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

AB 788 (Calderon)
Version: June 18, 2021
Hearing Date: June 29, 2021
Fiscal: No
Urgency: No
JT

SUBJECT

Juveniles: reunification

DIGEST

Existing law enables a juvenile dependency court to deny reunification services for a parent who has a history of drug or alcohol abuse and has resisted court-ordered treatment. This bill clarifies the meaning of "resisted" for these purposes.

EXECUTIVE SUMMARY

"It is difficult, if not impossible, to exaggerate the importance of reunification in the dependency system. With but few exceptions, whenever a minor is removed from parental custody, the juvenile court is required to provide services to the parent for the purpose of facilitating reunification of the family." (*In re Luke L.* (1996) 44 Cal.App.4th 670, 678, citation omitted.) One such exception applies when the parent has a drug or alcohol problem and has resisted court-ordered treatment for the problem. Courts have split as to whether a person "resists" treatment when they relapse despite earnestly participating in a treatment program, as opposed to those who refuse to participate or fail to participate meaningfully. Under case law, the former constitutes "passive" resistance while the latter constitutes "active" resistance.

This bill seeks to codify the reasoning of a recent California Court of Appeal decision that rejected the passive resistance interpretation. The bill is co-sponsored by the Children's Advocacy Institute and Dependency Legal Services, and is supported by groups that represent children and parents involved in the foster care system. Proponents argue that relapse is a part of recovery and is not itself a sufficient basis for denying families the opportunity to reunify. The bill has no known opposition. It passed the Senate Human Services Committee by a vote of 5-0.

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.)[1]

2) Requires, whenever a child is removed from a parent's or guardian's custody, that the juvenile order the social worker to provide child welfare services to the child and the child's mother and statutorily presumed father or guardians. (§ 361.5(a).)

3) Enumerates several exceptions to the reunification services requirement (§ 361.5(b)), including when court finds, by clear and convincing evidence, that the parent or guardian of the child has a history of extensive, abusive, and chronic use of drugs or alcohol and has resisted prior court-ordered treatment for this problem during a three-year period immediately prior to the filing of the petition that brought that child to the court's attention (*id.* at (b)(13)). Authorizes a court to provide reunification services despite this finding if it determines, by clear and convincing evidence, that reunification is in the best interest of the child. (§ *Id.* at (c)(2).)

This bill clarifies that "resisted" in 3), above, means the parent or guardian refused to participate meaningfully in a prior court-ordered drug or alcohol treatment program and does not include "passive resistance," in which the person meaningfully participates in the program but nonetheless continues to abuse drugs or alcohol, as described in recent case law.

COMMENTS

1. Author's statement

The author writes:

> According to a 2018 study, nearly 8% of Californians met the criteria for a substance use disorder. Relapses are a regular occurrence in rehabilitation journeys, with a study finding that the relapse rate for those with a substance use disorder is similar to the rate found across other chronic illnesses, such as hypertension or asthma. Under current law, however, if a drug addicted parent "resisted" treatment, family reunification services can be terminated, which inevitably leads to a child being permanently removed from the care of their parents. Some courts have embraced an interpretation of "resisted" to include a relapse. A recent California

[1] All further section references are to the Welfare and Institutions Code unless otherwise specified.

> appellate court decision has clarified that relapse is not the same as actively resisting drug treatment. Assembly Bill 788 would clarify that "resisted" does not include passive resistance, such as a relapse, and would prevent parents who have experienced a relapse from becoming disqualified for family reunification services.

2. The juvenile welfare system

The child welfare system is intended to achieve a delicate balance of values, including "protecting children from harm, preserving family ties, and avoiding unnecessary intrusion into family life." (*In re R.T.* (2017) 3 Cal.5th 622, 638.) The overarching goal of dependency proceedings is to safeguard the welfare of California's children. (*In re Josiah Z.* (2005) 36 Cal.4th 664, 673.) There are approximately 60,000 children in California's foster care system.

A child may be brought within the juvenile court's jurisdiction as a result of the conduct or omission of either or both parents that results in the child being a victim of abuse or neglect or risk thereof, as described by section 300.[2] The jurisdiction is over the child rather than the parents; consequently, there is no requirement that there be jurisdictional allegations regarding conduct by both parents.[3]

Juvenile court proceedings commence when a social worker files a petition under sections 311 and 332. The purpose of the petition is to protect the child from some parental deficiency, not to punish the parent. (*See In re Alysha S.* (1996) 51 Cal.App.4th 393, 397; *In re Rocco M.* (1991) 1 Cal.App.4th 814, 820.) If the child needs immediate care or is in immediate danger, the child may be removed from a parent's physical custody and may be placed in the temporary custody of the social worker, a responsible relative, or guardian. (§§ 305, 306.) If the social worker determines that the child should be detained in custody, the social worker is required to file a petition with the juvenile court. (§ 290.1.) Within two court days, the court must hold a detention hearing to determine whether the child should be further detained. (§ 315.) The petition must establish a prima facie case that the child is a victim of abuse or neglect under specified conditions described in section 300, that continuance in the parent's or guardian's home is contrary to the child's welfare, and that further harm will come to the child or the child does not want to return to the home due to abuse. (§ 319(c).)

If the court orders a child detained, the court must state the facts on which the decision is based, specify why the initial removal was necessary, reference specified evidence, and order that temporary placement and care of the child be vested with the county welfare department pending the subsequent hearing known as the "jurisdictional" hearing under section 355, which must be held within 15 court days. (§§ 319(g); 334.) If

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[2] *Seiser & Kumli on California Juvenile courts Practice and Procedure* (2019 ed.) § 2.84(1) at 2-291.
[3] *Id.*

appropriate, the court must order services to be provided as soon as possible to reunify the child and their family. (§ 319(g).)

Within 15 court days of a detention hearing or 30 calendar days of an initial petition hearing, the dependency court holds a "jurisdictional" hearing on the petition to determine whether the child is a victim of abuse or neglect under section 300. (§ 355.) Under section 300, the court has jurisdiction to adjudge the child a dependent if a preponderance of the evidence shows that the child has suffered or is at a substantial risk of suffering serious harm.

After sustaining the petition's allegations and establishing jurisdiction over the child, the court holds a "dispositional" hearing to decide where the child will live. (§ 361(a).) A dependent child may not be taken from the physical custody of a parent, guardian, or custodian unless the juvenile court finds clear and convincing evidence that at least one of several specified conditions showing that the child is endangered applies. (*Id.* at (c).) If the court decides the child should not be with the parents, a review hearing is held at least every six months. (§ 366.21(e) [six-month review]; § 366.21(f) [12-month review]; § 366.22(a) [18-month review].) At a review hearing, the court must return the child to their parents unless the court finds by a preponderance of evidence that the child would be in substantial risk of danger. (§ 366.21(e)(1).) With some exceptions, reunification services generally must be provided. (§§ 361.5, 364(a); 366(a)(1).)

If the court decides to terminate reunification services without returning the child to parental custody, the focus shifts from preserving the family to choosing a permanent placement for the child. A hearing is held under section 366.26 to terminate parental rights and select a permanent plan for the child—usually adoption, guardianship, or another specified permanent living arrangement. (§ 366.26(b).)

3. <u>Clarifies that relapsing is not "resistance" to drug or alcohol treatment</u>

When a child is removed from a parent, the court must order the social worker to provide services to reunify the family, unless an exception applies. "'The paramount goal in the initial phase of dependency proceedings is family reunification.'" (*In re T.G.* (2010) 188 Cal.App.4th 687, 696.) "Each reunification plan must be appropriate to the parent's circumstances. The plan should be specific and internally consistent, with the overall goal of resumption of a family relationship. The agency must make reasonable efforts to provide suitable services, 'in spite of the difficulties of doing so or the prospects of success.'" (*In re Luke L.*, *supra*, 44 Cal.App.4th at 678 [citations omitted].)

Section 361.5(b) provides that reunification services need not be provided if the court finds, by clear and convincing evidence, that one of 17 enumerated exceptions—commonly referred to as "bypass provisions"—apply. These exceptions generally encompass situations in which would it would be

dangerous or futile to attempt to return the child to the parents. (*See In re B.E.* (2020) 46 Cal.App.5th 932, 937-938.) The focus of this bill is the exception that applies when "the parent or guardian of the child has a history of extensive, abusive, and chronic use of drugs or alcohol and has *resisted* prior court-ordered treatment for this problem during a three-year period immediately prior to the filing of the petition that brought that child to the court's attention." (§ 361(b)(13), emphasis added.)

Some courts have held that "resisted" in this provision encompasses both *active* and *passive* resistance—in other words, the provision embraces parents who refuse to participate meaningfully in a court-ordered drug treatment program as well as those who participate in earnest but relapse nonetheless. (*Randi R. v. Superior Court* (1998) 64 Cal.App.4th 67 [mother who had previously completed two drug-treatment programs and relapsed within one year on both occasions]; *Laura B. v. Superior Court* (1998) 68 Cal.App.4th 776 [mother reunified with child and successfully completed a drug treatment program before resuming regular drug use after a period of sobriety]; *In re Levi U.* (2000) 78 Cal.App.4th 191, superseded by statute [failure to volunteer for a drug treatment program]; *Karen S. v. Superior Court* (1999) 69 Cal.App.4th 1006 [father who voluntarily sought out treatment programs but continued to abuse drugs and alcohol habitually]; *In re William B.* (2008) 163 Cal.App.4th 1220, 1230 [father who relapsed following successful completion of treatment program].) The court in *Karen S. v. Superior Court*, *supra*, summarized the active/passive distinction as follows:

> Thus, a parent can actively resist treatment for drug or alcohol abuse by refusing to attend a program or by declining to participate once there. The parent also can passively resist by participating in treatment but nonetheless continuing to abuse drugs or alcohol, thus demonstrating an inability to use the skills and behaviors taught in the program to maintain a sober life. In either case, a parent has demonstrated a resistance to eliminating the chronic use of drugs or alcohol which led to the need for juvenile court intervention to protect the parent's child. In other words, the parent has demonstrated that reunification services would be a fruitless attempt to protect the child because the parent's past failure to benefit from treatment indicates that future treatment also would fail to change the parent's destructive behavior."

(69 Cal.App.4th at 1010.)

This line of cases was recently rejected by the Fifth District Court of Appeal. (*In re B.E.* (2020) 46 Cal.App.5th 932.) The court concluded that the "[t]he bypass provision was intended for parents who refuse to participate meaningfully in a court-ordered drug treatment program, not parents who slip up on their road to recovery." (*Id.* at 934-935.) The court noted several reasons for why the passive-

resistance interpretation is inconsistent with the statutory language and other indicia of Legislative intent. "Conspicuously absent from subdivision (b)(13) is any language that clearly indicates a court may bypass reunification services to an addict who successfully completed a drug treatment program but subsequently relapsed. Had the Legislature meant that, it would have been very easy to express that concept in clear terms, as we just did. It did not." (*Id.* at 941.)

The court also pointed out that the view that a parent who relapses, even just once, is irredeemably unfit "is simply wrong in light of what we know today about addiction." (*Id.* at 941.) The court continued:

> As [the social services agency] acknowledged both at oral argument and in supplemental briefing, relapse is a normal part of recovery. In other words, a relapsed parent is far from hopeless. It is decidedly *not* fruitless to offer services to a parent who genuinely made an effort to achieve sobriety but slipped up on the road to recovery. On the other hand, where a parent has recently actively resisted a court-ordered drug treatment program—i.e., demonstrated an unwillingness to commit to sobriety—it becomes more apparent that trying the same approach so soon is unlikely to work. Courts cannot force a parent to choose sobriety. For this reason, our interpretation renders subdivision (b)(13) consistent with the other bypass provisions: a true case of futility.

(*Id.* at 941-942, emphasis in original.) The court also recognized the potential "need to address the parent who repeatedly relapses and seems genuinely hopeless," but stated that this issue is the purview of the Legislature. (*Id.* at 944.)

This bill seeks to codify the reasoning of *In re B.E.* by expressly providing that "resisted" means the parent or guardian refused to participate meaningfully in a prior court-ordered drug or alcohol treatment program and does not include "passive resistance," in which the person meaningfully participates in the program but nonetheless continues to abuse drugs or alcohol, as described in *In re B.E.*.

4. <u>Support</u>

The bill's co-sponsors, Children's Advocacy Institute and Dependency Legal Services, write:

> What constitutes "resistance"? Some courts have taken an extremely broad approach by creating the legal fiction of "passive resistance." These courts have declared that parents who have successfully completed court-ordered treatment, even years before, but have recently began using again, have "passively" resisted treatment and are eligible to lose their children forever.

> This interpretation far expands the law and puts many families at risk to be torn apart permanently for arbitrary reasons. For example, a child-less nineteen-year old who successfully completed a drug diversion program from a marijuana possession charge could, decades later after having children, be "bypassed" if substance-related issues […] caused CPS intervention.
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> However, a recent California appellate court decision, after a detailed and thoughtful analysis of this question, has clarified that relapse – an inevitable symptom of the disease – is not the same as "resisting" drug treatment. Pointing to the county's concession that relapse is a normal part of recovery, the court correctly reasoned: "*As [county] acknowledged…relapse is a normal part of recovery. In other words, a relapsed parent is far from hopeless. It is decidedly not fruitless to offer services to a parent who genuinely made an effort to achieve sobriety but slipped up on the road to recovery." In re B.E.* (2020) 46 Cal.App.5th 932, 934-35.
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> Legal clarity on this point is critical to ensuring that families are not unnecessarily torn asunder and to fulfill the Legislature's over-arching aim for child welfare: family reunification. As drug addiction is a disease, as relapse is an inevitable part of drug addiction, then allowing services intended to treat drug addiction denied on the basis solely of relapse is the same as refusing addiction services because the person is addicted. The so-called exception of the bypass swallows the rule of offering drug treatment to help parents get better; to help families remain together.
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> Furthermore, this interpretation is a contributing factor to the disproportionate number of children of color in California who are severed from their parents and placed irrevocably into foster care. in California, for example, African American children make up 23% of foster children but only 6% of the general child population. Black children are five times more likely than white children to be in foster care. Substance use disorder is a health issue that many parents and their families deal with every day. If these issues provoke the involvement of the child welfare system, families should not automatically lose access to reunification services if parents stay committed.

(Footnotes omitted; italics in original.)

SUPPORT

Children's Advocacy Institute (co-sponsor)
Dependency Legal Services (co-sponsor)
Alliance for Children's Rights
California Catholic Conference
California Medical Association
Children's Law Center of California
East Bay Family Defenders
Los Angeles Dependency Lawyers
Public Counsel

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation: AB 670 (Calderon, 2021), among other things, prevents the court from declining to offer reunification services in instances where the parent's services were terminated or their parental rights severed in a previous dependency case when the parent was a parenting foster youth, as provided. The bill is pending in the Senate Human Services Committee.

Prior Legislation: SB 1021 (Durazo, 2020) aimed to strengthen the reunification process by promoting meaningful visitation and guiding the courts in crafting visitation orders. The bill was referred to this Committee but was not heard.

PRIOR VOTES:

Senate Human Services Committee (Ayes 5, Noes 0)
Assembly Floor (Ayes 78, Noes 0)
Assembly Judiciary Committee (Ayes 11, Noes 0)
Assembly Human Services Committee (Ayes 8, Noes 0)

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