind of scenario, AB 2369 would require the court to order the respondent to pay for the survivor's attorney's fees, after taking into consideration the respondent's ability to pay.

SUPPORT

Family Violence Appellate Project (sponsor)
Advocates for Child Empowerment and Safety
California Partnership to End Domestic Violence
Coalition of California Welfare Rights Organizations
Community Overcoming Relationship Abuse
Desert Sanctuary, Inc.
Interface Children & Family Services
Jewish Family Service LA
Legislative Coalition to Prevent Child Abuse
Public Counsel
Rainbow Services

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation: AB 2391 (Cunningham, 2022) allows 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. AB 2391 is pending before the Senate Appropriations Committee.

Prior Legislation: None known.

PRIOR VOTES:

Assembly Floor (Ayes 73, Noes 0)

Assembly Judiciary Committee (Ayes 9, Noes 0)
