

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

SB 1182 (Eggman)
Version: April 18, 2022
Hearing Date: April 26, 2022
Fiscal: Yes
Urgency: No
AWM

SUBJECT

Family law

DIGEST

This bill requires a family court to provide referrals to resources for self-identified veterans, including how to contact the local Department of Veterans Affairs; and requires, when a family court that finds the effects of a parent's, legal guardian's, or relative's mental illness are a factor in determining the best interest of the child for purposes of custody or visitation, to put its reasons for the finding on the record and provide the affected parent, legal guardian, or relative with a list of local resources for mental health treatment. The bill's requirements take effect January 1, 2024.

EXECUTIVE SUMMARY

This bill addresses two shortcomings in the family court system identified by the author.

First, this bill reflects a concern that veterans are being allowed to fall through the cracks in family court and are likely missing out on resources available to them by virtue of their veteran status, such as relevant classes offered for veterans. To help veterans get this information, this bill requires family court judges, beginning January 1, 2024, to provide veterans appearing before the family court who identify themselves to the court with resources, including how to contact the local office of the Department of Veterans Affairs (CalVet). The Judicial Council of California (Judicial Council) is responsible for developing forms to implement the provision of information. The author has agreed to certain amendments to clarify the procedure for a person to provide their veteran status to the court and family courts' and CalVet's obligations once a court learns of a veteran's status.

Second, this bill addresses a concern that family courts are improperly discriminating against parents, legal guardians, or relatives who suffer from mental illnesses when

determining the best interest of the child in making a custody determination. The law requires a family court making a custody or visitation order to prioritize the best interest of the child, and instructs the court to take certain factors into account, such as whether there is a history of abuse. According to the author, some family courts are improperly determining the best interest of the child based on a parent's, guardian's, or relative's mere *diagnosis* of a mental illness, not on whether the mental illness has had any effect on the individual's ability to care for the child. This bill requires a family court that finds that the effects of a parent's, legal guardian's, or relative's mental illness are a factor in determining the best interest of the child to state its reasoning on the record or in writing, including the specific evidence the court relied on to make that finding. These requirements are intended to ensure that the family court has thought through the nature of the specific mental illness without attaching unwonted stigma to it, and to give the parties a clear record on appeal if necessary. This requirement also takes effect on January 1, 2024.

This bill is sponsored by the author and supported by the Beverly Hills/Hollywood NAACP, the Black Deported Veterans of America, the Fortitude Empowerment Center, the Legal Aid Foundation of Los Angeles, TimeDone, the Veterans Legal Institute, and one individual. This bill is opposed by the Association of Family Conciliation Courts.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Establishes certain procedural protections for persons who have served in the military who are facing criminal charges, including:
 - a) Requiring a county jail, upon the detention of a person, to ask if the person has served in the military and make the response available to the person's attorney and the district attorney. (Pen. Code, § 4001.2.)
 - b) Establishing a diversionary program for persons charged with a misdemeanor who were or are a member of the United States military and suffer from specified trauma or mental health conditions as a result of their service. (Pen. Code, § 1001.80.)
 - c) Where mental health services are ordered for a defendant, requiring the county mental health agency to coordinate an appropriate referral of the defendant to the county veterans' service with the goal of restoring defendants who acquired a criminal record as a result of a mental health disorder stemming from service in the United States military to the community of law-abiding citizens. (Pen. Code, § 1170.9.)
 - d) Requiring the Judicial Council of California (Judicial Council) to create a form to inquire about a person's military service that includes references to the availability of the diversionary program and other resources. (Pen. Code, § 858.)

- 2) States that it is the public policy of this state to ensure that:
 - a) The health, safety, and welfare of children is the court's primary concern in determining the best interests of children when making any orders regarding the physical or legal custody or visitation of children;
 - b) Children have the right to be safe and free from abuse, and that the perpetration of child abuse or domestic violence in a household where a child resides is detrimental to the health, safety, and welfare of the child; and
 - c) Children have frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, or ended their relationship, and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy, except when the contact would not be in the best interests of the child, as provided. (Fam. Code, § 3020(a), (b).)

- 3) Requires, when the policies set forth above are in conflict, a court's order regarding physical or legal custody or visitation to be made in a manner that ensures the health, safety, and welfare of the child and the safety of all family members. (Fam. Code, § 3020(c).)

- 4) Authorizes a court, in any of the following proceedings, to make any order for the custody of the child during minority that seems proper:
 - a) A proceeding for dissolution of marriage;
 - b) A proceeding for nullity of marriage;
 - c) A proceeding for legal separation of the parties;
 - d) An action for exclusive custody of the child;
 - e) A proceeding to determine physical or legal custody or for visitation in a proceeding under the Domestic Violence Prevention Act (Fam. Code, div. 10, §§ 6200 et seq.); or
 - f) A proceeding to determine physical or legal custody or visitation in an action under the Uniform Parentage Act (Fam. Code, div. 12, pt. 3, §§ 7600 et seq.);
 - g) A proceeding to determine physical or legal custody or visitation in an action brought by a district attorney. (Fam. Code, §§ 3021, 3022.)

- 5) Provides that when determining the best interests of a child, a court may consider any relevant factors and must consider: the health, safety, and welfare of the child; any history of abuse by any party seeking custody, any family members of any party seeking custody, or the intimate partner or cohabitant of any party seeking custody; the nature and amount of contact with the parents; and substance abuse by a parent. The court may not consider the sex, gender identity, gender expression, or sexual orientation of a parent, legal guardian, or relative in determining the best interests of the child. (Fam. Code, § 3011.)

- 6) Establishes an order of preference for a parenting plan in accordance with the child's best interests: (1) both parents jointly sharing custody, subject to certain

considerations; (2) if to neither parent, the person or persons in whose home the child has been living in a wholesome and stable environment; and (3) any other person deemed suitable by the court and able to provide adequate and proper care and guidance for the child. (Fam. Code, § 3040(a).)

- 7) Provides that, in considering an order for custody or visitation, the immigration status of a parent, legal guardian, or relative shall not disqualify the person from receiving custody. (Fam. Code, § 3040(b).)
- 8) Prohibits a court from considering the sex, gender identity, gender expression, or sexual orientation in determining the best interests of a child for purposes of a custody or visitation order. (Fam. Code, § 3040(c).)
- 9) Provides that the above order of preference establishes neither a preference nor presumption for or against joint legal custody, joint physical custody, or sole custody, but instead allows the court and the family the widest discretion to choose a parenting plan that is in the best interest of the child. (Fam. Code, § 3040(d).)
- 10) Establishes a rebuttable presumption that it is not in the best interest of the child to award sole or joint physical or legal custody of a child to a person who has perpetrated domestic violence against specified persons, including the child, within the last five years. (Fam. Code, § 3044.)

This bill:

- 1) Requires, beginning January 1, 2024, a family court in family law proceedings to provide self-identified veterans with a list of resources for veterans, including information about how to contact the local office of the Department of Veterans Affairs.
- 2) States that it is the intent of the Legislature that any information provided pursuant to 1) be similar in form to the information provided on the form for veterans developed in Penal Code section 858.
- 3) Requires Judicial Council, on or before January 1, 2024, to develop the forms necessary to implement the requirement in 1).
- 4) Defines, for purposes of 5)-6), “mental illness” as a significant mental illness or emotional impairment, as determined by a mental health professional qualified under the laws and regulations of the state.
- 5) Provides that, beginning January 1, 2024, if a court finds that the effects of a parent’s, legal guardian’s, or relative’s history of or current mental illness are a factor in

determining the best interest of a child for purposes of a custody or visitation order, the court must:

- a) Provide the parent, legal guardian, or relative with a list of local resources for mental health treatment; and
 - b) State its reasons for the finding and the evidence relied upon in writing or on the record.
- 6) Provides that the requirement in 4) does not prohibit a court from considering violence or abuse, even if it is as a result of a mental illness, from determining the best interest of the child.

COMMENTS

1. Author's comment

According to the author:

Navigating the Family Court, and Children's Court systems can be unnecessarily traumatizing to veteran families. These systems are especially burdensome on military veterans who are dealing with PTSD, traumatic brain injuries, or a service-linked mental health issue. Similar to any other parent, veterans derive a much-needed sense of belonging and purpose from their role in a family system. Their identity as a spouse and/or parent keeps them grounded as they begin the arduous task of transitioning back to civilian life. This transition has been made even more difficult by their treatment in family court due to a lack of cultural competence, consistency, and flexibility in the courtroom. Many veterans who find themselves in family court do not have a criminal case and therefore are unable to access many of the wrap-around services provided to veterans that do. Veterans should not have to break the law to have access to support and resources

2. Child custody and visitation

“Under California's statutory scheme governing child custody and visitation determinations, the overarching concern is the best interest of the child.”¹ That scheme “allows the court and the family the widest discretion to choose a parenting plan that is in the best interest of the child.”² When determining the best interests of a child, a court may consider any relevant factors, and must consider the health, safety, and welfare of the child; any history of abuse by the party seeking custody; the nature and amount of contact with the parents; and substance abuse by a parent.³ Custody and visitation orders are reviewed under the deferential “abuse of discretion” standard, under which

¹ *Montenegro v. Diaz* (2001) 26 Cal.4th 249, 255; see Fam. Code, §§ 3011, 3020, 3040, 3041.

² Fam. Code, § 3040(c).

³ *Id.*, § 3011; see also *id.*, § 3020.

reversal is warranted only “if there is no reasonable basis upon which the trial court could conclude that its decision advanced the best interests of the child.”⁴

Family Code section 3040(a) establishes the following order of preference for a parenting plan in accordance with the child’s best interests: (1) both parents jointly sharing custody; (2) if to neither parent, the person or persons in whose home the child has been living; and (3) any other person deemed suitable by the court and able to provide adequate and proper care and guidance for the child.⁵ However, the Family Code specifically “establishes neither a preference nor a presumption for or against joint legal custody, joint physical custody, or sole custody” and instead leaves broad discretion to the court and family to devise the parenting plan that is in the best interest of the child.⁶

“[T]he legal issues underlying custody and visitation disputes are necessarily intertwined, both requiring a consideration of the child’s best interests.”⁷ A “visitation” is a limited form of custody that operates during the time visitation rights are being exercised.⁸ The bests interest of the child are also the predominant factor: the court must grant reasonable visitation rights when it is shown that the visitation would be in the best interest of the child in the same way it determines whether custody would be in the best interest of the child.⁹ The court has the discretion to grant reasonable visitation rights to any other person having an interest in the welfare of the child.¹⁰ Additionally, if the child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody or visitation, the court must consider and give due weight to the child’s wishes in making a custody or visitation order.¹¹

3. What constitutes harm or a benefit in a best interest determination

Certain statutory provisions establish that a court lacks discretion to deny custody or visitation rights solely on the basis of certain factors relating to the parent, legal guardian, or relative (collectively, parent). The Family Code provides that the immigration status of a parent seeking custody does not disqualify them from receiving custody.¹² The Family Code also prohibits the court from considering the sex, gender identity, gender expression, or sexual orientation of a parent, legal guardian, or relative in determining the best interest of the child.¹³

⁴ *Ed H. v. Ashley C.* (2017) 14 Cal.App.5th 899, 904.

⁵ Fam. Code, § 3040(a).

⁶ *Id.*, § 3040(b); see *In re Marriage of Burgess* (1996) 13 Cal.4th 25, 34.

⁷ *In re Marriage of Birdsall* (1988) 197 Cal.App.3d 1024, 1028.

⁸ *Barkaloff v. Woodward* (1996) 47 Cal.App.4th 393, 398.

⁹ Fam. Code, § 3100(a).

¹⁰ *Ibid.*

¹¹ *Id.*, § 3042(a).

¹² *Id.*, § 3040(b).

¹³ *Id.*, § 3040(c).

On some matters, the court may consider a factor relating to the parent in determining the best interest of the child, but within a statutorily prescribed framework. If a parent has a physical disability, the court cannot consider the disability a per se harm, and instead must consider the parent's actual and potential physical capabilities, how the parent has adapted to the disability, how the other members of the household have adjusted to the disability, and any special contributions the person makes in spite of or because of the handicap.¹⁴ And in considering the modification of a custody or visitation order, a parent's absence, relocation, or failure to comply with the order cannot be the basis for a modification if the sole reason for the parent's absence was their activation to military duty or military deployment.¹⁵

Finally, some factors require more consideration for their potential harm to the child. If a parent has perpetrated domestic violence against the child, the other parent, or other specified persons within the last five years, there is a rebuttable presumption that an award of custody to the perpetrator is detrimental to the best interest of the child.¹⁶ To overcome the presumption, the court must find by a preponderance of the evidence that the perpetrator has demonstrated that custody is in the best interest of the child, and the court must take into account factors relating to the perpetrator's conduct, such as whether the perpetrator has completed treatment programs or is restrained by a protective order.¹⁷ Similarly, if a court finds that a parent has committed acts of abuse or is a habitual or continual user of illegal or controlled substances, the court may order custody or visitation for that parent only by setting forth its reasons in writing or on the record.¹⁸

4. This bill provides a framework for when, and how, a parent's mental illness may be considered by the court for purposes of determining the best interest of the child

Current law does not provide specific guidance to the courts on how a parent's mental illness should be considered when determining the best interest of a child for purposes of a custody determination. The issue is not academic: the National Institute of Mental Health estimates that nearly one in five adults in the United States lives with a mental illness.¹⁹ Approximately 14.2 million of those adults is classified as living with a "serious mental illness," defined as "a mental, behavioral, or emotional disorder resulting in serious functional impairment, which substantially interferes with or limits one or more major life activities."²⁰ The American Psychiatric Association estimates that

¹⁴ *Id.*, § 3049 (codifying factors set forth in *In re Marriage of Carney* (1979) 24 Cl.3d 725, 736).

¹⁵ *Id.*, § 3047.

¹⁶ *Id.*, § 3044.

¹⁷ *Ibid.*

¹⁸ *Id.*, § 3011(a)(2), (4), (5).

¹⁹ National Institute of Mental Health, Mental Illness, <https://www.nimh.nih.gov/health/statistics/mental-illness> (last visited Mar. 31, 2022).

²⁰ *Ibid.*

more than half of people with mental illnesses do not receive help for their disorders, often due to the stigma against mental illness and fear of discrimination.²¹

The existing statute setting forth the factors a family court may and must consider in determining the best interest of the child are, at least in theory, sufficient to prevent unfair bias against a parent simply because they have a mental illness. The statute does not require, or even specifically authorize, the court to consider the mere diagnosis of a mental illness, but it does require the court to consider factors bearing on the child's *experience* with the parent, including a history of abuse.²² This arguably establishes that a court should not consider a mental illness *per se* and instead consider only how the parent's mental illness affects the child, if at all.

Unfortunately, societal stigma against mental illness may at times infect a family court's determination. The author of the bill reports that, on some occasions, a parent has been denied custody simply because of a mental illness diagnosis, without an examination of whether the mental illness actually affected the parent's relationship with, or ability to care for, the child.

This bill is intended to encourage courts to engage in a more thoughtful examination of when, and how, to consider a mental illness in making a determination of the best interest of a child, and to give parents a clear record of that examination if they need to appeal. The bill requires, beginning January 1, 2024, a family court that finds that a parent's mental illness is a factor in determining the best interest of the child to state its reason for the finding and the evidence relied on in writing or on the record. This requirement will hopefully encourage courts to thoughtfully engage with mental illness diagnoses and affects and clearly articulate any bases for finding that a mental illness should play into a custody determination. The bill also clarifies that this provision does not prevent a court from considering a parent's violence or abuse, even if that violence or abuse is the result of mental illness; this is consistent with the bill's goal of distinguishing between the mere *existence* of a mental illness diagnosis and any *effects* of a mental illness that may affect the best interest of the child.

Additionally, the bill requires a court that finds that a parent's mental illness is a factor to provide the parent with a list of local resources for mental health treatment. This requirement is intended to help parents with mental illnesses get treatment.

²¹ American Psychiatric Association, Stigma, Prejudice, and Discrimination Against People with Mental Illness, <https://www.psychiatry.org/patients-families/stigma-and-discrimination> (last visited Mar. 31, 2022).

²² Fam. Code, § 3011.

5. This bill requires family courts in civil cases to provide self-identified veterans with resource referrals

Current law requires, in criminal cases, the court to ascertain whether a defendant is a current or former member of the United States military, so that the defendant can be referred to appropriate resources available to current and former members, including mental health services.²³ The Judicial Council of California (Judicial Council) has created a form, the MIL-100, which provides a streamlined way for courts to receive notice of a party's military status.²⁴

Despite the availability of assistance programs for current or former servicemembers in civil cases, there is no current civil equivalent to the MIL-100, or any requirement that a court inquire about a party's military status in order to make appropriate referrals.

This bill is intended to provide self-identified veterans appearing in the family court with resource referrals. The bill requires, beginning January 1, 2024, a family court to provide self-identified veterans appearing in family court proceedings with a list of resources for veterans, including information about how to contact the local office of the Department of Veterans Affairs. The bill does not require veterans to identify themselves as such, to protect veterans who, for whatever reason, would prefer to keep their status private. But if at any time a veteran appearing before the family court provides information to the court about their veteran status, the court must provide the list of resources. The bill also requires the Judicial Council to create a form to implement these requirements, on or before the January 1, 2024, implementation date.

As currently drafted, the bill makes reference to the intent of the Legislature that any information provided to the court regarding veteran status will be similar in form to the information provided and developed pursuant to Penal Code section 858. As explained below in Part 6, the author has agreed to amendments to clarify this provision and the process when a self-identified veteran submits their information via a Judicial Council form.

6. Amendments

As currently drafted, the new Family Code section 211.5 in this bill is somewhat unclear, both in terms of procedure and in terms of what the courts' and CalVet's obligations to self-identified veterans. The author has therefore agreed to clarifying amendments to ensure that, when a self-identified veteran files notice of their military status on the Judicial Council's existing military service form, the court must transmit the form to CalVet, and CalVet must contact the veteran within a reasonable time. The

²³ Pen. Code, § 858, 1170.9, 4001.2.

²⁴ See Judicial Council of California, Military Status Form (MIL-100), *available at* <https://www.courts.ca.gov/documents/mil100.pdf> (last visited Mar. 30, 2022).

amendments also authorize Judicial Council to develop rules necessary for the courts' to implement these statutory requirements. The specific amendments are as follows:

Amendment 1

On page 3, in line 1, after "(a)" insert "(1)"

Amendment 2

On page 3, strike out lines 21 to 24, inclusive, and insert:

(2) The veteran may, at their discretion, provide the information about their veteran status on the Judicial Council military service form, file the form with the court, and serve it on the other parties to the action.

(b)(1) When a person files a form identifying the person as a veteran pursuant to paragraph (2) of subdivision (a), the court shall transmit a copy of the form to the Department of Veterans Affairs.

(2) Upon receipt of a copy of the form, the Department of Veterans Affairs shall, within a reasonable time, contact the person using the information provided on the form.

Amendment 3

On page 3, on lines 25 and 26, strike out "shall develop the" and insert "may amend or develop the rules and"

7. Arguments in support

According to bill supporters Beverly Hills/Hollywood NAACP and the Fortitude Empowerment Center:

California is home to over 1.8 million veterans, more than any other state in the Nation. Additionally, almost 200,000 active military members reside in California. One in five veterans experiences a mental health disorder or cognitive impairment. Navigating Family Court and Children's Court systems can be unnecessarily traumatizing to veteran families. These systems are especially burdensome on military veterans who are dealing with PTSD, traumatic brain injuries, or a mental health issue relating to their time in service.

California has long recognized the unique needs of service members and their families when navigating the judicial system. This bill expands on the work of the Veteran Treatment Court and seeks to bring the same linkages to care found in criminal courts to civil courts. Further, it creates greater transparency and

accountability by ensuring the court documents when mental health diagnosis factors into a custody decision.

This bill goes a long way to alleviate the often unseen and unaddressed burdens that many military families deal with on a daily basis. Veterans should not have to break the law to gain access to services and supports in our court system.

8. Arguments in opposition:

According to the Association of Family Conciliation Courts (AFCC), writing in opposition:²⁵

The Board [of AFCC-CA] recognizes the apparent concern for a real problem that the Author and Sponsors are trying to address. We do not agree that the proposed amendments to Family Code Section 3011 and Family Code Section 3040 solve that problem. Furthermore, we are certain that the unintended consequences such an amendment will generate are contrary to the presumed goal of protecting veterans' mental health status from being weaponized in custody disputes...

SB 1182 [ignores] or [tries] to eliminate an important aspect of assessing the child's best interest in custody matters. Assessing a parent's mental stability/functioning (based on information accessible given evidentiary limitations) is a vital component in the overall analysis and goal of focusing on the child's needs (and protection), as opposed to the parent's needs/desires/sense of entitlement.

SUPPORT

Beverly Hills/Hollywood NAACP
Black Deported Veterans of America
Fortitude Empowerment Center
Legal Aid Foundation of Los Angeles
TimeDone
Veterans Legal Institute
One individual

OPPOSITION

Association of Family Conciliation Courts

²⁵ AFCC's letter appears to be in response to a prior version of the bill, and the most recent amendments appear to have addressed most or all of their concerns. The author reports that they are in contact with AFCC about whether AFCC will withdraw its opposition in light of the amendments.

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation:

SB 654 (Min, Ch. 768, Stats. 2021) required a family court, when considering the best interests of a child for purposes of an order for unsupervised visitation, to consider allegations relating to a parent, guardian, or relative's history of abuse or use of controlled substances and make certain findings on the record.

SB 495 (Durazo, Ch. 551, Stats. 2019) prohibited a court from considering the sex, gender identity, gender expression, or sexual orientation of a parent, legal guardian, or relative in determining the best interests of a child for the purpose of granting custody.

AB 2044 (Stone, Ch. 941, Stats. 2018) updates various child custody and visitation statutes in an effort to further protect children from parents who have perpetrated domestic violence or child abuse, including by requiring the court to make specific findings in the record when it determines that the presumption against custody for a person who has perpetrated violence in the last five years has been overcome.
