

WHAT IS A VEXATIOUS LITIGANT?

The average person generally spends their life trying to avoid the inside of a Court room. Yet, there are some who just cannot stay away; persistently initiating legal actions that do not have sufficient grounds, simply to harass or subdue their adversary. In such cases, the Court is often placed in the difficult position of balancing a person's fundamental right to access justice through the Courts, against ensuring the Court process is not being abused.

In Family Law proceedings, the impact that a vexatious litigant has on the individual who is the victim of their conduct can be significant. In many cases, the result is often that the party with limited financial resources 'bows out' of proceedings due to the delays and costs brought about by the vexatious litigant.

In assessing whether Court proceedings are vexatious, the Court must look at the whole history of the matter, including the number, general character and the result of the proceedings. The Court may determine that proceedings are vexatious notwithstanding that a particular case may have had a legal basis.

If the Court is satisfied that an applicant has frequently started Court Applications that are frivolous, vexatious or an abuse of process, it may:

- (a) dismiss the applicant's application;
- (b) make a costs order; and
- (c) stop the Applicant filing any further applications, without the court's permission.

Such an order may be made by a court on its own initiative, or the application of a party. However, an order of this nature cannot be made unless the litigant in question has had "a reasonable opportunity to be heard". The Court Rules provide that if a person who has been prohibited from filing or continuing an application without the Court's permission wants to file an Application, they must first file an "Application in a Case" and the matter will be heard ex parte (without the other party's attendance). On the first Court date the Court may dismiss the application, or if the Court is satisfied that the case has "a reasonable likelihood of success", it may order service of the documents and list the matter for a hearing. This approach ensures that, if the Application is vexatious and is then dismissed, then the other party has not had to waste time and money attending Court.

A vexatious litigant can be represented or unrepresented. Interestingly, people often associate unrepresented litigants with vexatious conduct, which has been the subject of much discussion among Law Reform Committees and community organisations. One theory is that many unrepresented litigants do have valid causes of action, but are simply not able to properly state them without adequate legal representation. Alternatively, it is argued that vexatious litigants are often obsessive people with particular personality traits who refuse to accept adverse outcomes, regardless of whether they have adequate representation.

Sometimes, individuals who are represented engage in conduct that adversely impacts on the efficiency or effectiveness of the Court for 'tactical reasons', consequently obstructing the course of justice. Such conduct has a range of impacts which can include significant resources being consumed in appearances, court time, gathering evidence, defending claims and so on.

IN THE MARRIAGE OF WILMOTH, R.S. AND WILMOTH, M.R. (1981)

In this case the parties had been married for 8 years and had 2 sons. Following separation there was an extraordinary amount of litigation between the parties, both in the Victorian Supreme Court and the Family Court of Australia, principally concerned with what was then called "custody" of, and "access" to, the children.

The Mother commenced proceedings for dissolution of marriage in 1974 and those proceedings took some years to bring to fruition. In 1976 following a contested hearing, Final Orders regarding parenting arrangements were also issued awarding 'custody' of the boys to the Mother and ordering the Father have defined periods of 'access'.

As a result of continued litigation the Wife eventually applied in 1981 for, among other things, an injunction to restrain the Husband from instituting any application unless he was represented by a solicitor, or had first obtained "leave" from the Court.

At the time the Wife's Application was heard, there were 9 applications before the Family Court for determination. Some of the orders sought by the Husband in the various applications included the following:

- an order that he be given custody of the children or unlimited access until the children are 18 years old;
- that after each function held at his business premises, the wife bring the children to the business to assist in cleaning up after each function and do the odd jobs boys do, and that he call and take them back to the residence if the children do not stay on with him.
- due to the irregular nature of his business, he be given complete access during all school holidays.
- that he not be required to maintain the boys while he has them during access.
- that the Wife reside at a place where the boys can commute between properties of himself and his Wife, either by foot or public transport.
- that certain items of furniture be paid for by the Wife, despite the fact that a property settlement agreement has been signed and approved.
- that the children when sick be not left in the Wife's home but be brought to him to be cared for.
- that he be given control of the children's education and that they receive vocational guidance.

In the final judgement the Judge stated:

"At the hearing before me, the Husband made it plain that he intended to institute further proceedings to force his Wife to give way to his demands regarding access and the control of the boys... In my view, any further proceedings by the husband concerning access or the control of the boys based on the material disclosed in the husband's affidavits filed in support of his applications or based on what he told me during the proceedings would be a plain abuse of the process of the Court".

Held:

The Court ordered that the Husband be restrained from instituting any Court application unless he was represented by a solicitor, or had first obtained "leave" from the Court.

CONCLUSION

There are only a very small number of people who have formally been declared vexatious litigants nationally. This does not reflect the number of proceedings that are frivolous or vexatious, but rather the conservative approach taken by the Court given the very serious infringement of human rights that long term preclusion of access to legal processes causes.