SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

AB 2159 (Bryan)
Version: March 16, 2022
Hearing Date: June 14, 2022
Fiscal: Yes
Urgency: No
AWM

SUBJECT

Reunification services

DIGEST

This bill prohibits a dependency court from denying family reunification services to a parent or guardian who is in custody before conviction and requires the court, in determining the appropriate reunification services for the parent or guardian in custody, to consider the particular barriers to an incarcerated, institutionalized, detained, or deported parent's or guardian's access to those court-mandated services and ability to maintain contact with the child and document that information in the child's care plan.

EXECUTIVE SUMMARY

California's child welfare system is responsible for ensuring the protection and safety of children at risk of abuse, neglect, or abandonment. When it is necessary for the state to remove a child from their parent's custody, the primary objective of the child welfare system is to reunify the child with their family, if doing so is consistent with the best interests of the child. To that end, in most cases a juvenile court orders reunification services—such as counseling for the family, and parenting classes or drug or alcohol treatment for the child's parents—before making a final determination regarding parental rights.

Current law prohibits a court from refusing to provide reunification services to a parent or guardian who is incarcerated, institutionalized, or detained by the United States Department of Homeland Security, or has been deported to the parent's or guardian's country of origin, unless the court determines, by clear and convincing evidence, that those services would be detrimental to the child. The relevant statute provides various factors for the court to consider in making that determination, such as the degree of the parent-child bond and the length of the sentence. The statute fails, however, to distinguish between parents who are in custody prior to a conviction as opposed to

those who are in custody after conviction. As a result, parents who have been convicted of no crimes, but simply cannot afford bail, may be denied reunification services. Not only does this prevent parents who may be innocent from reuniting with their children, but it creates a blatantly unequal application of the law between parents who can afford bail and parents who cannot. Given that the California Supreme Court has held that conditioning bail solely on whether the arrestee can afford it is unconstitutional (*see In re Humphrey* (2021) 11 Cal.5th 135, 143), conditioning the availability of reunification services may present similar constitutional problems.

This bill resolves this potential constitutional issue by clarifying that the provisions allowing a court to consider a parent's custodial status in deciding whether to grant reunification services do not apply to a parent who is in custody prior to conviction. The bill further requires that, in deciding the content of reasonable services to be provided to a parent in pre-conviction custody, the court must consider the particular barriers to an incarcerated, institutionalized, detained, or deported parent's or guardian's access to those court-mandated services and ability to maintain contact with the child and document that information in the child's case plan. Finally, the bill clarifies that existing provisions regarding the length of reunification services apply to parents in custody prior to a conviction, and that the parent's pre-conviction custodial status does not prohibit a court from denying reunification services if there is a separate statutory basis for doing so.

This bill is sponsored by Dependency Legal Services and Los Angeles Dependency Lawyers, Inc., and is supported by a number of community organizations, groups dedicated to children's health and safety, and legal services organizations. If this bill is passed by this Committee, it will be heard by the Senate Human Services Committee.

PROPOSED CHANGES TO THE LAW

Existing law:

1) Provides that a child may become a dependent of the juvenile court and be removed from their parents or guardian on the basis of abuse or neglect, as specified. (Welf. & Inst. Code, § 300.)

2) Provides that the purpose of the juvenile court and the dependency system is to provide the maximum safety and protection for children who are currently being physically, sexually, or emotionally abused, being neglected, or being exploited, and to ensure the safety, protection, and physical and emotional well-being of children who are at risk of that harm. This safety, protection, and physical and emotional well-being may include provision of a full array of social and health services to help the child and family and to prevent the reabuse of children. (Welf. & Inst. Code, § 300.2.)

3) Requires, at an initial hearing following the removal of a child from their parent's custody:[1]
    a) The social worker to report on, among other things, the available services and the referral methods to those services that could facilitate the return of the child the custody of their parent. (Welf. & Inst. Code, § 319(b).)
    b) The court to make a determination on the record as to whether reasonable efforts were made to prevent or eliminate the need for removal of the child from their home, and whether there are available services that would prevent the need for further detention. Services to be considered are case management, counseling, emergency shelter care, emergency in-home caretakers, out-of-home respite care, teaching and demonstrating homemakers, parenting training, transportation, and any other child welfare services authorized by the State Department of Social Services (DSS). (Welf. & Inst. Code, § 319(f)(1).)
    c) The court, if it determines that the child can be returned to the custody of their parent through the provision of the services in 3)(b), to place the child with their parent and order that the services be provided. (Welf. & Inst. Code, § 319(f)(3).)

4) Requires, at a dispositional hearing held after the child has been removed from the parent's custody, the court to order the social worker to provide child welfare to the child and the child's mother and statutorily presumed father or guardians. In advance of the hearing, the social worker must prepare a report that discusses whether reunification services shall be provided.
    a) The services ordered may include family reunification services, which shall be provided for up to 12 months, or six months if the child was under three years of age when removed from the custody of their parent.
    b) The duration of the services may be extended for 18 months if the court finds that there is a substantial probability that the child will be returned to the physical custody of the parent within that extended time period or that reasonable services were not provided; or for 24 months if the court determines that it is in the child's best interest to have the time period extended and there is a substantial probability that the child will be returned to physical custody of the parent within that period, or that reasonable services were not provided to the parent. (Welf. & Inst. Code, § 361.5(a).)

5) Provides that the court need not provide reunification services to a parent pursuant to 3) when the court finds, by clear and convincing evidence, that specified conditions exist, including:
    a) The parent is suffering from a mental disability that renders the parent incapable of utilizing reunification services.
    b) The parent caused the death of another child through abuse or neglect.

[1] Going forward this analysis uses "parent" to refer to a parent, parents, guardian, or Indian custodian.

   c) The parent has been convicted of a violent felony.
   d) The parent has advised the court that they are not interested in receiving reunification services or having the child returned to or placed in their custody. (Welf. & Inst. Code, § 361.5(b).)

6) Prohibits a court from ordering reunification services for a parent in specified situations, including the situations in 5)(a), (b), and (c), unless the court finds, by clear and convincing evidence, that reunification is in the child's best interest. (Welf. & Inst. Code, § 361.5(c).)

7) Requires a court, where a parent is incarcerated, institutionalized, or detained by the United States Department of Homeland Security, or has been deported to the parent's or guardian's country of origin, to order reasonable reunification services unless the court determines, by clear and convincing evidence, that those services would be detrimental to the child. The court, in determining detriment, should consider:
   a) The age of the child.
   b) The degree of parent-child bonding.
   c) The length of the sentence.
   d) The length and nature of the treatment.
   e) The nature of the crime or illness.
   f) The degree of detriment if services are not offered.
   g) If a child is 10 years of age or older, the child's attitude toward reunification services, the likelihood of the parent's discharge within the specified time periods for reunification services, and any other appropriate factors. (Welf. & Inst. Code, § 361.5(e)(1).)

8) Requires the court, in determining the content of reasonable reunification services for a parent in 7), to consider the particular barriers to an incarcerated, institutionalized, detained, or deported parent's access to those court-mandated services and ability to maintain contact with the child, and to document this information in the child's case plan. Any reunification services provided are subject to the applicable time limitations imposed in 4), above. (Welf. & Inst. Code, § 361.5(e)(1).)

This bill:

1) Clarifies that the provision permitting a court to deny reunification services for a parent who is incarcerated, institutionalized, or detained by the United States Department of Homeland Security, or has been deported to the parent's or guardian's country of origin does not apply to permit a court to deny reunification services to a parent who is in custody prior to conviction.

2) Provides that, in determining the appropriate reunification services for a parent who is in custody prior to conviction, the court must consider the particular barriers to an incarcerated, institutionalized, detained, or deported parent's or guardian's access to those court-mandated services and their ability to maintain contact with the child, and shall document this information in the child's case plan.

3) Provides that reunification services provided pursuant to 2) are subject to existing statutory time limits for reunification services.

4) Provides that the limitation in 1) does not prevent a court from denying reunification services if the parent falls under other existing statutory bases for denying services.

COMMENTS

1. Author's comment

According to the author:

> Currently, there are parents that are bypassed from eligibility to begin the family reunification process solely for the reason of being incarcerated pre-trial. These parents have not been convicted of a crime. But today, they are bypassed from even beginning the reunification with their children even before they have their day in court.
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> AB 2159 will amend the Welfare and Institution Code section 361.5(e) to clearly state that parents who are incarcerated pre-trial shall not be bypassed solely for the reason of incarceration and shall instead be given the same rights to reunify with their children as parents who were able to afford bail.

2. This bill clarifies that a court may not deny reasonable reunification services to a parent on the basis that the parent is in custody prior to a conviction

The overarching purpose of the juvenile court is to provide for the protection and safety of the public and each child under the court's jurisdiction and, where possible, to preserve and strengthen the child's family ties so that a child is removed from their parent's custody only when necessary for the child's welfare or the safety and protection of the public.[2] To that end, when a child has been removed from a parent's physical custody but the parent's parental rights have not been terminated, a juvenile court generally must order reunification services for the parent to try and remedy the issues that led to juvenile jurisdiction in the first instance, such as parenting classes or

[2] Welf. & Inst. Code, § 202(a).

drug or alcohol treatment.[3] These "[f]amily reunification services play a critical role in dependency proceedings" and should be "tailored to the particular needs of the family."[4] The parent must be offered services for at least 12 months, or six months if the child was under three years of age when the child was removed from custody, and may be extended for up to 24 months depending on circumstances such as the parent's progress.[5]

That said, the Legislature has recognized that there are circumstances where reunification services may not be in the child's best interests. Current law thus provides a number of circumstances in which a court may elect not to order reunification services if it finds by clear and convincing evidence that the services are not in the child's best interest, and a handful of circumstances where the court cannot provide reunification services unless the court finds, by clear and convincing evidence, that reunification is in the best interest of the child.[6]

One circumstance where the provision of reunification services may be limited is where the parent is incarcerated, institutionalized, or detained by the United States Department of Homeland Security, or has been deported to the parent's or guardian's country of origin.[7] In such a case, the default is still for services to be provided; the court may deny services only if it finds, by clear and convincing evidence, that the services would be detrimental to the child.[8] The statute provides a list of factors the court must consider in making that finding, such as the length of the parent's sentence or treatment and the nature of the parent's crime or illness.[9] The statute further provides that, where services are appropriate, the court must consider the particular barriers to an incarcerated, institutionalized, detained, or deported parent's access to those court-mandated services and ability to maintain contact with the child and document this information in the child's case plan.[10]

Unfortunately, the statute relating to the denial of services for a parent in custody does not distinguish between a parent who is in custody prior to conviction (i.e., because they were denied or cannot afford bail) and a parent who has actually been convicted of a crime.[11] As a result, current law allows a court to deny reunification services to a parent who has not, and may never be, convicted. In this circumstance, the considerations for a parent in custody after a conviction do not make sense. Moreover, because the parent's custodial status likely depends on their ability to afford bail, this

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[3] *Id.*, § 361.5.
[4] *In re M.F.* (2019) 32 Cal.App.5th 1, 13.
[5] Welf. & Inst. Code, § 361.5.
[6] *See id.*, § 361.5(b), (c).
[7] *Id.*, § 361.5(e)(1).
[8] *Ibid.*
[9] *Ibid.*
[10] *Ibid.*
[11] *Ibid.*

creates a tragic inequality in the law—giving wealthy parents the chance to maintain contact with their children but denying that chance to parents too poor to afford bail.

Justice Goodwin Liu noted this inequitable discrepancy in a statement concurring in the denial of a petition for review.[12] A mother was denied reunification services while she was in custody on pending charges, and appealed on the basis that the term "incarcerated" should include only persons who were convicted and sentenced to a period of incarceration.[13] The Court of Appeal disagreed, holding that the plain language of the statute made no such distinction.[14] Justice Liu's statement "expresses no view on the proper reading of the statute" but suggested that the statutory scheme might violate principles of equal protection.[15] As he explained:

> The courts have reasoned that any disparate treatment is rationally related to the government's legitimate interest in finding permanent placements for children within a limited timeframe, which is made more difficult when a parent is confined. ([Citations].) But even if factors such as "the nature of the crime" and "the length of the sentence" facing the parent are rational considerations in determining the best placement for a child, I find it troubling that a court could consider such factors in denying reunification services altogether in the case of a parent who cannot afford bail, when the court could not deny reunification services based on such factors in the case of a parent who faces the exact same charges but can afford bail. "The common practice of conditioning freedom solely on whether an arrestee can afford bail is unconstitutional," and "[t]he disadvantages to remaining incarcerated pending resolution of criminal charges are immense and profound." ([Citation].) Such disadvantages include the possible termination of parental rights. Whether principles of equal protection permit disparate treatment in the provision of reunification services to parents who can afford bail and those who cannot is an issue that courts may need to resolve.[16]

Justice Liu concluded that the Legislature might "wish to reconsider the statute in light of the potential unfairness it creates."

This bill does just that. Specifically, the bill clarifies that the statutory provision allowing a court to deny reunification services to a detained parent does not apply when the parent is in custody prior to conviction. The bill further requires that, in

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[12] *See In re Joshua S.* (Cal., Sept. 29, 2021), Case No. S269868 (statement concurring in denial of petition by Goodwin, J.).
[13] *Ibid.*
[14] *See In re Joshua S.* (Cal.Ct.App. Jun. 14, 2021), Case No. F082100, 2021 WL 2410555, *5-6 (nonpub. opn.).
[15] *See In re Joshua S.* (Cal., Sept. 29, 2021), Case No. S269868 (statement concurring in denial of petition by Goodwin, J.).
[16] *Ibid.*

deciding the content of reasonable services to be provided to a parent in pre-conviction custody, the court must consider the particular barriers to an incarcerated, institutionalized, detained, or deported parent's or guardian's access to those court-mandated services and ability to maintain contact with the child and document that information in the child's case plan. Finally, the bill clarifies that existing provisions regarding the length of reunification services apply to parents in custody prior to a conviction, and that the parent's pre-conviction custodial status does not prohibit a court from denying reunification services if there is a separate statutory basis for doing so.

3. Arguments in support

According to Dependency Legal Services and Los Angeles Dependency Lawyers, Inc., the sponsors of the bill:

> Under current case law, parents who are incarcerated *prior* to conviction and sentencing can also be considered under this bypass provision. (*In re Edgar O. v. Superior Court (*2000) 84 Cal.App.4th 13.) These parents may be denied reunification, and face the prospect of losing their children forever, because of charges that are ultimately dismissed. This provision is also unfairly applied based on socio-economic status, as it can be used target parents who are awaiting trial and simply do not have the financial means to afford bail. Because of the fast-paced nature of dependency proceedings, a parent in custody for a short period of time pending trial may face life-altering consequences like the termination of their parental rights.
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> Not only does this offend the basic sense of fairness, it also highlights the inequality of the child welfare system. As Justice Liu noted in his concurring [statement in the denial of the petition for review] in *In re Joshua S.,* conditioning reunification services on whether a parent has the financial means to pay for bail raises serious constitutional issues. (*In re Joshua S*. (Sept 29, 2001) S269868, 5.) Only parents unable to afford bail are forced to face the possibility of permanently losing their children prior to conviction. Parents facing the same criminal charges, but financially secure enough to afford bail, are not subject to this bypass provision. Furthermore, this bypass provision disproportionately affects children of color. Not only are Black, Indigenous and People of Color overrepresented in the child welfare system, 11.4 percent of African American children and 3.5 percent of Hispanic children have an incarcerated parent (as opposed to 1.8 percent of white children). Consequently, failure to amend WIC 361.5(e) would only further fracture these families.
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> This bill will amend Welfare and Institutions Code Section 361.5(e) to clarify that only parents in custody after conviction and sentencing can be eligible for bypass under this specific provision. This amendment does not change the statutory

times that incarcerated parents have to reunify, or limit any other bypass provision. Moreover, nothing in this amendment prevents this bypass from applying after conviction and sentencing.

SUPPORT

Dependency Legal Services (co-sponsor)
Los Angeles Dependency Lawyers, Inc. (co-sponsor)
ACLU California Action
Alliance for Children's Rights
California Teachers Association
Californians for Safety and Justice
Children's Advocacy Institute at the University of San Diego School of Law
Children's Law Center of California
Communities United for Restorative Youth Justice
East Bay Family Defenders
Ella Baker Center for Human Rights
Felony Murder Elimination Project
Fresno Barrios Unidos
Legal Services for Prisoners with Children
National Association of Social Workers – California Chapter
Root & Rebound

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation: AB 2866 (Cunningham, 2022) modifies the standard of proof for establishing at a review hearing that a parent or guardian whose child has been removed from their physical custody was offered reasonable reunification services by raising the standard to the clear and convincing evidence standard, in order to make the standard of proof consistent with the clear and convincing evidence standard already in place for permanent placement hearings. AB 2866 is pending before the Senate Human Services Committee.

Prior Legislation:

AB 670 (Calderon, Ch. 585, Stats. 2021) provided additional protections to parents under the jurisdiction of the juvenile court, including by providing that specified exemptions to reunification services do not apply to parents when reunification services or parental rights were terminated for a previous child when the parent was in foster care.

AB 2805 (Eggman, Ch. 356, Stats 2020) expanded the scope of evidence that a court may consider when determining whether to order reunification services for a young child who has been made a dependent of the juvenile court because the child suffered severe physical abuse by a parent or by any person known by the parent.

AB 1702 (Stone, Ch. 124, Stats. 2016) provided that reunification services need not be provided when the court finds that the parent or guardian participated in, or consented to, the sexual exploitation of the child, as prescribed, except if the parent or guardian was coerced into consenting to, or participating in, the sexual exploitation of the child.

PRIOR VOTES:

Assembly Floor (Ayes 61, Noes 12)
Assembly Appropriations Committee (Ayes 13, Noes 3)
Assembly Human Services Committee (Ayes 6, Noes 0)
Assembly Judiciary Committee (Ayes 7, Noes 1)

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