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# The Need for More States to Adopt Specific Legislation Addressing Abusive Use of Litigation in Intimate Partner Violence

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Ashley Beeman\*

## I. INTRODUCTION

Survivors of intimate partner violence<sup>1</sup> and their advocates have long known that abusers often use the civil legal system, most often family court, to continue to exercise power and control over survivors.<sup>2</sup> As courts are finally recognizing the significant issue of abusive use of litigation in the domestic violence field, they are running into problems with offering solutions. Courts have authority to address abusive litigation tactics and control their courtrooms by issuing sanctions and other judicial orders, but these tools are not frequently utilized and do not always consider the particular concerns that arise in domestic violence cases.<sup>3</sup> Current remedies have been found to be “inadequate, inaccessible to many litigants, and inconsistently applied.”<sup>4</sup>

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<sup>1</sup> A note about terminology: Throughout this comment you will see both “domestic violence” and “intimate partner violence.” Generally, domestic violence refers to violence among people in a domestic situation and can thus include spouses, partners, parents, siblings, etc. Intimate partner violence more specifically describes violence perpetrated by a partner in a romantic or dating relationship. Domestic violence is used more frequently. I have decided to use both phrases. In addition, I have chosen to use “survivor” to describe individuals who have experienced these forms of violence. For more information, see Women Against Abuse, *The Language We Use*, <https://www.womenagainstabuse.org/education-resources/the-language-we-use> [<https://perma.cc/Z7UM-D7TZ>].

<sup>2</sup> David Ward, *In Her Words: Recognizing and Preventing Abusive Litigation Against Domestic Violence Survivors*, 14 SEATTLE J. FOR SOC. JUST. 429, 430 (2015).

<sup>3</sup> See discussion *infra* Section III.

<sup>4</sup> *Preventing Abusive Litigation Between Intimate Partners: Pub. Hearing on SB 6268 Before the L. & Just. Comm.*, 66th Legislature (Wash. 2020) (statement of Lindsey

In light of these concerns, and while recognizing litigants' constitutional rights to access the courts, two states have passed legislation addressing abusive use of litigation in intimate partner violence. In 2018, the Tennessee Legislature enacted legislation defining abusive civil litigants, outlining a process where survivors and the courts can identify abusive litigants, and impose prefiling restrictions.<sup>5</sup> Washington followed suit in 2020 by passing Senate Bill 6268.<sup>6</sup> The bill defines abusive litigation and provides a process for obtaining an order restricting abusive litigation by imposing prefiling restrictions.<sup>7</sup>

Currently, Tennessee and Washington are the only states with such statutes. While courts retain inherent authority to address the issue, the lack of a specific statute identifying the problem and providing a process to stop abusive use of litigation leaves survivors of intimate partner violence in other states to rely on inconsistent judicial decisions.<sup>8</sup> More states must use the new laws in Tennessee and Washington as models and adopt similar legislation. New legislation should clearly define abusive use of litigation, provide a process where the court and survivors can move for an order restricting abusive litigation, and impose prefiling restrictions upon the party found to have engaged in abusive litigation.

Section II of this comment discusses abusive litigation in the intimate partner violence context and provides information on common tactics abusers employ. Section III discusses currently available remedies for curbing abusive use of litigation and problems with those remedies. Section IV addresses legislation undertaken in Tennessee and Washington to curb

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Goheen), <https://app.leg.wa.gov/committeeschedules/#//0/01-01-2020/11-01-2020/Schedule/6268//Bill/> [<https://perma.cc/B6UG-JQ9G>] [hereinafter *Washington Hearing*].

<sup>5</sup> TENN. CODE ANN. § 29-41 (2018).

<sup>6</sup> Abusive Litigation, ch. 311, 2020 Wash. Sess. Laws 2268 (codified as WASH. REV. CODE § 26.51).

<sup>7</sup> *Id.*

<sup>8</sup> *Washington Hearing*, *supra* note 4.

abusive use of litigation. Section V compares and contrasts the Tennessee and Washington laws and proposes a legislative solution that other states should adopt to address abusive use of litigation in their courts.

## II. ABUSIVE LITIGATION IN THE INTIMATE PARTNER VIOLENCE CONTEXT

Domestic violence is widely prevalent, appearing in every community and affecting all people regardless of age, socioeconomic status, sexual orientation, gender, race, religion, or nationality.<sup>9</sup> Significantly, one in four women and one in ten men nationwide experience sexual violence, physical violence, or stalking by an intimate partner in their lifetimes.<sup>10</sup> In addition, data indicates LGBTQ+ people experience similar, if not higher, rates of intimate partner violence as compared with cisgender or heterosexual individuals.<sup>11</sup> Further, those who are most marginalized—LGBTQ+ people of color, LGBTQ+ people with disabilities, and LGBTQ+ people who are undocumented—experience unique barriers and have often been excluded from conversations on intimate partner violence.<sup>12</sup>

Domestic violence is regularly defined by researchers, advocates, and theorists as a pattern of abusive behavior used by an abuser to gain or maintain control over their victim employed through a variety of tactics.<sup>13</sup> Such tactics may include “fear and intimidation, physical and/or sexual abuse, psychological and emotional abuse, destruction of property and pets,

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<sup>9</sup> NAT'L COAL. AGAINST DOMESTIC VIOLENCE, DOMESTIC VIOLENCE 1 (2020), [https://assets.speakcdn.com/assets/2497/domestic\\_violence-2020080709350855.pdf?1596828650457](https://assets.speakcdn.com/assets/2497/domestic_violence-2020080709350855.pdf?1596828650457) [<https://perma.cc/Y9SC-M2WM>].

<sup>10</sup> *Id.*

<sup>11</sup> NAT'L COAL. OF ANTI-VIOLENCE PROGRAMS, LESBIAN, GAY, BISEXUAL, TRANSGENDER, QUEER, AND HIV-AFFECTED INTIMATE PARTNER VIOLENCE IN 2015 12 (2016), [http://avp.org/wp-content/uploads/2017/04/2015\\_ncavp\\_lgbtqipvreport.pdf](http://avp.org/wp-content/uploads/2017/04/2015_ncavp_lgbtqipvreport.pdf) [<https://perma.cc/B4XB-JUBK>].

<sup>12</sup> *Id.* at 13.

<sup>13</sup> Margaret E. Johnson, *Redefining Harm, Reimagining Remedies, and Reclaiming Domestic Violence Law*, 42 U.C. DAVIS L. REV. 1107, 1116 (2009).

isolation and imprisonment, economic abuse, and rigid expectations of sex roles.”<sup>14</sup> Advocates who work with survivors regularly use and reference the “power and control wheel,” recognizing that power and control are exercised through “interrelated dimensions of physical abuse, economic abuse, coercion and threats, intimidation, [and] emotional abuse (using isolation, minimizing, denying, and blaming).”<sup>15</sup> Sociologist Evan Stark refined and expanded the broader theory of coercion and control, defining coercion as “the use of force or threats to compel or dispel a particular response” and control as “structural forms of deprivation, exploitation, and command that compel obedience indirectly by monopolizing vital resources, dictating preferred choices, microregulating a partner’s behavior, limiting [their] options, and depriving [them] of supports needed to exercise independent judgment.”<sup>16</sup>

However, the legal system has more narrowly defined domestic violence, largely focusing on physical assaults and threats to commit physical assaults.<sup>17</sup> Because of this narrow definition, survivors subjected to psychological, emotional, and economic abuse are often left without a civil remedy.<sup>18</sup> For instance, Tennessee has defined abuse as inflicting or attempting to inflict physical injury or placing someone in fear of physical harm, physical restraint, or malicious damage to personal property.<sup>19</sup> While California has a similar definition for abuse, the state also recognizes additional behavior.<sup>20</sup> This includes the following:

[M]olesting, attacking, striking, stalking, threatening, sexually assaulting, battering, credibly impersonating . . . falsely

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 1119.

<sup>16</sup> EVAN STARK, COERCIVE CONTROL: THE ENTRAPMENT OF WOMEN IN PERSONAL LIFE 228–29 (2007).

<sup>17</sup> LEIGH GOODMARK, A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM 30 (2012).

<sup>18</sup> Johnson, *supra* note 13, at 1112.

<sup>19</sup> TENN. CODE ANN. § 36-3-601(1) (2019).

<sup>20</sup> CAL. FAM. CODE § 6203 (West 2020).

personating . . . harassing, telephoning, including, but not limited to, making annoying telephone calls . . . destroying personal property, contacting, either directly or indirectly, by mail or otherwise, coming within a specified distance of, or disturbing the peace of the other party . . . <sup>21</sup>

California recently expanded the definition of “disturbing the peace of the other party”<sup>22</sup> to include “coercive control,” a pattern of behavior that “unreasonably interferes with a person’s free will and personal liberty,” including “unreasonably isolating a victim from friends, relatives, and additional sources of support.”<sup>23</sup> This means that a survivor experiencing coercive control tactics may be able to obtain a civil protection order and coercive control will be considered in custody and visitation decisions.<sup>24</sup> Hawaii also passed coercive control legislation in 2020 that makes coercive control a felony and allows evidence to be used in obtaining a protection order.<sup>25</sup> Connecticut added coercive control to its definition of domestic violence in 2022.<sup>26</sup> The Washington legislature recently passed a bill to follow suit.<sup>27</sup> Several states, including New York, South Carolina, and Maryland, have proposed legislation regarding coercive control.<sup>28</sup> While broadening the legal definition of abuse to include coercive control tactics reflects a deeper understanding that domestic violence is about power and control, there are concerns that these same laws could potentially be used

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<sup>21</sup> CAL. FAM. CODE § 6320 (West 2014).

<sup>22</sup> S.B. 1141, 2020 Leg., Reg. Sess. (Cal. 2020).

<sup>23</sup> CAL. FAM. CODE § 6320(c) (West 2020).

<sup>24</sup> Carrie N. Baker, *A New Frontier in Domestic Violence Prevention: Coercive Control Bans*, MS. MAGAZINE (Nov. 11, 2020), <https://msmagazine.com/2020/11/11/coercive-control-hawaii-california-domestic-violence/> [<https://perma.cc/J46T-JXWA>].

<sup>25</sup> *Id.*

<sup>26</sup> CONN. GEN. STAT. 46b-1 (2022).

<sup>27</sup> H.B. 1901, 67<sup>th</sup> Leg., Reg. Sess. (Wash. 2022). Washington included abusive litigation as an example in the definition of coercive control (“Engaging in vexatious litigation or abusive litigation as defined in RCW 26.51.020 against the other party to harass, coerce, or control the other party, to diminish or exhaust the other party’s financial resources, or to compromise the other party’s employment or housing.”) RCW 7.105.010(37)(a)(v).

<sup>28</sup> *Id.*

against survivors and specifically expanding criminalization can cause more harm.<sup>29</sup>

In addition to coercive control tactics, economic abuse can be crippling for survivors. Financial insecurity has been recognized as the primary obstacle to survivors' safety and experiencing intimate partner violence can be incredibly expensive.<sup>30</sup> Economic abuse includes behaviors that control a party's "ability to acquire, use, and maintain economic resources, thus threatening [survivors'] economic security and potential for self-sufficiency."<sup>31</sup> Many studies have identified economic dependence on a partner as a critical obstacle for survivors attempting to leave abusive partners.<sup>32</sup> Significantly, in a study by Michigan State University, 99% of the women surveyed had been subjected to some form of economic abuse during their relationships.<sup>33</sup> Further, in a meta-analysis study that considered costs attributed to impaired health, lost productivity, and criminal justice costs, researchers found the estimated intimate partner violence lifetime cost was \$103,767 per female victim and \$23,414 per male victim.<sup>34</sup> While abusive litigation can affect many aspects of a survivor's life, it is also a tactic of economic abuse because it both impacts survivors' ability to maintain employment due to repeated court dates and imposes significant financial costs for attorneys' fees and court costs.<sup>35</sup>

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<sup>29</sup> Marie Solis, *Do 'Coercive Control' Laws Really Help Abuse Victims?*, THE CUT (Feb. 2, 2021), <https://www.thecut.com/2021/02/coercive-control-laws-domestic-abuse.html> [<https://perma.cc/KR3X-38A7>].

<sup>30</sup> KIRKLEY DOYLE ET AL., FREEFROM, SURVIVORS KNOW BEST: HOW TO DISRUPT INTIMATE PARTNER VIOLENCE DURING COVID-19 AND BEYOND 6 (2020), <https://www.freefrom.org/wp-content/uploads/2021/06/Survivors-Know-Best.pdf> [<https://perma.cc/U73R-9SDJ>] [hereinafter FREEFROM REPORT].

<sup>31</sup> Adrienne E. Adams et al., *Development of the Scale of Economic Abuse*, 14 VIOLENCE AGAINST WOMEN 563, 564 (2008).

<sup>32</sup> *Id.* at 568.

<sup>33</sup> *Id.* at 580.

<sup>34</sup> Cora Peterson et al., *Lifetime Economic Burden of Intimate Partner Violence Among U.S. Adults*, 55 AM. J. PREVENTIVE MED. 433 (2018).

<sup>35</sup> See MICHELE WELDON, I CLOSED MY EYES: REVELATIONS OF A BATTERED WOMAN (1999) (In her book, Michele Weldon discusses how she spent the equivalent of three

### A. Abusive Use of Litigation

Abusive use of litigation has been defined in many ways, including frivolous litigation<sup>36</sup> and vexatious litigation.<sup>37</sup> However, these terms do not take into account the particular concerns of domestic violence survivors. Within the domestic violence field, “abusive litigation” has been described as “a range of tactics that survivors and their advocates have reported that abusers use in connection with court proceedings in order to control, harass, intimidate, coerce, and/or impoverish survivors.”<sup>38</sup> Unfortunately, an abuser can turn the courts into a new forum to continue abusive behavior.<sup>39</sup>

### B. Abusive Litigation Tactics

Abusive litigation tactics vary, but survivors, advocates, and practitioners have identified many common tactics abusers employ through the courts. Once a survivor separates from their abuser, the courtroom may be the only place left where an abuser can continue their abuse.<sup>40</sup> For example, an abuser may first try initiating contact by seeking custody or visitation rights with their children, thus prolonging contact with the survivor.<sup>41</sup> Many states have custody statutes that favor co-parenting, and judges frequently fail to consider abuse between the parties in making custody determinations.<sup>42</sup> Unfortunately, it is common for children to become another weapon abusers

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college educations on motions, pleadings, hearings, and more defending against her ex-husband’s endless lawsuits).

<sup>36</sup> See Byron C. Keeling, *Toward a Balanced Approach to “Frivolous” Litigation: A Critical Review of Federal Rule 11 and State Sanctions*, 21 PEPP. L. REV. 1067 (1994).

<sup>37</sup> Frank O. Carroll III, *“Vex My Soul”: A Primer on Vexatious Litigants*, 6 HOUS. L. REV.: OFF RECORD 231 (2016).

<sup>38</sup> Ward, *supra* note 2, at 432.

<sup>39</sup> Mary Przekop, *One More Battleground: Domestic Violence, Child Custody, and the Batterers’ Relentless Pursuit of their Victims Through the Courts*, 9 SEATTLE J. FOR SOC. JUST. 1053, 1055 (2011).

<sup>40</sup> *Id.* at 1064.

<sup>41</sup> *Id.* at 1061.

<sup>42</sup> Lizzy Wingfield, *How Pennsylvania’s Child Protective Services Law Punishes Survivors of Domestic Violence*, 90 TEMP. L. REV. 279, 295 (2018).



use to harm their victim because visitation rights give an abuser access to the other parent and a way to continue monitoring their victim when contact may not otherwise be available.<sup>43</sup>

During a court case, abusers can employ a variety of tactics to abuse the process. It is not uncommon for abusers to portray themselves as the victim in court filings and during hearings.<sup>44</sup> This can be an attempt to distort information and distract from the abusive dynamics present in the relationship, but it can also be retaliatory.<sup>45</sup> Survivors report that abusers frequently claim the survivors have made false domestic violence allegations in order to gain leverage in an ongoing custody dispute or that abusers will falsely proclaim the survivor is unfit to parent, which can cause the court to order survivors to undergo mandatory mental health or substance abuse evaluations.<sup>46</sup> This can have a significant impact on the case, especially if the judicial officer has not been specifically trained on domestic violence.<sup>47</sup> Abusers frequently use excessive, and often frivolous, court filings to overwhelm, embarrass, and financially impact survivors and their lawyers.<sup>48</sup> In addition, survivors report that abusers repeatedly seek continuances to prolong the litigation as much as possible, which causes

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<sup>43</sup> Przekop, *supra* note 39, at 1065.

<sup>44</sup> Ward, *supra* note 2, at 435.

<sup>45</sup> Ellen Gutowski & Lisa A. Goodman, “*Like I’m Invisible*”: IPV Survivor-Mothers’ Perceptions of Seeking Child Custody through the Family Court System, 35 J. FAM. VIOLENCE 441, 442 (2019).

<sup>46</sup> Ward, *supra* note 2, at 437, 443–44.

<sup>47</sup> See WASH. STATE SUP. CT. GENDER & JUST. COMM’N, DOMESTIC VIOLENCE BENCH GUIDE FOR JUDICIAL OFFICERS (2016), <https://www.courts.wa.gov/index.cfm?fa=home.contentDisplay&location=manuals/domViol/index> [https://perma.cc/LZG7-S5F6] [hereinafter WA DV MANUAL] (The WA DV Manual is an excellent example of training and guidance for judicial officers. Presciently, the introduction states “[u]nderstanding the what, why, and who, as well as the impact of domestic violence, enables judicial officers to improve the court’s fact-finding and decision-making in domestic violence cases, and to develop appropriate court cases to handle these cases more effectively, efficiently, and safely.”).

<sup>48</sup> Ward, *supra* note 2, at 438.

survivors to miss more time from work and adds significantly to the economic costs of domestic violence.<sup>49</sup>

While most court cases have an element of finality, verdicts in family law cases, including divorce and child custody cases, do not end the dispute.<sup>50</sup> This results in abusers repeatedly filing petitions to modify the parenting plan or repeatedly attempting to relitigate issues that have already been decided by the courts.<sup>51</sup> Even when a survivor receives a court order that should offer some relief, abusers often refuse to comply with the order, forcing survivors to return to court in order to seek enforcement.<sup>52</sup> Survivors have reported that the need to endure prolonged contact with their abuser due to the long-term nature of the process significantly interfered with their ability to heal and recover from the abuse.<sup>53</sup>

While litigation is ongoing, it is not uncommon for abusers to undertake additional tactics that can affect the litigation and the survivor's general wellbeing. These include making false reports to Child Protective Services or licensing agencies, which can threaten survivors with loss of their children or their livelihood.<sup>54</sup> In addition, abusers frequently "take or threaten retaliation against a survivor's friends and family, as well as that survivor's attorney."<sup>55</sup> The effect of these threats is to further isolate a survivor from their support network during an especially vulnerable and trying time.<sup>56</sup>

When children are involved, abusive litigation tactics can have significant consequences. Many studies have concluded that when intimate

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<sup>49</sup> *Id.* at 440.

<sup>50</sup> Leah J. Pollema, Note, *Beyond the Bounds of Zealous Advocacy: The Prevalence of Abusive Litigation in Family Law and the Need for Tort Remedies*, 75 UMKC L. REV. 1107, 1118 (2006).

<sup>51</sup> Ward, *supra* note 2, at 439.

<sup>52</sup> *Id.* at 442.

<sup>53</sup> Gutowski & Goodman, *supra* note 45, at 446.

<sup>54</sup> Ward, *supra* note 2, at 442–43.

<sup>55</sup> *Id.* at 445.

<sup>56</sup> *Id.*

partner violence is present, children are often victimized themselves and exposure to intimate partner violence causes long-lasting harms.<sup>57</sup> Survivors are often prosecuted or subject to dependency proceedings under failure-to-protect laws that define child endangerment to include allowing or enabling the abuse of children.<sup>58</sup> Unfortunately, the majority of criminal charges related to children often fall on mothers who are seen as responsible for protecting their children at any cost.<sup>59</sup> Failure-to-protect laws have punished women more than men and Black parents more than white parents.<sup>60</sup> In family court, survivors reporting child abuse are frequently discredited based on the concept of parental alienation, where a parent may allege abuse to separate children from the other parent.<sup>61</sup> Fathers who allege the mother has engaged in parental alienation are more likely to win custody themselves.<sup>62</sup> A survivor reporting abuse risks removal of their child to the abusive partner or to the dependency system.<sup>63</sup> Survivors report feeling “powerless in their ability to protect their children from the abusive parent.”<sup>64</sup>

During the litigation process, immigrant survivors are even more vulnerable, and it is extremely common for abusers to threaten to use immigration status against them.<sup>65</sup> First, immigrants, particularly immigrant women, are on average among the poorest people in the United States.<sup>66</sup> Most are ineligible for public benefits, which makes leaving an abuser and their financial support even more difficult.<sup>67</sup> Second, a lack of familiarity

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<sup>57</sup> Gutowski & Goodman, *supra* note 45, at 442.

<sup>58</sup> Courtney Cross, *Criminalizing Battered Mothers*, 2018 UTAH L. REV. 259, 273.

<sup>59</sup> *Id.*

<sup>60</sup> Wingfield, *supra* note 42, at 298.

<sup>61</sup> Gutowski & Goodman, *supra* note 45, at 442.

<sup>62</sup> *Id.*

<sup>63</sup> Wingfield, *supra* note 42, at 296.

<sup>64</sup> Gutowski & Goodman, *supra* note 45, at 451.

<sup>65</sup> Ward, *supra* note 2, at 446.

<sup>66</sup> Mariela Olivares, *Battered by Law: The Political Subordination of Immigrant Women*, 64 AM. U. L. REV. 231, 236 (2014).

<sup>67</sup> *Id.* at 237.

with the United States legal system and language barriers can prevent an immigrant survivor from attempting to access assistance in leaving their abuser.<sup>68</sup> Further, abusers' exploitation of immigrant survivors' immigration status and threats that children will be taken away reasonably lead survivors to believe their best option is to remain in the abusive relationship.<sup>69</sup>

Combined, these tactics can have a significant impact on survivors of intimate partner violence. Specifically, abusive litigation negatively impacts survivors' finances, including legal fees, the loss of jobs, and career opportunities.<sup>70</sup> The severe financial impacts are the "result of abusers deliberately using litigation as a means to impoverish, punish, and control survivors for leaving abusive relationships."<sup>71</sup> Abusive litigation can result in a survivor's loss of faith and trust in the legal system "because of the numerous ways that litigation seems to legitimize the abuser's actions and cause harm to the survivor."<sup>72</sup> Survivors report heightened psychological distress during the legal process and negative effects on their mental health even upon entering the courthouse.<sup>73</sup> As one survivor explained, "I feel like even though I was the victim and he was the perpetrator, I really feel like he still has more rights than I do. My rights are completely like thrown aside."<sup>74</sup>

### III. EXISTING REMEDIES FOR CURBING ABUSIVE USE OF LITIGATION

Both the courts and survivors have some remedies available to them to curb abusive use of litigation. These remedies include sanction provisions, inherent authority of courts, tort remedies, and educating judicial officers.

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<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 238.

<sup>70</sup> Ward, *supra* note 2, at 451.

<sup>71</sup> *Id.* at 453.

<sup>72</sup> *Id.* at 448.

<sup>73</sup> Gutowski & Goodman, *supra* note 45, at 443.

<sup>74</sup> *Id.* at 449.

However, these remedies were not designed specifically for instances of intimate partner violence.<sup>75</sup> Because of this, these remedies do not fully support the needs of a survivor.

### *A. Remedies Currently Available*

#### **1. Sanction Provisions**

In federal courts, the court may impose an appropriate sanction on either a party or a lawyer for frivolous or improper filings.<sup>76</sup> Federal Rule of Civil Procedure 11 (Rule 11) requires that a party making representations to the court certify that the pleading is not being presented for an improper purpose “such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation.”<sup>77</sup> The court may order sanctions in various forms, including nonmonetary directives, an order to pay a penalty to the court, an order directing payment to the other party, or the reasonable attorney’s fees and expenses resulting from the violation.<sup>78</sup> However, any sanction imposed “must be limited to what suffices to deter repetition of the conduct.”<sup>79</sup>

In comparison, state courts, where most cases involving domestic violence will occur, take different approaches to sanctions provisions. While many states systemically replicate the Federal Rules of Civil Procedure, other states have more loosely modeled the Federal Rules.<sup>80</sup>

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<sup>75</sup> For example, some states have utilized anti-SLAPP legislation, originally designed to allow small-time protestors to challenge wealthy companies who use frivolous lawsuits to drain their financial resources, to aid domestic violence survivors facing abusive litigants. Jessica Klein, *How Domestic Abusers Weaponize the Courts*, THE ATLANTIC (July 18, 2019), <https://www.theatlantic.com/family/archive/2019/07/how-abusers-use-courts-against-their-victims/593086/> [https://perma.cc/48P5-M85G]. For a more detailed discussion of anti-SLAPP legislation, see Victor J. Cosentino, *Strategic Lawsuits Against Public Participation: An Analysis of the Solutions*, 27 CAL. W. L. REV. 399 (1991).

<sup>76</sup> FED. R. CIV. P. 11(c).

<sup>77</sup> FED. R. CIV. P. 11(b)(1).

<sup>78</sup> FED. R. CIV. P. 11(c)(4).

<sup>79</sup> *Id.*

<sup>80</sup> For example, both Washington and Tennessee systematically replicate the Federal Rules of Civil Procedure while California adopted and remains committed to code

With regards to adopting Rule 11, state courts have taken roughly three approaches.<sup>81</sup> First, some states have a “high threshold” model emphasizing free, unimpeded access to the courts and depending upon a subjective standard of review.<sup>82</sup> Second, some states have a “low threshold” model, which gives state court judges significant power to address litigation abuse based upon an objective standard.<sup>83</sup> Third, other states have adopted a “hybrid” model, which attempts to accommodate the competing goals of limiting litigation abuse and preserving free access to the courts and is dependent on an objective standard.<sup>84</sup> Because states have taken different approaches to adopting Rule 11, the use of sanction provisions in addressing abusive litigation will vary by state.

## 2. Inherent Authority of Courts

In addition to rule-based and statutory authority, courts have inherent authority and power governed “by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.”<sup>85</sup> In *Chambers v. NASCO*, the Supreme Court explained that courts’ “inherent power extends to a full range of litigation abuses.”<sup>86</sup> While these powers “must be exercised with restraint and discretion,” a court may penalize a party who has “acted in bad faith, vexatiously, wantonly, or for oppressive reasons.”<sup>87</sup>

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pleading. See John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1377, 1383 (1986).

<sup>81</sup> Keeling, *supra* note 36, at 1094–95.

<sup>82</sup> *Id.* at 1095.

<sup>83</sup> *Id.* at 1102.

<sup>84</sup> *Id.* at 1111.

<sup>85</sup> *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630–31 (1962).

<sup>86</sup> *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46 (1991).

<sup>87</sup> *Id.* at 44, 45–46.

### 3. Tort Remedies

Additional remedies available to survivors of domestic violence subjected to abusive use of litigation from their abuser arise under tort law. First, the tort of abuse of process may be available when a party files suit with an improper motive.<sup>88</sup> This suit can arise when a proceeding “has been perverted in an attempt to accomplish an improper motive or ulterior purpose” and proximately causes direct damage to another party.<sup>89</sup> Because there are concerns that this tort may have a chilling effect on meaningful access to the courts, it is “sometimes disfavored and must be narrowly construed to insure the individual a fair opportunity to present his or her claim.”<sup>90</sup> Second, the tort of malicious prosecution may be available when a party files a frivolous claim without legal merit.<sup>91</sup> This tort serves a dual purpose by providing a remedy to innocent parties and deterring abusive litigants with improper motives.<sup>92</sup>

Tort remedies can provide a party with awards not available in family court. For instance, a jury may award actual or compensatory damages for “lost time, danger to life or liberty, injured reputation, health problems, mental and emotional suffering, and expenses, including attorneys’ fees.”<sup>93</sup> In addition, a jury may award punitive damages meant to punish the abusive litigant for “actions of malice, improper motive, or oppression.”<sup>94</sup> Tort remedies may be a tool survivors can use to further empower themselves, and instead of relying solely on the courts, “she can proactively assert herself into a position of relative control in relation to her abuser.”<sup>95</sup>

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<sup>88</sup> Pollema, *supra* note 50, at 1108.

<sup>89</sup> *Id.* at 1121.

<sup>90</sup> *Id.* at 1122.

<sup>91</sup> *Id.* at 1108.

<sup>92</sup> *Id.* at 1122.

<sup>93</sup> *Id.* at 1124.

<sup>94</sup> *Id.*

<sup>95</sup> Przekop, *supra* note 39, at 1090.

#### 4. Educating Judicial Officers

Both survivors and attorneys have recognized the significance of educating judicial officers about both domestic violence generally and abusive litigation specifically.<sup>96</sup> “Simply having the wherewithal to recognize the behavior is a necessary first step for courts to take before the abusive behaviors can be addressed.”<sup>97</sup> In one study, survivors argued that all court professionals, including judges, custody evaluators, mediators, and lawyers, working on cases involving intimate partner violence need in-depth training on this topic.<sup>98</sup> Courts need to be able to identify when intimate partner violence is present in a case, learn how to respond sensitively to disclosures of abuse, and recognize when coercion and control are being re-enacted during the legal process.<sup>99</sup>

##### *B. Problems with Currently Available Remedies*

The major challenge with all of these available remedies is that they were not designed to specifically address abusive litigation in the intimate partner violence context. Experts argue that the statutes intending to help survivors, including civil protection order statutes, “need to provide additional remedies that are targeted at the petitioner’s actual experience of multifaceted abuse in her life.”<sup>100</sup> With abusive litigation, courts are faced with “addressing a problem that is the manifestation of domestic violence in the courtroom.”<sup>101</sup> Because these remedies were not designed with intimate partner violence in mind, there are many limitations to using them.

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<sup>96</sup> Ward, *supra* note 2, at 462.

<sup>97</sup> Przekop, *supra* note 39, at 1070.

<sup>98</sup> Gutowski & Goodman, *supra* note 45, at 452.

<sup>99</sup> *Id.*

<sup>100</sup> Johnson, *supra* note 13, at 1155.

<sup>101</sup> Telephone Interview with Lindsey Goheen, Staff Attorney, Northwest Justice Project (Nov. 20, 2020).



## 1. Sanction Provisions

Monetary sanctions, like awarding costs and attorneys' fees to the prevailing party, can have some deterrent effect on abusive litigants but are limited in several ways.<sup>102</sup> First, these awards fail to fully compensate victims for all of the costs associated with abusive litigation, including job loss, child care, and missed educational or employment opportunities.<sup>103</sup> Second, for a variety of reasons, courts may be reluctant to impose monetary sanctions on a pro se indigent party.<sup>104</sup> Third, and most notably, sanction remedies fail to recognize the main impetus behind abusive litigation—forcing the victim back into court and under their abuser's control.<sup>105</sup> The second the survivor is involved and is forced into court, the abuser's mission is accomplished and it no longer matters whether the court sanctions the abuser or not.<sup>106</sup>

## 2. Inherent Authority of Courts

Under their inherent authority, courts have the ability to respond uniquely to the cases before them.<sup>107</sup> One practitioner praised the effectiveness of a unique order in an abusive litigation case, which did not require a response from the survivor until the presiding judge had reviewed the new motion for merit and subsequently requested a response from the survivor.<sup>108</sup> Another explained how these types of orders are often the result of a concerted advocacy effort by a skilled attorney who knows to ask for this type of relief and knows how to write an effective proposed order.<sup>109</sup>

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<sup>102</sup> Pollema, *supra* note 50, at 1107.

<sup>103</sup> *Id.*

<sup>104</sup> Przekop, *supra* note 39, at 1089.

<sup>105</sup> *Id.* at 1064.

<sup>106</sup> Telephone Interview with Lindsey Goheen, *supra* note 101.

<sup>107</sup> See discussion *infra* Section III.A.2.

<sup>108</sup> Ward, *supra* note 2, at 461.

<sup>109</sup> Telephone Interview with Lindsey Goheen, *supra* note 101.

Because of the skill required, this remedy is practically inaccessible to pro se litigants.<sup>110</sup> The Self-Represented Litigation Network estimates that three out of five people in civil cases are unrepresented.<sup>111</sup> This number is an estimate because there is no national data about self-represented litigants.<sup>112</sup> However, the Legal Services Corporation has reported that while 71% of low-income households experience a civil legal problem, 86% of civil legal problems received inadequate or no legal help.<sup>113</sup> In households with survivors of domestic violence, 97% experience a civil legal problem.<sup>114</sup> A similar study conducted by Washington State University found that victims of domestic violence or sexual assault experience the highest number of problems of any low-income group and that more than 76% of those who have a legal problem face their problems without an attorney.<sup>115</sup>

In addition, with this remedy, judges are asked to “stick their neck out” and open their decisions to the risk of appeal.<sup>116</sup> A judicial officer in Connecticut described this tension as a “tightrope to ensure due process.”<sup>117</sup> While courts can dismiss particular pleadings as frivolous, “[j]udges are

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<sup>110</sup> *Id.*

<sup>111</sup> SELF-REPRESENTED LITIGATION NETWORK, <http://www.srln.org> [https://perma.cc/33CF-TU2A].

<sup>112</sup> *See* SELF-REPRESENTED LITIGATION NETWORK, SLRN BRIEF: HOW MANY SRLS?, <https://www.srln.org/node/548/srln-brief-how-many-srls-srln-2015> [https://perma.cc/4XCD-BK69].

<sup>113</sup> LEGAL SERVICES CORPORATION, THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS EXECUTIVE SUMMARY 1 (2017), <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-ExecutiveSummary.pdf> [https://perma.cc/8X94-S2LZ].

<sup>114</sup> *Id.* at 2.

<sup>115</sup> CIV. LEGAL NEEDS STUDY UPDATE COMM., WASH. STATE SUP. CT., CIVIL LEGAL NEEDS STUDY UPDATE 3 (2015), [https://ocla.wa.gov/wp-content/uploads/2015/10/CivilLegalNeedsStudy\\_October2015\\_V21\\_Final\\_10\\_14\\_15.pdf](https://ocla.wa.gov/wp-content/uploads/2015/10/CivilLegalNeedsStudy_October2015_V21_Final_10_14_15.pdf) [https://perma.cc/RWM7-4Q6P].

<sup>116</sup> Telephone Interview with Lindsey Goheen, *supra* note 101.

<sup>117</sup> Emilie Munson, *Woman, Advocates, Seek End to ‘Stalking’ Through Court System*, CONN. POST (Nov. 26, 2018, 9:13 PM), <https://www.ctpost.com/local/article/Woman-advocates-seek-end-to-stalking-13417249.php> [https://perma.cc/96C5-Q7ZZ].

reluctant to cut off litigants and potentially infringe on their access to justice and their rights to be heard.”<sup>118</sup> Finally, these unique orders end up lacking uniformity and can be difficult for court clerks to understand and enforce.<sup>119</sup>

### 3. Tort Remedies

While the criminal legal system focuses on eradicating violence for the benefit of society as a whole, the civil system, specifically tort law, is meant to provide a remedy for the petitioner to address their harms from domestic violence.<sup>120</sup> However, these remedies are rarely used in this way and survivors often do not know that this may be an option.<sup>121</sup> Tort remedies also fail to recognize that a survivor who has been “pursued relentlessly through the courts may not want to obtain money as their first choice.”<sup>122</sup> In addition, pursuing a tort case against their abuser puts a survivor in the same position they are trying to escape: prolonged contact with the abuser.<sup>123</sup>

### 4. Educating Judicial Officers

Educating judicial officers also presents significant challenges. According to the National Council of Juvenile and Family Court Judges, as of 2014, only twenty-one states and the District of Columbia mandated domestic violence training for judges.<sup>124</sup> In four of those states, training was limited to certain locations and courts.<sup>125</sup> Further, the judicial education

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<sup>118</sup> *Id.*

<sup>119</sup> Telephone Interview with Lindsey Goheen, *supra* note 101.

<sup>120</sup> Johnson, *supra* note 13, at 1142.

<sup>121</sup> Klein, *supra* note 75.

<sup>122</sup> Przekop, *supra* note 39, at 1090.

<sup>123</sup> *Id.*

<sup>124</sup> NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, MANDATORY DOMESTIC VIOLENCE TRAINING FOR JUDGES (2014), <https://rcdvpc.org/resources/resource-library/resource/mandatory-dv-training-for-judges.html> [<https://perma.cc/RL9N-RBD5>].

<sup>125</sup> *Id.*

system is mostly voluntary; judges attending conferences and training events can choose which sessions to attend.<sup>126</sup> Judges who are most in need of instruction on particular issues are perhaps the least likely to choose to attend those particular programs.<sup>127</sup>

#### IV. LEGISLATIVE MEASURES ADDRESSING ABUSIVE LITIGATION

Experts have regularly opined that domestic violence cases are unique and legislation should be specifically targeted to address the multifaceted abuse that survivors experience.<sup>128</sup> Abusive litigation must be recognized as a form of emotional, psychological, and economic abuse and, most importantly, as “part of a pattern of controlling and coercive behaviors”<sup>129</sup> and “the manifestation of domestic violence in the courtroom.”<sup>130</sup> As discussed in the prior section, while courts have inherent and statutory authority to address abusive litigation, those remedies are not always used, resulting in ad hoc rulings. But targeted legislation to address abusive litigation in the domestic violence context could remedy these problems.<sup>131</sup> This section and the following section will present the two existing pieces of legislation that address abusive use of litigation in intimate partner relationships. First, this section will focus on Tennessee’s Abusive Civil Actions Law of 2018, the first state legislation designed to address this problem in the family law context. Next, this section will discuss Washington’s Abusive Use of Litigation Law of 2020, based in part and built upon Tennessee’s law. Later, in Section V, I compare and contrast

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<sup>126</sup> S.I. Strong, *Judicial Education and Regulatory Capture: Does the Current System of Educating Judges Promote a Well-Functioning Judiciary and Adequately Serve the Public Interest?*, 2015 J. DISP. RESOL. 1, 15 (2015).

<sup>127</sup> *Id.*

<sup>128</sup> Johnson, *supra* note 13, at 1155.

<sup>129</sup> Ward, *supra* note 2, at 456.

<sup>130</sup> Telephone Interview with Lindsey Goheen, *supra* note 101.

<sup>131</sup> In enacting legislation, the Washington legislature declared its intent “to provide the courts with an additional tool to curb abusive litigation and to mitigate the harms abusive litigation perpetuates.” WASH. REV. CODE § 26.51.010 (2020).

these laws to show how other states can learn from these statutes to enact specific, targeted legislation addressing abusive use of litigation.

#### *A. Tennessee's Abusive Civil Action Law of 2018*

In 2018, Tennessee became the first state to enact a specific remedy for abusive litigation in the domestic violence context.<sup>132</sup> Representative Mike Carter, one of the bill's sponsors, cited his experience as an attorney and former judge witnessing multiple cases as "a litigious form of domestic assault" as impetus for the legislation.<sup>133</sup> Before the bill was considered, the Violence Policy Center released annual data revealing that, in 2015, Tennessee ranked fourth among states with the highest rate of women killed by men.<sup>134</sup> Tennessee had been in the top ten states for the previous eight years.<sup>135</sup> Legislators considered the harrowing local case of Staci Jones, whose husband made three separate attempts to kill her.<sup>136</sup> Despite being sentenced to thirty years in prison, Fred Auston Wortman III, a former lawyer, continued to bring his now ex-wife into court by filing motions, most often concerning the parties' children, from prison.<sup>137</sup> Legislators also considered the economic impact that this kind of serial litigation could have. Staci Jones stated that she owed more than \$100,000 from the

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<sup>132</sup> Klein, *supra* note 75.

<sup>133</sup> *Id.*

<sup>134</sup> VIOLENCE POLICY CENTER, WHEN MEN MURDER WOMEN: AN ANALYSIS OF 2015 HOMICIDE DATA 4 (2017), <https://vpc.org/studies/wmmw2017.pdf> [<https://perma.cc/WK2R-79LZ>]. The study analyzes data submitted to the Federal Bureau of Investigation and is limited to the age, sex, race, and ethnicity of both victims and offenders, type of weapon used, relationship of victims to offenders, and circumstances of the murders. *Id.* at 2. Significantly, this data does not identify whether an individual is LGBTQ+.

<sup>135</sup> Jennifer Pignolet & Yolanda Jones, *Her Husband Tried to Kill Her Three Times. Three Years Later, He's Still Taking Her to Court*, MEMPHIS COM. APPEAL (July 2, 2018, 7:00 AM), <https://www.commercialappeal.com/story/news/crime/2018/07/02/new-state-law-seeks-protect-domestic-violence-victims-against-stalking-lawsuits/739937002/> [<https://perma.cc/PK8V-8B67>].

<sup>136</sup> *Id.*; see also Klein, *supra* note 75.

<sup>137</sup> Pignolet & Jones, *supra* note 135.

ongoing litigation, and a second woman testified during a committee hearing that she had spent \$400,000 fighting numerous lawsuits filed by her ex-husband.<sup>138</sup> Legislators were especially concerned by cases of forum shopping, where the party would lose in one county and then immediately file the same suit elsewhere.<sup>139</sup>

In response to these concerns, Tennessee passed the Abusive Civil Action Law and created a process for specifically holding abusive civil litigants accountable.<sup>140</sup> The law has several components. First, the law defines both the types of cases that may be eligible for this type of relief and the relationships of the involved parties. Second, the law outlines a process whereby a party can be found to be an abusive civil litigant. Third, the law provides several remedies the court may use in addressing an abusive civil litigant.

## 1. When Tennessee's Abusive Civil Action Law Can be Used

Tennessee defines an abusive civil action as an action “filed by a plaintiff against a defendant with whom the plaintiff shares a civil action party relationship primarily to harass or maliciously injure the defendant.”<sup>141</sup> Civil action party relationship specifies that the law applies to current or former spouses, adults who live or have lived together, adults who are dating or who have dated or had a sexual relationship, adults related by

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<sup>138</sup> Sheila Burke, *New State Law Seeks to Stop ‘Stalking by Way of the Courts’*, ASSOCIATED PRESS NEWS (June 25, 2018), <https://apnews.com/article/0249e6d67b1d419b9787cb6adb297cb7>

[<https://perma.cc/5PTQ-DHG6>]; see also *Abusive Civil Action Bill: Hearing on SB 1601 Before the S. Judiciary Comm.*, 110th General Assemb. (Tenn. 2018), [http://tnga.granicus.com/MediaPlayer.php?view\\_id=354&clip\\_id=15034](http://tnga.granicus.com/MediaPlayer.php?view_id=354&clip_id=15034)

[<https://perma.cc/FNJ4-QQDD>] [hereinafter *Tennessee Hearing*]. Kim Nelson additionally testified that the abuse was psychological in addition to financial every time she was drawn back into court and passionately told the committee “this [law] is to prevent someone from being able to use our court system as a weapon.” *Id.*

<sup>139</sup> Burke, *supra* note 138; *Tennessee Hearing*, *supra* note 138.

<sup>140</sup> TENN. CODE ANN. § 29-41 (2018).

<sup>141</sup> TENN. CODE ANN. § 29-41-101(1) (2018).

blood or adoption, adults who are or were related by marriage, or adult children of a person in a relationship as previously defined.<sup>142</sup> These types of relationships are the same that make a party eligible to file for an order for protection from domestic violence in Tennessee, except domestic abuse victims includes minors and the civil action party relationship is limited to adults.<sup>143</sup>

Another feature of the Tennessee law highlights an abuser's purpose and intent in filing the action. There are a number of different purposes behind harassing or maliciously injuring a defendant.<sup>144</sup> First, the action may be designed to exhaust, deplete, impair, or adversely impact the defendant's resources.<sup>145</sup> Second, the purpose may be to prevent or interfere with a party's ability to raise a child in the manner they deem appropriate, unless the plaintiff has a lawful right to interfere and a good faith basis for doing so.<sup>146</sup> The intent may be to force or coerce a party to make adverse concessions regarding financial, custodial, support, or other previously litigated issues.<sup>147</sup> The intent may also be to force or coerce a party to alter, engage in, or refrain from engaging in lawful conduct.<sup>148</sup> An abuser may also intend to impair the health or well-being of the other party and prevent or interfere with a survivor's ability to pursue a livelihood.<sup>149</sup> Finally, an abuser may intend to harm a survivor's reputation in the community or

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<sup>142</sup> TENN. CODE ANN. § 29-41-101(5) (2018).

<sup>143</sup> TENN. CODE ANN. § 36-3-601(5) (2019).

<sup>144</sup> TENN. CODE ANN. § 29-41-101(6) (2018).

<sup>145</sup> TENN. CODE ANN. § 29-41-101(6)(A) (2018). There are two exceptions to this intent. First, if punitive damages are requested and appropriate. TENN. CODE ANN. § 29-41-101(6)(A)(i) (2018). Second, if there has been a change in the circumstances of the parties and there is a good faith basis to change a financial award, support, or distribution of resources. TENN. CODE ANN. § 29-41-101(6)(A)(ii) (2018).

<sup>146</sup> TENN. CODE ANN. § 29-41-101(6)(B) (2018).

<sup>147</sup> TENN. CODE ANN. § 29-41-101(6)(C) (2018).

<sup>148</sup> TENN. CODE ANN. § 29-41-101(6)(D) (2018).

<sup>149</sup> TENN. CODE ANN. § 29-41-101(6)(E)–(F) (2018).

alienate the survivor from friends and colleagues by needlessly subjecting them to interrogatories or depositions.<sup>150</sup>

These features address many of the concerns that arise in abusive litigation cases, including causing financial issues,<sup>151</sup> interfering with survivors' ability to raise children,<sup>152</sup> pressuring survivors into making concessions to stop the litigation,<sup>153</sup> and isolating survivors from their support network of friends and family.<sup>154</sup>

## 2. Procedure to Declare an Action and Party Abusive

The process for addressing abusive civil actions follows typical motion practice. First, claims asserting that an action is abusive can be raised by the defendant in the answer to the action, by motion at any time, or by the court on its own motion.<sup>155</sup> Next, the court will conduct a hearing; hear all relevant testimony; and review affidavits, documentary evidence, or other records deemed necessary.<sup>156</sup> Evidence of any of the following creates a rebuttable presumption that the action is an abusive civil action and prefilng restrictions should be imposed on the plaintiff:

- (1) The same or substantially similar issues between the same or substantially similar civil action parties . . . have been litigated . . . within the past five (5) years . . . and the actions were dismissed on the merits or with prejudice . . . ;
- (2) The alleged civil action plaintiff has used the same or substantially similar issues that are the subject of the current civil action as the basis for an adverse complaint against the civil action

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<sup>150</sup> TENN. CODE ANN. § 29-41-101(6)(G) (2018).

<sup>151</sup> FREEFROM REPORT, *supra* note 30, at 38; *see also* Ward, *supra* note 2, at 451 (explaining that the financial impact includes not only legal fees but also the loss of jobs and career opportunities).

<sup>152</sup> *See* Ward, *supra* note 2, at 434.

<sup>153</sup> *Id.* at 449.

<sup>154</sup> *Id.* at 445.

<sup>155</sup> TENN. CODE ANN. § 29-41-103 (2018).

<sup>156</sup> TENN. CODE ANN. § 29-41-104 (2018).



defendant to a regulatory or licensing board . . . and the complaint [was dismissed] after a contested hearing . . . ;

(3) The alleged civil action plaintiff has been sanctioned under Rule 11 of the Tennessee Rules of Civil Procedure, or a similar rule or law in another state or the federal government for filing one (1) or more frivolous, vexatious, or abusive civil actions within the past ten (10) years . . . involv[ing] the same or substantially the same issues between the same or substantially the same civil action parties; or

(4) A court . . . has determined that a civil action filed against the civil action defendant was an abusive civil action and is under or has been under prefiling restrictions in that judicial district.<sup>157</sup>

### 3. Remedies

Once a court finds that a plaintiff is an abusive civil action plaintiff,<sup>158</sup> the court must issue a judgment with several remedies. First, if any or all civil actions filed by the plaintiff are abusive civil actions then the actions shall be dismissed.<sup>159</sup> Second, all costs of any pending action must be taxed against the plaintiff.<sup>160</sup> Third, the court must award the defendant reasonable attorney fees and all reasonable costs of defending the abusive civil action.<sup>161</sup> Finally, and most significantly, the court must impose prefiling restrictions on any civil action the plaintiff attempts to file for a period of no less than four years and no more than six years.<sup>162</sup>

The prefiling restrictions, based in part by a notorious political Tennessee case,<sup>163</sup> impose several barriers but still allow plaintiffs to have meaningful

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<sup>157</sup> TENN. CODE ANN. § 29-41-105 (2018).

<sup>158</sup> TENN. CODE ANN. § 29-41-106(a) (2018) (finding based on a preponderance of the evidence).

<sup>159</sup> *Id.*

<sup>160</sup> TENN. CODE ANN. § 29-41-106(b)(1) (2018).

<sup>161</sup> TENN. CODE ANN. § 29-41-106(b)(2) (2018).

<sup>162</sup> TENN. CODE ANN. § 29-41-106(b)(3) (2018).

<sup>163</sup> *Hooker v. Sundquist*, 150 S.W.3d 406 (Tenn. Ct. App. 2004). The court upheld prefiling restrictions issued against a former government official holding “the screening

access to the courts.<sup>164</sup> Before filing a new action, the plaintiff must appear before the same judge who imposed the prefiling restrictions and apply for permission to file.<sup>165</sup> The judge may examine witnesses, including the plaintiff and defendant, to determine if there are reasonable and legitimate grounds for the complaint.<sup>166</sup> If the judge believes the new action is abusive, the application will be denied.<sup>167</sup> Further, if a party subject to prefiling restrictions files a civil action without application to the sanctioning judge, the court must dismiss the action and the sanctioning judge may take whatever action the court deems necessary for a violation of the court's order.<sup>168</sup>

### *B. Washington's Abusive Use of Litigation Bill of 2020*

In 2020, with Tennessee's Abusive Civil Action Law as a model, Washington passed its own Abusive Use of Litigation bill.<sup>169</sup> Washington State Senator Christine Rolfes acted in response to a constituent complaint from a woman who experienced nonstop court harassment from an abusive former partner.<sup>170</sup> Senator Rolfes worked with domestic violence advocates, lawyers, and survivors from around the state of Washington to draft Senate Bill 6268.<sup>171</sup> During the public hearing, several attorneys who have worked with survivors of domestic violence testified in support of the bill arguing that remedies currently available are "inadequate, inaccessible to many

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mechanism imposed by the trial court was narrowly tailored and short in duration." *Id.* at 413. Further, the mechanism was fully warranted given Mr. Hooker's history of filing essentially the same lawsuit. *Id.*

<sup>164</sup> *Id.* at 410.

<sup>165</sup> TENN. CODE ANN. § 29-41-107(c)(1) (2018).

<sup>166</sup> TENN. CODE ANN. § 29-41-107(c)(2)(A) (2018).

<sup>167</sup> TENN. CODE ANN. § 29-41-107(c)(3)(A) (2018).

<sup>168</sup> TENN. CODE ANN. § 29-41-107(f)(2) (2018).

<sup>169</sup> Abusive Litigation, ch. 311, 2020 Wash. Sess. Laws 2268.

<sup>170</sup> Senator Rolfes 2020 Legislative Report, WASH. STATE S. DEMOCRATIC CAUCUS (May 7, 2020), <https://senatedemocrats.wa.gov/rolfes/2020/05/07/2020-legislative-report/> [<https://perma.cc/C8CX-XX9W>].

<sup>171</sup> *Id.*

litigants, and inconsistently applied.”<sup>172</sup> Attorney Lindsey Goheen testified about a client who had experienced a years-long campaign of abusive litigation from the father of her child after she separated from him.<sup>173</sup> In that case, the trial judge described the abuser as “relentless in his efforts to terrorize, intimidate, and abuse her . . . obsessed with punishing her and his abuse has only escalated [since separation].”<sup>174</sup>

The Washington Legislature found that specific, targeted legislation was necessary and adopted Senate Bill 6268.<sup>175</sup> In doing so, the legislature recognized that parties “who abuse their intimate partners often misuse court proceedings in order to control, harass, intimidate, coerce, and/or impoverish the abused partner”<sup>176</sup> and found the term “abusive litigation” was the most common term utilized that accurately describes the problem.<sup>177</sup> The legislature also emphasized that “forcing a survivor to spend time, money, and emotional resources responding to the action provides a means for the abuser to assert power and control over the survivor.”<sup>178</sup>

Similar to Tennessee’s law, Washington’s abusive use of litigation law also first defines the types of cases that apply and the parties who are eligible for relief. Next, the law outlines a process for obtaining an order restricting abusive litigation. Finally, the law describes remedies the court may impose to address the abusive use of litigation.

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<sup>172</sup> *Washington Hearing*, *supra* note 4.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> Abusive Litigation, ch. 311, 2020 Wash. Sess. Laws 2268.

<sup>176</sup> WASH. REV. CODE § 26.51.010 (2020). This language was taken directly from the Washington Domestic Violence Manual for Judges. WA DV MANUAL, *supra* note 47, at Appendix H.

<sup>177</sup> WASH. REV. CODE § 26.51.010 (2020).

<sup>178</sup> *Id.*

## 1. When Washington's Abusive Use of Litigation Law Can be Used

Like in Tennessee, Washington's law defined the type of litigation that can be abusive and the relationships that must be involved. First, abusive litigation is litigation where the opposing parties have a current or former intimate partner relationship.<sup>179</sup> Intimate partner relationships includes the following types of relationships: current or former spouses or domestic partners; persons who have a child in common regardless of whether they have been married or lived together; and adult persons presently or previously residing together who have or have had a dating relationship.<sup>180</sup> In addition, intimate partner relationships include persons sixteen years of age or older who are presently residing together, resided together in the past, and who had a dating relationship, and persons sixteen years or older with whom a person sixteen years or older has or has had a dating relationship.<sup>181</sup> Thus, unlike Tennessee, Washington specifically recognized that some minors can seek this remedy in select cases.

Next, the party filing, initiating, advancing, or continuing the abusive litigation has to have been found by a court to have committed domestic violence against the other party pursuant to an order for protection, restrictions in a parenting plan, or a restraining order with a specific finding due to domestic violence.<sup>182</sup> This was a deliberate choice by the drafters of the Washington bill, who wanted to recognize that real abusive litigation is another tactic of domestic violence and wanted to narrow the application of this law to prevent its misuse against survivors.<sup>183</sup> The litigation is abusive if it is being initiated, advanced, or continued for the primary purpose of harassing, intimidating, or maintaining contact with the other party.<sup>184</sup> In

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<sup>179</sup> WASH. REV. CODE § 26.51.020(1)(a)(i) (2020).

<sup>180</sup> WASH. REV. CODE § 26.50.010(7) (2019).

<sup>181</sup> *Id.*

<sup>182</sup> WASH. REV. CODE § 26.51.020(1)(a)(ii) (2020).

<sup>183</sup> Telephone Interview with Lindsey Goheen, *supra* note 101.

<sup>184</sup> WASH. REV. CODE § 26.51.020(1)(a)(iii) (2020).

addition, at least one of the following factors apply: the claims are not warranted by existing law, the allegations do not have evidentiary support, or the issue was previously filed and the action has been litigated or disposed of unfavorably to the party filing the action.<sup>185</sup>

## **2. Procedure to Obtain an Order Restricting Abusive Litigation**

The process for obtaining an order restricting abusive litigation is similar to Tennessee's abusive civil action process. First, a party may request an order restricting abusive litigation in any answer or response to the litigation or by motion at any time during an open or ongoing case.<sup>186</sup> In addition, Washington allows a party to make a separate motion within five years of the entry of an order for protection, even if the protection order has subsequently expired.<sup>187</sup> Further, a court may, on its own motion, determine that a hearing is needed.<sup>188</sup> Next, upon verification that the parties have or previously had an intimate partner relationship and the party raising the claim has been found to be a victim of domestic violence by the other party, the court will set a hearing.<sup>189</sup> At the hearing, the court can hear all relevant testimony and review affidavits, documentary evidence, or other records deemed necessary by the court.<sup>190</sup>

Washington also has a provision outlining evidence that creates a rebuttable presumption that the primary purpose of the litigation is to harass, intimidate, or maintain contact with the other party. Evidence creating a rebuttable presumption includes the following:

- (1) The same or substantially similar issues between the same or substantially similar parties have been litigated within the past five

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<sup>185</sup> WASH. REV. CODE § 26.51.020(1)(b) (2020).

<sup>186</sup> WASH. REV. CODE § 26.51.030(1) (2020).

<sup>187</sup> WASH. REV. CODE § 26.51.030(1)(c) (2020). *See also* WASH. REV. CODE § 26.50.060(1)(n) (2020).

<sup>188</sup> WASH. REV. CODE § 26.51.030(2) (2020).

<sup>189</sup> WASH. REV. CODE § 26.51.040(1) (2020).

<sup>190</sup> WASH. REV. CODE § 26.51.040(2) (2020).

years in the same court or any other court of competent jurisdiction; or

(2) 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; or

(3) Within the last ten years, the party allegedly engaging in abusive litigation has been sanctioned under superior court civil rule 11 or a similar rule or law in another jurisdiction 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; or

(4) A court of record in another judicial district has determined that the party allegedly engaging in abusive litigation has previously engaged in abusive litigation or similar conduct and has been subject to a court order imposing prefilng restrictions.<sup>191</sup>

### **3. Remedies**

Upon finding that a party is engaging in abusive litigation,<sup>192</sup> the court must impose remedies. First, the pending litigation “shall be dismissed, denied, stricken, or resolved by other disposition with prejudice.”<sup>193</sup> Second, the court will enter an order restricting abusive litigation that contains the following: impose all costs of any abusive civil action against the party advancing abusive litigation, award reasonable attorneys’ fees and costs to the other party for responding to the abusive litigation and seeking the order, identify the party protected by the order, and impose prefilng restrictions on the party advancing abusive litigation for four to six years.<sup>194</sup>

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<sup>191</sup> WASH. REV. CODE § 26.51.050 (2020).

<sup>192</sup> Finding based on preponderance of the evidence. WASH. REV. CODE § 26.51.060(1) (2020).

<sup>193</sup> WASH. REV. CODE § 26.51.060(1) (2020).

<sup>194</sup> WASH. REV. CODE § 26.51.060(2) (2020).

The prefiling restrictions in Washington’s law<sup>195</sup> are nearly identical to those in the Tennessee law,<sup>196</sup> with one notable exception. When a person subject to an order restricting litigation applies for permission to institute a civil action and the judicial officer determines the proposed litigation is abusive litigation based on the records and any evidence from the person subject to the order, then it is not necessary for the survivor to appear or participate in any way.<sup>197</sup> Because of this, survivors will not have to appear in court, pay for an attorney, take time off work, find childcare, or be forced to face their abuser. The drafters of the legislation wanted the court to act as a gatekeeper in this type of case to prevent abusers from accomplishing the ultimate goal of getting a survivor back to court.<sup>198</sup> If, however, the judicial officer cannot make that decision without hearing from the protected party, the court will issue an order scheduling a hearing and notifying the protected party of their right to appear and respond, and when possible, the protected party should be permitted to appear telephonically.<sup>199</sup>

Washington also recognized the importance of limiting this law to prevent it from being used against survivors seeking to protect their children. Because of this concern, the court may enter restrictions in a parenting plan based on a finding that a parent’s involvement or conduct may have an adverse effect on the child’s best interests based on abusive use of conflict.<sup>200</sup> Abusive use of conflict includes, but is not limited to, abusive litigation.<sup>201</sup> Significantly, “a report made in good faith to law enforcement, a medical professional, or child protective services of sexual,

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<sup>195</sup> WASH. REV. CODE § 26.51.070 (2020).

<sup>196</sup> TENN. CODE ANN. § 29-41-107 (2018).

<sup>197</sup> WASH. REV. CODE § 26.51.070(3)(b)(ii) (2020).

<sup>198</sup> Telephone Interview with Lindsey Goheen, *supra* note 101.

<sup>199</sup> WASH. REV. CODE § 26.51.070(3)(b)(ii) (2020).

<sup>200</sup> WASH. REV. CODE § 26.09.191(3)(e) (2020).

<sup>201</sup> *Id.*

physical, or mental abuse of a child shall not constitute a basis for a finding of abusive use of conflict.”<sup>202</sup>

## V. HOW ADDITIONAL STATE LEGISLATURES CAN ADDRESS ABUSIVE USE OF LITIGATION

Because domestic violence is widely prevalent, appears in every community, and affects all people, more state legislatures need to take active steps to protect survivors from abusive litigation. The first step is to consult with survivors of domestic violence and their advocates. In drafting the Washington bill, Senator Rolfes worked with survivors and advocates across Washington state.<sup>203</sup> This resulted in a well-drafted bill that narrowly tailored the law to address the particular needs of survivors in Washington.<sup>204</sup> The next few sections discuss specific components that should be included in proposed legislation based on the laws of Tennessee and Washington.

### A. Define Abusive Litigation and the Relationships it Applies to

First, explicitly defining abusive litigation is significant because recognizing the behavior as abusive validates the experiences of survivors.<sup>205</sup> In Washington, litigation is abusive when the primary purpose is to harass, intimidate, or maintain contact with the other party.<sup>206</sup> By including language specifying that a primary purpose is to maintain contact, the legislature recognized that litigation remains one of the only places where an abuser can continue to see and exert power and control over the other party.<sup>207</sup>

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<sup>202</sup> *Id.*

<sup>203</sup> Senator Christine Rolfes, *2020 Legislative Report*, WASH. STATE S. DEMOCRATIC CAUCUS (May 7, 2020), <https://senatedemocrats.wa.gov/rolfes/2020/05/07/2020-legislative-report/> [<https://perma.cc/C8CX-XX9W>].

<sup>204</sup> Telephone interview with Lindsey Goheen, *supra* note 101.

<sup>205</sup> See Przekop, *supra* note 39, at 1070.

<sup>206</sup> WASH. REV. CODE § 26.51.020(1)(a)(iii) (2020).

<sup>207</sup> See Pollema, *supra* note 50, at 1110.



In contrast, Tennessee chose to define an action as abusive when filed primarily to harass or maliciously injure the defendant, including examples like depleting a defendant's financial resources, preventing or interfering with one's ability to raise a child, or forcing or coercing adverse concessions.<sup>208</sup> There are pros and cons to providing such examples. While examples may help guide the judicial officer to determine whether an action is abusive, if an example is not listed, the judicial officer may be inclined to deny the motion to declare an action as abusive. In Tennessee, this can have severe consequences because if the court determines that an action was not abusive, the court has the discretion to tax all costs and award reasonable attorney fees against the defendant.<sup>209</sup> This means that a survivor asking the court to declare an action as abusive may have to pay costs if they lose the motion. The drafters of the Washington law omitted such a section, likely because courts will be conservative in finding that a party has engaged in abusive litigation, but it is not unreasonable for a survivor to ask the court to review whether an action is abusive, and they should not have to pay costs if they lose. Because of concerns that these laws could be used against survivors, other states should not include language in their statutes that would order survivors to pay costs if they lose a motion to define the action as abusive.<sup>210</sup>

Defining the parties and relationships involved is another integral component to making a strong law against abusive use of litigation. Tennessee expressly defined the parties; only a plaintiff who initially files an action can be abusive.<sup>211</sup> While this addressed one of the legislators' main concerns of forum shopping in different counties and courthouses,<sup>212</sup> it may reduce the parties eligible to seek redress because it emphasizes who

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<sup>208</sup> TENN. CODE ANN. § 29-41-101(6) (2018).

<sup>209</sup> TENN. CODE ANN. § 29-41-106(d) (2018).

<sup>210</sup> See Munson, *supra* note 117 ("Some advocates and legal observers have worried that the Tennessee law could be used against victims as well as abusers . . .").

<sup>211</sup> TENN. CODE ANN. § 29-41-101(2), (4) (2018).

<sup>212</sup> *Tennessee Hearing*, *supra* note 138, at statement of Sen. Ken Yager.

filed first and is limited to new cases. In contrast, Washington refers only to the party filing abusive litigation and then has an expansive definition of litigation, which includes complaints, motions, subpoenas, notice of deposition, and other filings.<sup>213</sup> In reality, abusive litigation comes in many forms. For example, an abuser will sometimes continue to raise the same claims within the same case by repeatedly attempting to modify a parenting plan. In other cases, the abuser will forum shop, filing new actions in a different jurisdiction. Both scenarios could be considered abusive litigation under Washington's law but only the latter would fit within Tennessee's law. Because abusive litigation can include filings within an existing case and filing new cases, states considering abusive litigation legislation should take Washington's broader approach.

In addition, both Tennessee and Washington chose to match the relationship between the parties with the relationships eligible for domestic violence protection orders. However, Tennessee limited civil action party relationships to adults only, excluding minors.<sup>214</sup> Washington's definition of intimate partner includes persons sixteen years of age or older and was not modified in the abusive litigation statute.<sup>215</sup> Because domestic violence is not limited to adults, it should also be recognized that persons under eighteen may be subjected to abusive litigation. In general, matching the relationship between the parties with those eligible for domestic violence protection orders helps limit this litigation to its intended audience. In furtherance of that goal, Washington explicitly limits this law to cases where a party has already been found by a court to have committed domestic violence against the other party.<sup>216</sup> If the purpose of an abusive use of litigation statute is to prevent abusive litigation in intimate partner relationships, then it should be limited to, and targeted at, intimate partner

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<sup>213</sup> WASH. REV. CODE § 26.51.020(3) (2020).

<sup>214</sup> TENN. CODE ANN. § 29-41-101(5) (2018).

<sup>215</sup> WASH. REV. CODE § 26.51.010(7) (2019).

<sup>216</sup> WASH. REV. CODE § 26.51.020(1)(a)(ii) (2020).

relationships. Therefore, states should strongly consider adopting Washington's approach of limiting abusive litigation to cases where there has already been a finding of domestic violence.

*B. Include a Process for a Judge to Declare Litigation Abusive and Impose Prefiling Restrictions*

One of the significant issues with currently available remedies is that they are inaccessible to many litigants. The procedures and process outlined by both Tennessee and Washington are clearly designed to allow a party to easily bring this issue to the court's attention. While judges have come up with creative solutions using their inherent authority,<sup>217</sup> advocates and survivors have been forced to be proactive and creative in how to raise these issues. A clearly outlined process and a statute for judicial officers to consult about abusive litigation in the domestic violence context will have a significant impact on survivor's ability to address these issues.

Tennessee and Washington have outlined a similar process where a party, or the court on its own motion, can raise concerns that an action is abusive.<sup>218</sup> Both states have similar remedies of dismissing the abusive action, imposing costs on the abusive litigant, awarding reasonable attorney's fees to the survivor, and imposing subsequent prefiling restrictions on the abusive litigant.<sup>219</sup> The prefiling restrictions are also very similar and provide a non-arduous process for an abuser to bring legitimate concerns to the court in recognition of parties' constitutional rights to access the courts.<sup>220</sup> In one crucial difference, Washington explicitly allows a judicial officer to determine proposed litigation is abusive without requiring the protected party to appear or participate in any way.<sup>221</sup> As discussed, this was a deliberate choice by the drafters to address the fact

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<sup>217</sup> See e.g., *Hooker v. Sundquist*, 150 S.W.3d 406 (Tenn. Ct. App. 2004).

<sup>218</sup> TENN. CODE ANN. § 29-41-103 (2018). WASH. REV. CODE § 26.51.030 (2020).

<sup>219</sup> TENN. CODE ANN. § 29-41-106 (2018). WASH. REV. CODE § 26.51.060 (2020).

<sup>220</sup> TENN. CODE ANN. § 29-41-107 (2018). WASH. REV. CODE § 26.51.070 (2020).

<sup>221</sup> WASH. REV. CODE § 26.51.070(3)(b)(ii) (2020).

that the intent of abusive litigation is to continue to exert power and control over a victim.<sup>222</sup> Because of this, survivors will not have to return to court every time their abuser attempts to file something. While the Tennessee law does not prohibit the court from making such a determination without a survivor present, because it is not explicitly stated in the law, survivors in Tennessee are more likely to be forced to return to court. States adopting similar legislation should make it clear that a judicial officer has the authority to make this decision without requiring the survivor to appear in court, unless the court deems that appearance necessary.

### *C. Include an Exception for Good Faith Reporting of Child Abuse*

After Tennessee's law passed, Joan Meier, Professor of Law at George Washington University, expressed concerns that the law might have unintended consequences.<sup>223</sup> Meier explained that the law could empower abusers who are taken to court for legitimate reasons.<sup>224</sup> Thus, Meier concluded the Tennessee law should include a provision that it does not apply when a party makes good faith claims about a child's welfare.<sup>225</sup> In response, Washington created such an exception where a good faith report of sexual, physical, or mental abuse of a child is not a basis for a finding of abusive use of conflict.<sup>226</sup> Because of how challenging it is to prove instances of child abuse, reporting can often backfire on survivors and lead to changes in custody.<sup>227</sup> Survivors report feeling powerless to protect their children from an abusive parent.<sup>228</sup> In light of the history of abusers employing the courts against survivors as an additional abusive tactic, and

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<sup>222</sup> See discussion *infra* Section IV.B.3; see also Przekop, *supra* note 39, at 1061 ("In this way, the courtroom may present an opportunity to prolong contact with the victim or seek contact that is not otherwise available.").

<sup>223</sup> Burke, *supra* note 138.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> WASH. REV. CODE § 26.09.191(3)(e) (2020).

<sup>227</sup> Gutowski & Goodman, *supra* note 45, at 442.

<sup>228</sup> *Id.*

the complexity of child abuse cases, states considering adopting similar legislation should also adopt a good faith exception to any abusive use of litigation law.

## VI. CONCLUSION

Long recognized by survivors and their advocates, abusive litigation is the manifestation of domestic violence in the courtroom. It is an additional tactic abusers use to continue to exert power and control over a survivor. While courts have statutory and inherent authority to address abusive litigation tactics, these tools are not frequently utilized, not easily accessible, and do not always consider the particular concerns that arise in domestic violence cases.

In light of these concerns, and while recognizing litigants' constitutional rights to access the courts, both Tennessee and Washington passed legislation specifically addressing abusive use of litigation in intimate partner violence. These laws outline a specific process that a survivor, or the court, may take to declare litigation abusive. The laws provide several remedies, including the imposition of prefiling restrictions on an abusive litigant. Prefiling restrictions are a non-arduous way to eliminate further abusive proceedings while still allowing a litigant to bring legitimate concerns to the court.

More states must work with attorneys, advocates, and survivors to draft similar legislation. The laws in Tennessee and Washington can be used as models. It is essential that this legislation clearly defines abusive use of litigation, provides a process where the court and survivors can move for an order restricting abusive litigation, and imposes prefiling restrictions upon the party found to have engaged in abusive litigation. Such action will significantly impact survivors and prevent further abuse of the courts to continue acts of domestic violence.