

HOUSE BILL REPORT

ESSB 6268

As Reported by House Committee On:
Civil Rights & Judiciary

Title: An act relating to abusive litigation.

Brief Description: Preventing abusive litigation between intimate partners.

Sponsors: Senate Committee on Law & Justice (originally sponsored by Senators Rolfes, Kuderer, Wellman, Darneille, Hasegawa, Wilson, C. and Das).

Brief History:

Committee Activity:

Civil Rights & Judiciary: 2/26/20, 2/28/20 [DPA].

**Brief Summary of Engrossed Substitute Bill
(As Amended by Committee)**

- Defines "abusive litigation," recognizes that abusive litigation against domestic violence survivors arises in a variety of court proceedings, and provides a court process for restricting abusive litigation.

HOUSE COMMITTEE ON CIVIL RIGHTS & JUDICIARY

Majority Report: Do pass as amended. Signed by 12 members: Representatives Kilduff, Chair; Thai, Vice Chair; Irwin, Ranking Minority Member; Goodman, Hansen, Kirby, Orwall, Peterson, Rude, Valdez, Walen and Ybarra.

Minority Report: Without recommendation. Signed by 2 members: Representatives Dufault, Assistant Ranking Minority Member; Graham.

Minority Report: Do not pass. Signed by 1 member: Representative Klippert.

Staff: Cece Clynch (786-7195).

Background:

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

There are a number of civil protective orders that allow a court to restrain a person from having contact with or threatening another person or that exclude the person from certain locations or coming within a specified distance of certain locations. Protection orders are available for victims of domestic violence, stalking, harassment, sexual assault, and vulnerable adult abuse. A court may enter a short-term ex parte temporary protection order and, after a full hearing, a final order that lasts for a fixed term, or in some cases is permanent.

In addition to protection orders, a court may enter a civil restraining order in family law proceedings that may include provisions restraining a person from contacting another person or excluding the person from certain locations. In the context of criminal proceedings, a court may issue a no-contact order to protect the victim of the crime during the pendency of the criminal proceedings or as a condition of the sentence.

The Domestic Violence Manual for Judges, 2015 (Manual), was produced by the Washington State Supreme Court Gender and Justice Commission. It recognizes that domestic violence appears in a wide variety of civil court proceedings, with or without concurrent criminal proceedings, and that these cases present unique challenges for the courts. The Manual provides information about the behavioral and legal definitions of domestic violence, as well as the societal and familial context in which domestic violence occurs. The Manual advises that domestic violence abusers (abusers) may sometimes misuse court proceedings to control, harass, intimidate, coerce, or impoverish the abused party. For instance, an abuser may initiate repeated delays in proceedings, such as by: dragging out parenting plan proceedings over years; requesting changes of counsel; or not following through with appointments with counsel. Requesting mutual orders of protection may be utilized as a way to continue control over the abused party and manipulate the court. Continually testing limits of visitation and support agreements may be another control tactic, or an abuser may seek changes in a parenting plan as a way to maintain access to and control over the abused party.

Statutes, court rules, and case law recognize the inherent authority of the courts to facilitate the orderly administration of justice and control the conduct of litigants. A court may, in its discretion, place reasonable restrictions on any litigant who abuses the judicial process.

Summary of Amended Bill:

Abusive Litigation.

A new chapter regarding abusive litigation is enacted and codified in the title governing domestic relations. "Abusive litigation" is defined as a legal action or proceeding in which:

1. the opposing parties are currently, or were formerly, intimate partners (current or former spouses or domestic partners; persons with a child in common; persons 16 years of age or older who are presently, or were previously, residing together and have or had a social relationship of a romantic nature; and persons 16 years of age or older with whom a person 16 years of age or older has or has had a social relationship of a romantic nature);
2. the party filing, initiating, or continuing the litigation has been found by a court to have committed domestic violence against the other party;

3. the litigation is being initiated, advanced, or continued primarily for the purpose of harassing, intimidating, or maintaining contact with the other party; and
4. at least one of the following are applicable:
 - the claims, allegations, and other legal contentions are not warranted by existing law or by a reasonable argument for changing existing law or establishing new law;
 - the allegations and factual contentions made are not supported by the evidence; or
 - a similar issue(s) has previously been filed, litigated, and disposed of unfavorably to the party filing, initiating, or continuing the litigation.

A party to a case may request that a court issue an order restricting abusive litigation. The parties must be current or former intimate partners, and one party must have been found to have committed domestic violence against the other. A party's request may be made in an answer or responsive pleading, by motion during an open or ongoing case, or by separate motion made within five years of the entry of an order for protection, whether or not the protective order has expired. Alternatively, a court on its own motion may determine that a hearing is necessary to determine if a party is engaging in abusive litigation. These new provisions are nonexclusive and do not affect any other available remedy.

Prior to setting a hearing to determine whether the litigation meets the definition of "abusive litigation" above, the court must attempt to verify the first two elements. If the court so verifies, or is unable to verify that they are not true, the court must set a hearing. At the time of the hearing, the court must hear all relevant testimony and may require any affidavits, documentary evidence, or other records the court deems necessary.

Evidence of any of the following creates a rebuttable presumption that litigation is being initiated, advanced, or continued primarily for the purpose of harassing, intimidating, or maintaining contact with the other party:

- the same or substantially similar issues between the same or substantially similar parties have been litigated within the past five years;
- the same or substantially similar issues between the same or substantially similar parties have been raised, pled, or alleged in the past five years and were dismissed on the merits or with prejudice;
- within the last 10 years, the party allegedly engaging in abusive litigation has been sanctioned under Court Rule 11 or a similar rule in a case or cases involving the same opposing party for filings that were found to be frivolous, vexatious, intransigent, or brought in bad faith; or
- another court has previously determined that the party allegedly engaging in abusive litigation has previously engaged in abusive litigation or similar conduct and subjected him or her to a court order imposing prefiling restrictions.

If the court finds by a preponderance of the evidence that a party is engaging in abusive litigation, and that any or all of the motions or actions pending before the court constitute abusive litigation, the litigation must be dismissed, denied, stricken, or resolved by other disposition with prejudice in order that the party may not refile or relitigate. In addition, the court shall enter an order restricting abusive litigation which:

- imposes all costs of any abusive civil action against the party advancing the same;

- awards the other party reasonable attorneys' fees and costs, including the cost of seeking the restrictive order; and
- identifies the party protected by the order and imposes pre-filing restrictions, for a period of not less than 48 nor more than 72 months, upon the party found to have engaged in abusive litigation.

If the court finds by a preponderance of the evidence that the litigation does not constitute abusive litigation, the court shall enter written findings and the litigation shall proceed.

A person who is subject to an order restricting abusive litigation is prohibited from filing, initiating, advancing, or continuing litigation during the 48- to 72-month restricted period without first seeking and obtaining permission from the judicial officer who imposed the restrictions. Upon such application, the judicial officer may examine witnesses, court records, and any other available evidence to determine if the proposed litigation is abusive or if it is based on reasonable and legitimate grounds. If the judicial officer determines that it is abusive, the other party need not appear or participate in any way, and the application shall be denied, dismissed, or otherwise disposed of with prejudice. If the judicial officer is unable to determine whether it is abusive without hearing from the protected person, the court shall schedule a hearing, notify the protected party, and indicate whether the protected party is expected to submit a written response. When possible, the protected party should be permitted to appear telephonically.

If the litigation for which permission is sought is determined not to be abusive, the judicial officer may grant the application and issue an order permitting the filing of the case, motion, or pleading, which order shall accompany any pleading that is filed or served. Subsequently, if the judicial officer presiding over the matter that was allowed to proceed determines that a person is attempting to add parties, amend the complaint, or is otherwise attempting to alter the parties and issues in a manner reasonably believed to constitute abusive litigation, that judicial officer shall stay the proceedings and refer the case back to the judicial officer who granted the application for further disposition.

In the event that a protected party is served with a pleading filed by the person subject to the order restricting abusive litigation, and an order allowing the pleading is not attached, the protected party may respond by filing a copy of the order restricting abusive litigation. The protected party is under no obligation or duty to respond to the summons, complaint, petition, motion, to answer interrogatories, to appear for depositions, or take any other responsive action required by rule or statute in a civil action.

Other provisions of the new chapter provide that:

- Judicial findings must be reduced to writing, and these shall be made part of the record. A party may seek review of the decision as provided by applicable court rules.
- The period of time commencing with the filing of the application for permission and ending with the issuance of an order permitting filing, shall not be computed as a part of any applicable period of limitations within which the matter must be initiated.
- Nothing in the new chapter is to be construed as limiting the court's inherent authority to control the proceedings and litigants before it.

Administrative Office of the Courts.

The Administrative Office of the Courts (AOC) must update the instructions, brochures, standard petition, and order for protection forms, and create new motion and order forms with respect to abusive litigation. No filing fee may be charged to the unrestricted party. The AOC must also update the court staff handbook when changes in the law make that necessary. Forms and instructional brochures must be provided free of charge.

Effect of Abusive Litigation Determination in the Context of Particular Proceedings.

Current law provides that courts may preclude or limit provisions of a parenting plan if any of several factors exist, including "abusive use of conflict" which creates the danger of serious damage to the child's psychological development. This section pertaining to abusive use of conflict is amended to provide that the term expressly includes, but is not limited to, abusive litigation as defined in the new chapter. Litigation that is aggressive or improper, but that does not constitute abusive litigation as that term is defined in the new chapter is not abusive use of conflict. A report made in good faith to law enforcement, a medical professional, or child protective services of sexual, physical, or mental abuse of a child shall not constitute a basis for a finding of abusive use of conflict.

The current law section setting forth the types of relief available under chapter 26.50 RCW (pertaining to Domestic Violence Prevention) is amended to expressly permit a court to provide relief that includes an order restricting the respondent from engaging in abusive litigation, and allowing the petitioner to request this relief in the petition or by separate motion. Such a separate motion may be made at any time within five years of the date an order for protection is entered, even if the order has since expired. In cases where a finding of domestic violence was entered pursuant to an order issued under chapters 26.09, 26.26, or 26.26A RCW (pertaining to: Dissolution Proceedings–Legal Separation; Cooperative Services–Indians; and Uniform Parentage Act), a motion for an order restricting abusive litigation may be brought under the family law case or as a stand-alone action filed under the chapter pertaining to domestic violence orders.

Other.

The act is to be construed liberally so as to effectuate the goal of protecting survivors of domestic violence from abusive litigation. A severability clause is included.

Amended Bill Compared to Engrossed Substitute Bill:

The amended bill adds an effective date of January 1, 2021.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Amended Bill: The bill takes effect on January 1, 2021.

Staff Summary of Public Testimony:

(In support) The genesis of this bill was a constituent phone call. The constituent had been through a terrible divorce, was still being stalked, and had sustained significant financial losses due to the ongoing litigation. The bill sponsor convened a group of lawyers to draft the bill, and the legislation was then perfected in the Senate Law and Justice Committee to tighten it up in such a way that it will work well and pass Constitutional muster. There needed to be a piece included in the bill to ensure that where an abuser does have a meritorious claim, that claim can move forward but that other nonmeritorious claims are weeded out. The Senate threaded the needle very carefully and addressed the concerns that were raised. The bill passed out of the Senate with a unanimous, bipartisan vote which reflected the good work that was done.

One woman, a victim of four years of ongoing abusive litigation, must appear in court yet again in a few weeks to respond to her ex-husband's continuing efforts at intimidation, degradation, stalking, and threats. In court, she will have to: read his letters and texts out loud, again; tell the court about his physical violence, again; and once again relate, in a room full of strangers, the impact that his abuse has had on her family. This upcoming hearing is his third effort to obtain early termination of the court order that prohibits him from coming near her. Because her husband can afford a lawyer, and she cannot, she has to face him in court alone. Regardless of the outcome of the hearing, she loses. If she does not attend, she will lose the order of protection. If she attends and testifies against him, and the order is maintained, she will still lose her sense of safety. If she testifies, and loses the order, she is not sure what will happen to her. This abuser delayed the refinancing of the home by not providing documents and signatures. It took three years to obtain a divorce due to his dilatory tactics and avoidance of service. Meanwhile, she has had to pay over \$10,000 in attorneys' fees, which is a significant financial hardship for her. Being the victim of abusive litigation is exhausting and financially devastating. Because the abusive litigation continues, it is impossible to heal and deal with the other things that he has done to her.

To illuminate what abusive litigation means to survivors, Legal Voice has published a law review article and also an appendix to the Domestic Violence Manual for Judges. In the law review article, survivors and attorneys were interviewed about their experiences with abusive litigation. Those people made suggestions as to how to address abusive litigation, including: having a single judicial officer oversee the case; making sure there are consequences for engaging in abusive litigation, including attorneys' fee awards; and limiting an abuser's ability to file more motions.

(Opposed) None.

Persons Testifying: Senator Rolfes, prime sponsor; Amber Rosewood; Catherine West, Legal Voice; and Larry Shannon, Washington State Association for Justice.

Persons Signed In To Testify But Not Testifying: None.