

Date of Hearing: March 22, 2022

ASSEMBLY COMMITTEE ON JUDICIARY
Mark Stone, Chair
AB 2391 (Cunningham) – As Amended March 16, 2022

PROPOSED CONSENT

SUBJECT: CIVIL ACTIONS: VEXATIOUS LITIGANTS

KEY ISSUE: SHOULD CALIFORNIA ADOPT A STREAMLINED PROCESS FOR DEEMING A PERSON SUBJECT TO A DOMESTIC VIOLENCE RESTRAINING ORDER A VEXATIOUS LITIGANT IN ORDER TO PREVENT THE COURTS FROM BECOMING A TOOL TO HARASS DOMESTIC VIOLENCE VICTIMS?

SYNOPSIS

This laudable measure seeks to prevent the perpetrators of domestic violence from utilizing the court system as a means to continue to harass and intimidate their victims. A growing body of academic evidence suggests that the open-ended nature of some family law matters provides an opportunity for abusers to prolong their victims suffering by seeking numerous changes to divorce or custody matters. Although access to family law proceedings is necessary to protect due process, this bill would provide a streamlined process for deeming a person subject to a domestic violence restraining order a vexatious litigant and impose financial security requirements on that person.

Several stakeholders have inquired as to how this bill may work in practice; however, this bill has no formal support or opposition. The author is committing to continuing to work with stakeholders to ensure that any concerns that do arise can be addressed. However, this Committee is satisfied that this bill is workable and provides necessary and meaningful protections to the victims of domestic violence, while still ensuring that those subject to restraining orders still have access to the courts.

SUMMARY: Provides criteria for deeming a person, already subject to a domestic violence restraining order a vexatious litigant. Specifically, **this bill:**

- 1) Provides that a person who has obtained a domestic violence restraining order against another person may file a petition, without fee, to have the person who is the subject of that order declared a vexatious litigant if a preponderance of the evidence shows the person who was the subject of the order has met the criteria of either 2) or 3).
- 2) Provides that a person may be deemed a vexatious litigant, pursuant to 1), if the person has filed, initiated, advanced, or continued litigation on three or more proceedings not related to the custody of a child or five or more proceedings related to the custody of a child in seven years primarily for the purpose of harassing, intimidating, or maintaining contact with the other party if that litigation meets one of the following conditions:
 - a) Involved claims, allegations, and other legal contentions that were not warranted by existing law or by a reasonable argument for the extension, modification, or reversal of existing law, or the establishment of new law; or

- b) Involved allegations and other factual contentions that were without the existence of evidentiary support.
- 3) Provides that a person may be deemed a vexatious litigant, pursuant to 1), if the person has within the last ten years has been sanctioned pursuant to California Rule of Court 5.14 for filing one or more cases, petitions, motions, or other filings, that were found to have been frivolous, vexatious, intransigent, or brought in bad faith involving the same opposing party.

EXISTING LAW:

- 1) Permits in any litigation pending in any court of this state, at any time until final judgment is entered, a defendant to move the court, upon notice and hearing, for an order requiring the plaintiff to furnish security. Requires that the motion for an order requiring the plaintiff to furnish security must be based upon the ground, and supported by a showing, that the plaintiff is a vexatious litigant and that there is not a reasonable probability that they will prevail in the litigation against the moving defendant. (Code of Civil Procedure Section 391.1.)
- 2) Provides that any defendant, in any litigation pending in any court of this state, at any time until final judgment is entered, may move the court, upon notice and hearing for an order dismissing the litigation in accordance with 3).
- 3) Requires that upon a move of a defendant pursuant to 2), if the court, after hearing evidence on the motion, determines that the litigation has no merit and has been filed for the purposes of harassment or delay, the court must order the litigation dismissed. (Code of Civil Procedure Section 391.3 (b).)
- 4) Defines for the purpose of 1) through 3) a “vexatious litigant” as a person who does any of the following:
 - a) In the immediately preceding seven-year period has commenced, prosecuted, or maintained in propria persona at least five litigations, other than in a small claims court that have been finally determined adversely to the person or unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing;
 - b) After a litigation has been finally determined against the person, repeatedly relitigates or attempts to relitigate, in propria persona, either the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined or 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; or
 - d) Has previously been declared to be a vexatious litigant by any state or federal court of record in any action or proceeding based upon the same or substantially similar facts, transaction, or occurrence. (Code of Civil Procedure Section 391 (b).)

- 5) Defines, for the purpose of 1) through 3), “security” as an undertaking to assure payment, to the party for whose benefit the undertaking is required to be furnished, of the party’s reasonable expenses, including attorney’s fees and not limited to taxable costs, incurred in or in connection with a litigation instituted, caused to be instituted, or maintained or caused to be maintained by a vexatious litigant. (Code of Civil Procedure Section 391 (c).)
- 6) Requires when a security that has been ordered furnished is not furnished as ordered, in accordance with 1) the litigation must be dismissed as to the defendant for whose benefit it was ordered furnished. (Code of Civil Procedure Section 391.4.)
- 7) Provides that, in addition to any other relief provided under law, the court may, on its own motion or the motion of any party, enter a prefiling order which 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, and that disobedience of the order by a vexatious litigant may be punished as a contempt of court. (Code of Civil Procedure Section 391.7 (a).)
- 8) Prohibits the clerk of the court from filing any litigation presented by a vexatious litigant subject to a prefiling order unless the vexatious litigant first obtains an order from the presiding justice or presiding judge permitting the filing. (Code of Civil Procedure Section 391.7 (c).)
- 9) Permits a vexatious litigant subject to a prefiling order in accordance with 7) to file an application to vacate the prefiling order and remove their name from the Judicial Council’s list of vexatious litigants subject to prefiling orders, and that such application must be filed in the court that entered the prefiling order, either in the action in which the prefiling order was entered or in conjunction with a request to the presiding justice or presiding judge to file new litigation. (Code of Civil Procedure Section 391.8 (a).)
- 10) Provides that an order may be issued 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. (Family Code Section 6300.)

FISCAL EFFECT: As currently in print this bill is keyed non-fiscal.

COMMENTS: Seeking to prevent the courts from being utilized as a tool for domestic violence perpetrators to further harass and traumatize their victims, this bill proposes to adopt standards by which a person subject to a domestic restraining order can be deemed a vexatious litigant. Once the vexatious litigant status is placed onto a person, that person must post financial security before pursuing additional litigation as a means of deterring the conduct and protecting the defendant from incurring unnecessary legal costs. In support of the bill the author states:

Because family law cases typically last so long and can be reopened so easily, they become an opportunity for abusers to repeatedly drag survivors back to court. Usually the survivor no longer lives with their abuser, so bringing the survivor back to court allows the abuser to find a new way to continue to exercise power and control over them. Finding an attorney, responding to motions, and attending hearings is incredibly draining—both psychologically and financially—and thus litigation abuse continues to be a widespread problem for survivors. While California does have a vexatious litigant standard, victims of domestic

violence often have a difficult time having their victims declared such due to the standards not fitting the situations many survivors find themselves in in family court. By creating a new section specifically for survivors with DVROs against their abusers, survivors will be better equipped to finally cut off contact with their abusers through the courts.

Existing law seeks to deter vexatious litigants from clogging the justice system with frivolous lawsuits. Despite anecdotal complaints that California’s laws generate significant amount of “frivolous lawsuits,” in practice California maintains a relatively strong set of laws to deter plaintiffs from repeatedly pursuing frivolous litigation. Under existing law, a party is deemed a vexatious litigant if they have lost, or failed to make significant progress in litigating, five claims or attempts to relitigate a final judgment against the same defendant over a seven year period. Once a party is deemed a vexatious litigant, they are required to post a security at the commencement of litigation that will cover all costs and damages incurred by a person sued by a vexatious litigant to ensure that if the litigant fails to prove their case the defendant is not harmed. Additionally, should the vexatious litigant fail to adhere to specific orders issued by the court, including orders dictating how the litigant may file cases, the litigant can face significant court sanctions.

Research shows that abusers frequently try to manipulate domestic violence victims after the relationship ends. Legal scholars note that 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. (Przekop, *One More Battleground: Domestic Violence, Child Custody, and the Batters’ Relentless Pursuit of their Victims Through the Courts* (2011) 9.2 Seattle Journal for Social Justice 1053, 1058.) Tragically, victims of domestic violence are six times more likely to be killed by their abuser after physical separation than before. (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.) Even if the victim has broken off physical contact with an abuser, and manages to escape further violence, abusers frequently seek to continue asserting their control using coercive tactics to limits the victim’s individual liberty. (Przekop, *One More Battleground: Domestic Violence, Child Custody, and the Batters’ Relentless Pursuit of their Victims Through the Courts, supra.*)

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. Existing California law permits an abuse victim to seek a restraining order in order to separate the parties until additional legal remedies can be obtained to stop the violence. However, particularly in instances in which the victim and abuser were legally married or have children together, the parties may be forced to continue to interact as the marriage is dissolved, assets divided, and (if needed) child custody is determined.

Unfortunately family courts provide abusers a legal means to force victims of domestic violence to continue to interact with their abusers. Unlike most civil legal matters, cases involving family law issues do not always result in a timely final judgment. 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 it is imperative to maintain access to the justice system in family law matters, the lack of finality in family law cases provides opportunities for abusers to use the legal system to continue to harass domestic abuse 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.” (Campbell, *How Domestic Violence Batterers Use Custody Proceedings in Family Courts to Abuse Victims and How Can Put a Stop to It, supra*, at p. 53.) 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. (*Ibid.*) Victims’ attorneys also note that for perpetrators who have attempted to stalk their victims, court is a means of forcing contact, with one attorney telling the Atlantic Magazine, “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.” (Jessica Klein, *How Domestic Abusers Weaponize the Courts*” (July 2019) The Atlantic, available at: <https://www.theatlantic.com/family/archive/2019/07/how-abusers-use-courts-against-their-victims/593086/>.) Recognizing the growing instances of abusers utilizing the courts to prolong contact with victims, in recent years several states have moved to enact legislation to deter domestic violence perpetrators from weaponizing the courts.

This bill. Seeking to ensure that courts are not used as a tool to further victimize those who suffered domestic violence, this bill would adopt a streamlined standard for deeming those subject to a domestic violence restraining order vexatious litigants. The bill would permit the victim of domestic violence to petition a court to find their abuser a vexatious litigant if the abuser files five frivolous cases in family court or three frivolous general civil cases over a span of seven years. The bill deems litigation to be frivolous if a court determines, by a preponderance of the evidence, that the case involved claims not warranted by existing law or cannot be reasonably argued to extend or modify the law, relies on facts that cannot be proved, or adjudicates a previously litigated issues that is subject to a final decision. Additionally, if a litigant subject to a domestic violence restraining order has been sanctioned in accordance with the California Rule of Court for being a vexatious litigant in any legal matter within the prior ten years they can be deemed a vexatious litigant for the purposes of this bill. Once a litigant is deemed vexatious pursuant to this bill, the existing law’s provisions requiring the posting of a security before proceeding with litigation and potential for sanctions will apply.

Ensuring that courts can balance the need to protect domestic violence victims while maintaining due process. Despite the need to protect victims of domestic violence, due process requires that all Californians have access to the justice system. As noted, due to changing life circumstances it is imperative that parties in family law cases have the ability to reopen their cases and make adjustments to custodial or spousal support arrangements. Accordingly, this bill seeks to strike a balance between maintaining access to the courts and ensuring that the courts cannot become a tool for abuse. In addition to permitting all legitimate matters to come before the court, this bill also provides that a party is only a vexatious litigant after filing five frivolous claims in a seven-year period, or roughly one frivolous claim every 16 to 17 months.

Although this bill has no formal opposition, the Judicial Council of California has raised several questions about the bill to both the author and this Committee. The questions appear to surround why this bill extends beyond family law, and whether or not the petition to deem the person subject to the domestic violence restraining order a vexatious litigant should be filed with the judge that originally granted the order or with the judge hearing the most recent legal matter filed by the litigant. As the Committee reviewed this bill these two questions raise legitimate features of the bill. Should the bill be amended to only implicate family law cases, a loophole would

arguably be created whereby an abuser could file traditional civil matters as a means of harassing their victim. Furthermore, the flexibility of permitting the abuse victim to petition the court in which they are presently litigating a matter before seems to promote judicial efficiency. Nonetheless, the author is committed to continuing to work with all stakeholders as this bill advances to ensure that this bill can be implemented efficiently and provide the most robust protections for the victims of domestic violence.

REGISTERED SUPPORT / OPPOSITION:**Support**

None on file

Opposition

None on file

Analysis Prepared by: Nicholas Liedtke / JUD. / (916) 319-2334