

SENATE BILL REPORT

ESSB 6268

As Passed Senate, February 19, 2020

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: Law & Justice: 1/23/20, 1/30/20 [DPS-WM].

Ways & Means: 2/05/20, 2/10/20 [DPS (LAW)].

Floor Activity:

Passed Senate: 2/19/20, 48-0.

Brief Summary of Engrossed First Substitute Bill

- Provides a new court process restricting a domestic violence abuser from pursuing litigation intended to harass, intimidate, or maintain contact with a current or former intimate partner.
- Authorizes a court to enter an order restricting a domestic violence abuser from pursuing litigation if a court finds, by a preponderance of evidence, that the proceedings meet the definition of abusive litigation.
- Creates an exception process allowing a court to overrule a litigation restriction if reasonable and legitimate grounds exist for filing a new action.

SENATE COMMITTEE ON LAW & JUSTICE

Majority Report: That Substitute Senate Bill No. 6268 be substituted therefor, and the substitute bill do pass and be referred to Committee on Ways & Means.

Signed by Senators Pedersen, Chair; Dhingra, Vice Chair; Padden, Ranking Member; Holy, Kuderer, Salomon and Wilson, L..

Staff: Melissa Burke-Cain (786-7755)

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.

SENATE COMMITTEE ON WAYS & MEANS

Majority Report: Do pass.

Signed by Senators Rolfes, Chair; Mullet, Capital Budget Cabinet; Braun, Ranking Member; Brown, Assistant Ranking Member, Operating; Honeyford, Assistant Ranking Member, Capital; Becker, Billig, Carlyle, Conway, Darneille, Dhingra, Hasegawa, Hunt, Keiser, Liias, Muzzall, Pedersen, Rivers, Schoesler, Van De Wege, Wagoner, Warnick and Wilson, L..

Staff: Corban Nemeth (786-7736)

Background: Washington's domestic violence manual for judges recognizes abusive litigation against domestic violence survivors as a common practice among abusers who repeatedly misuse court proceedings to control, harass, intimidate, coerce, or impoverish survivors. Abusive litigation arises in a variety of contexts such as family law, protection order, and parenting plan cases. These tactics often involve repeated contempt motions, starting multiple new cases in different jurisdictions, and making other frivolous motions or appeals. Even if a case has no merit, the survivor must spend time, money, and emotional resources responding to the abusive claims. Abusive litigation may coerce survivors to make concessions in cases just to end the litigation.

Current law gives courts inherent authority to facilitate the orderly administration of justice, including authority to address abusive litigation tactics. For example, courts may grant injunctive relief to address abusive litigation or impose sanctions under Civil Rule 11 when litigants abuse judicial processes. Washington's courts have ruled there is no absolute and unlimited constitutional right of access to courts. Due process requires only a reasonable right of access, or a meaningful opportunity to be heard, absent an overriding state interest. Courts must still ensure a party can access the courts to present a new and independent matter. Washington courts have held that a court order restricting access to the courts must not be absolute and should provide a safety valve for emergencies.

In 2018, Tennessee enacted an abusive civil actions law. Tennessee's law creates a hearing process for a person who is a party to an abusive civil action brought by a former domestic partner or family member. The law allows the party to request a court order dismissing abusive litigation or restricting filing of new cases. Tennessee defines an abusive civil action as litigation filed primarily to harass or cause malicious injury, subject to specific statutory requirements. Tennessee also authorizes a separate civil action declaring a person as an abusive civil action offender, and established a registry of abusive civil action offenders. Under Tennessee's recent law, an abusive civil action offender may seek relief from a court's order limiting their ability to file new civil actions against a former domestic partner or adult family member in specific circumstances.

Summary of Engrossed First Substitute Bill: The bill provides a process for a party to litigation to request a court order restricting abusive litigation as a nonexclusive remedy, when the parties are current or former intimate partners, one party has been found by the court to have committed domestic violence against the other, and at least one of the following three factors apply:

- the legal contentions are not warranted by existing law, a reasonable argument for extending existing law, or establishment of new law;
- the allegations and factual contentions have not evidentiary support; or
- one or more issues have already been filed elsewhere, litigated, and disposed of unfavorably to the filing party.

The request may be made in an answer or responsive pleadings in a case, by motion during an open case, by a separate motion within five years of entry of a protective order even if the order is expired, or by the court on its own motion. The filing fee is waived for the party asking the court to restrict continuing abusive litigation. Abusive litigation, intimate partner, and litigation is defined. If a court is able to verify the intimate partner relationship, and that the party requesting the order has been a domestic violence victim, or cannot verify these two criteria are both true, a court hearing decides if the litigation meets the law's definition of abusive litigation

At hearing, any of the following creates a rebuttable presumption of abusive litigation:

- evidence showing the parties have litigated similar issues within the last five years;
- evidence showing similar issues have been raised within the last five years and dismissed with prejudice;
- the court has sanctioned the alleged abusive litigation perpetrator under Civil Rule 11 or similar rules within the last ten years; or
- a court of record in another judicial district has previously found the alleged perpetrator engaged in abusive litigation or similar conduct and ordered pre-filing restrictions.

If the court finds the party is engaging in abusive litigation, based on a preponderance of evidence, the action is dismissed with prejudice, the court enters a restricting order, and costs are awarded.

A party subject to a pre-filing restriction must obtain the court's permission before filing a new case. The court may take testimony, examine court records, or consider other evidence to determine if reasonable and legitimate grounds exist for filing a new case. If the court decides the case requested for filing is not abusive litigation, then the court enters an order permitting the filing. The order filed and served, together with the pleading, initiate the new case. If the court denies the filing, the unsuccessful party may seek review of the decision may be appealed as provided by the court rules. If a party restricted from filing a new case does not obtain pre-filing permission from the court, the court dismisses the case. The current law restricting temporary or permanent parenting plans by making abusive litigation an abusive use of conflict is amended. A good faith report of child abuse to police, medical providers, or the child protective services agency is not a basis for finding abusive use of conflict. A court may enter an order restricting abusive litigation in a domestic violence case within five years of the date finding domestic violence or under other family law chapters, or as a stand alone matter. The act is liberally construed to protect domestic violence survivors from abusive litigation and contains a severability clause

Appropriation: None.

Fiscal Note: Available.

Creates Committee/Commission/Task Force that includes Legislative members: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony on Original Bill (Law & Justice): *The committee recommended a different version of the bill than what was heard.* PRO: Domestic abusers frequently move their abuse into the courts by filing multiple cases, demanding information from their victims that would embarrass them or coerce them to give up rights to end the litigation. Three things that could change the dynamic of court systems used to abuse domestic violence victims would be to assign a single judge to preside over a case, limit filings in a case, or limit new case filings. Current options for dealing with this problem are limited for many litigants. As an example, in one case, the court's order reflected the abuse, calling the party obsessed and relentless in pursuit of the victim in court. The abuser obtained an ex parte order by lying, and it caused a child to be taken from their home. The abuser scheduled these court matters to coincide with holidays or other important family dates. The court's order slowed the abuser down but did not stop the harassment. A new case was filed and eventually dismissed, but only after a costly motion and hearing. This bill creates a simple process in which showing past domestic violence and a prior relationship is enough. Abusive litigation is an expensive process. It is expensive for the courts, but the victims not only pay for the legal help, but also must take time away from work to come to court, and may risk losing their job. Courts are not designed as a way to abuse by transferring physical abuse to another form—litigation abuse. This issue came forward from a handful of constituents, some of whom fear for their lives. The problem is not limited to Kitsap county; abusive litigation affects the judicial system as a whole. I favor the bill because this is a problem across this state and across the nation. The impact on the courts is significant, and it is costly for the courts and the victims. Tennessee's 2018 law has important language in the definition of abusive litigation. An abusive case must be a non-meritorious claim.

CON: Courts have inherent authority to deal with the problem of abusive litigation now. There may be different approaches used across the state because limiting access to the courts has constitutional implications, and in cases involving parenting issues, the fundamental right to parent may cause a court to be reluctant to take action. The main concern of the superior court judges is section 7 of the bill, creating an appeal right to the presiding judge sitting in an appellate capacity. That is not a process that occurs otherwise in any other cases.

OTHER: Overall this is a good idea, but we have a few concerns. Many domestic violence orders are entered without testimony and the evidence rules do not apply. The vast majority of domestic violence orders should be granted, but we propose a clear and convincing evidence standard should be used when making the abusive litigation finding, not a preponderance of evidence standard. Many other types of cases that do not involve domestic violence have elements of the abusive use of litigation. Courts rarely exercise their inherent authority to limit access to the courts.

Persons Testifying (Law & Justice): PRO: Senator Christine Rolfes, Prime Sponsor; Larry Shannon, Washington State Association for Justice; Catherine West, Legal Voice; Lindsey Goheen, Northwest Justice Project; Jamila Taylor, Northwest Justice Project.

CON: Judge Sean O'Donnell, Superior Court Judges' Association.

OTHER: Richard Bartholomew, Draw.

Persons Signed In To Testify But Not Testifying (Law & Justice): No one.

Staff Summary of Public Testimony on First Substitute (Ways & Means): PRO: This is important legislation that addresses tactics used by abusers to further harm survivors of domestic violence. This bill is narrow in application and specifically addresses abusive litigation by former or current intimate partners. This is a very real problem in our state and around the country, and this is a great way to address it. There may be a savings in this bill by preventing unnecessary litigation.

Persons Testifying (Ways & Means): PRO: Pamela Crone, Legal Voice; Larry Shannon, Washington State Association for Justice.

Persons Signed In To Testify But Not Testifying (Ways & Means): No one.