SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

SB 463 (Wahab)
Version: March 20, 2023
Hearing Date: April 11, 2023
Fiscal: Yes
Urgency: No
AWM

SUBJECT

Protection and advocacy agency

DIGEST

This bill eliminates the evidentiary presumption in juvenile court that a parent or guardian's lack of participation or progress in a treatment program endangers the child, for purposes of determining whether the child should be returned to the parent or guardian's custody.

EXECUTIVE SUMMARY

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.) A child may be brought into the system if the child is subjected to serious physical harm or a substantial risk thereof by a parent's willful or negligent failure to properly provide for the child; the juvenile court and child welfare agency are required to provide the parent, whenever feasible, with services and resources that will help resolve the issues that led to juvenile court jurisdiction. These services can include court-ordered treatment programs for substance use issues if a court determines that a parent's substance use has contributed to the harm or risk of harm.

When a child has been removed from a parent's custody, the juvenile court conducts review hearings at six-month intervals to determine whether the child can be returned to the parent's home. One factor the court considers as part of this analysis is whether the parent has taken advantage of resources or services provided. Under current law, if the court finds that a parent has failed to participate regularly and make substantive progress, that failure is prima facie evidence that it would be detrimental to return the child to their parent's custody. As the stakeholders note, there are reasons why a parent might not be able to participate in treatment programs that do not reflect on their willingness to regain custody of their child, such as a waiting list or the inability to take

time off of work. And while the presumption of detriment is rebuttable, stakeholders report that this evidentiary default weighs too heavily in favor of removal and hampers the court's discretion in the matter.

This bill eliminates the presumption regarding a parent's failure to participate or make progress in a treatment program, allowing the court to consider all of the facts to determine whether returning the child to their parent's custody would be harmful to the child.

This bill is sponsored by the County of Santa Clara and Los Angeles Dependency Lawyers, Inc., and is supported by Dependency Advocacy Center, Dependency Legal Services, East Bay Family Defenders, the Family Reunification, Equity, and Empowerment (FREE) Project, Public Counsel, Starting Over, Inc., and one individual. There is no known opposition.

PROPOSED CHANGES TO THE LAW

Existing law:

1) Establishes the juvenile court, which is intended to provide for the protection and safety of the public and minors falling under its jurisdiction. (Welf. & Inst. Code, §§ 202, 245.)

2) Provides that a child may become a dependent of the juvenile court and be removed from the custody of their parent or guardian[1] on the basis of enumerated forms of abuse or neglect. (Welf. Inst. Code, § 300(a)-(j).)

3) 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.)

4) Requires, following the removal of a child from their parent's custody, the juvenile court to hold an initial hearing at which the court determines whether custody may be resumed or what services should be offered to the parent that could facilitate the child's return in the future.
    a) The court must make a determination on the record as to whether reasonable efforts were made to prevent or eliminate the need for removal of the child

[1] Going forward, this analysis uses "parent" to include "guardian."

from their home, and whether there are available services that would prevent the need for further detention.

   b) In determining whether to return a child to the parent's custody at this stage, the fact that the parent is enrolled in a certified substance abuse treatment facility that allows a dependent child to reside with their parent shall not be, for that reason alone, prima facie evidence of substantial danger. (Welf. & Inst. Code, §§ 311, 319.)

5) Requires, in a case where a child remains out of their parent's custody after the initial hearing in 4) and the long-term plan is to return the child to the parent's custody, the court to order the social worker to provide child welfare services and family reunification services that will benefit the child, which can include court-ordered treatment programs for the parent. (Welf. & Inst. Code, § 361.5.)

6) Provides that, when a child has been kept out of their parent's custody after the hearing in 4), the court must hold periodic review hearings no less frequently than six months, starting six months after the initial dispositional hearing.
   a) For children three years of age and older, the court must return the child to their parent's custody unless it finds, by a preponderance of the evidence, that the return of the child would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child.
   b) If the child was under three years of age at the date of removal is a member of a sibling group as specified, and the court determines the parent has not been participating and making progress in a court-ordered treatment plan, the court may schedule a permanency hearing within 120 days. (Welf. & Inst. Code, § 366, 366.21(e).)

7) Provides that, for a child who remains out of their parent's custody after the hearing in 6), the court may hold a permanency hearing no later than 12 months after the initial removal; the court may also continue the permanency hearing for up to two more six-month periods, so that the permanency hearing may be held, at a maximum, 24 months after the child was initially removed. (Welf. & Inst. Code, §§ 366.21(f), (g), 366.22, 366.25.)

8) Establishes that, at both review and permanency hearings, a parent's failure to participate regularly and make substantive progress in court-ordered treatment programs is prima facie evidence that returning the child to the parent's custody would be detrimental. (Welf. & Inst. Code, §§ 366.21(e)(1), (f)(1)(B), 366.22(a)(1), 366.25(a)(1).)

This bill:

1) Eliminates, for purposes of status and permanency hearings conducted by the juvenile court, the provision making the failure of a parent to participate regularly

and make substantive progress in court-ordered treatment programs prima facie evidence that it would be detrimental to return the child to the parent.

2) Makes nonsubstantive conforming changes.

COMMENTS

1. Author's comment

According to the author:

> The purpose of dependency law is to protect children, not to punish or regulate their parents. Under child welfare laws, a child who has been removed from the home must be returned to their parents at review hearings absent a showing that the return causes a risk of detriment to the child. However, those provisions are significantly diluted by a statement that failure of a parent to participate or make substantive progress in the court-ordered services is prima facie evidence of detriment.
>
> While a parent's lack of compliance is a red flag, there may be valid explanations, including illness, inability to get time off, or inability to pay. Moreover, research in child welfare and recent legislative trends suggests that current danger to the child should always be the analysis, not the parent's level of compliance. This is particularly important because many marginalized groups have fear and generational trauma around the child welfare system, making them less likely to be "compliant" or "cooperative." This legal presumption, which traces back to the late 1980s, puts a thumb on the scale against disadvantaged parents and reinforces racial inequity in the system.
>
> SB 463 simply proposes to delete this presumption. Doing so enhances judicial discretion to make an appropriate, holistic determination about the current risk posed to the child. Such decisions may continue to properly factor in the parent's lack of compliance.

2. Background on the child welfare process and the effect of a parent's failure to regularly participate and make substantive process in court-ordered treatment programs

The County of Santa Clara and Los Angeles Dependency Lawyers, Inc., the bill's sponsors, neatly summarizes the procedures at issue and the problem addressed by this bill:

> The status of every child in the child welfare system is reviewed at least every six months.[2] The goal is to establish a permanent plan for the child 12 months after removal, but in some circumstances the permanency review hearing may be extended to 18 months or 24 months after removal.[3] In these review hearings, the court must return the child to the parent or guardian unless the court finds by a preponderance of the evidence that the return would create a substantial risk of detriment to the child. The social worker has the burden of establishing that detriment. The court must consider the report and recommendation of the social worker and the child advocate, as well as the efforts or progress demonstrated by the parent or guardian and the extent to which they availed themselves of services provided. Relevant to [this] bill, the failure of the parent or guardian to participate regularly and make substantive process in court-ordered treatment programs is prima facie evidence that the return would be detrimental.[4]
>
> By classifying the parent or guardian's lack of compliance as prima facie evidence, this provision creates a rebuttable presumption affecting the burden of producing evidence.[5] "The effect of a presumption affecting the burden of producing evidence is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence…"[6] Consequently, unless a parent or guardian produces admissible contrary evidence, a social worker can meet their burden to establish detriment simply by showing the parent or guardian failed to participate regularly or did not make substantive progress in the program. In such cases, the court must assume the parent or guardian is unfit.

According to the author and sponsors, a parent or guardian's inadequate participation in substance abuse treatment is a red flag that bears further investigation, but should not automatically result in a presumption that the parent is unfit. As they note, there are many reasons unrelated to parental fitness that a parent might not be able to meaningfully participate in a treatment program, such as the inability to take time off of work, the unavailability of treatment programs or significant waitlists, and the inability to afford the program. Moreover, the subjective nature of the assessment—whether a parent has made "substantive" progress—leaves room for unconscious bias to slip into the calculation. As the sponsor notes, families of color are more likely to be characterized as "uncooperative" than white families, which might extend to the assessment of whether meaningful progress has been made in treatment.

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[2] Welf. & Inst. Code, §§ 361.21, 366(b).
[3] *See id.*, §§ 366.21(e) (six-month review), 366.21(f) (12-month review), 366.22(a) (18-month review), 366.25 (24-month review).
[4] *Id.*, §§ 366.21(e)(1), (f)(1), 366.22(a)(1), 366.25(a)(1).
[5] *In re Heather B.* (1992) 9 Cal.App.4th 535, 561.
[6] Evid. Code, § 604 (ellipses in original).

3. <u>This bill removes the presumption that, if a parent fails to regularly participate and make substantive progress in court-ordered treatment programs, it would be detrimental to the child to return them to their parent's custody</u>

This bill removes the automatic assumption that a parent's failure to regularly participate in and make substantive progress in a court-ordered treatment program means the parent is unfit and the child should not be returned to their custody. Without this presumption, the court will still have to consider whether the parent's failure means it would be detrimental to the child to return them to the parent's custody; but rather than defaulting to a conclusion of unfitness, the court will have to look at the specific facts of the case and the reasons the parent failed to participate and/or make progress, the parent's progress and utilization of services in other areas, and whether the overall circumstances warrant keeping the child out of the parent's custody.

To be clear, the removal of the prima facie provision only eliminates a presumption against the parent; it does not establish a presumption the other way. This bill simply requires the court to make the determination of a parent's failure to participate and make progress in court-ordered treatment is detrimental to the child based on the totality of the circumstances, rather than requiring the court to begin with the assumption that the parent is unfit. This bill is thus consistent with other recent legislation that requires the child welfare agencies to provide specific evidence showing that a child is at risk instead of relying on inferences based on a parent's circumstances.[7]

SUPPORT

City of Santa Clara (co-sponsor)
Los Angeles Dependency Lawyers, Inc. (co-sponsor)
Dependency Advocacy Center
Dependency Legal Services
East Bay Family Defenders
Family Reunification, Equity, and Empowerment (FREE) Project
Public Counsel
Starting Over, Inc.
One individual

OPPOSITION

None known

[7] *See* SB 1085 (Kamlager, Ch. 832, Stats. 2022); AB 788 (Calderon, Ch. 201, Stats. 2021); SB 977 (Liu, Ch. 219, Stats. 241).

RELATED LEGISLATION

Pending Legislation:

SB 578 (Ashby, 2023) requires a social worker to report on, and a juvenile court to consider, the potential harms to a child when considering whether to remove a child from their parent or guardian's custody. SB 578 is pending before this Committee and is scheduled to be heard on the same date as this bill.

AB 954 (Bryan, 2023) would require a juvenile court, when ordering services for a dependent child or their parent, to inquire whether a parent or guardian can afford court-ordered services; and would prohibit a court from declaring a parent noncompliant with a court-ordered case plan when there is evidence that the parent is unable to pay for a service, or that payment for a service would create an undue financial hardship for them, at specified review hearings. AB 954 is pending before the Assembly Human Services Committee.

AB 937 (McKinnor, 2023) would clarify that the court must specify its factual basis for its conclusion that reasonable services have not been provided to the parent or guardian if the court extends reunification services on that basis. The bill would also require the court to extend reunification services for an additional 6 months if the court determines at the 18-month permanency hearing that reasonable services have not been provided. The bill is pending in the Assembly Judiciary Committee.

Prior Legislation:

AB 2866 (Cunningham, Ch. 165, Stats. 2022) modified 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 788 (Calderon, Ch. 201, Stats. 2021) clarified, for purposes of the exemption to the requirement to provide reunification services for a parent who has a history of extensive substance abuse and previously "resisted" court-ordered substance abuse treatment, that "resisted" does not include "passive resistance," i.e., when the parent meaningfully participates in the program but nonetheless continues to abuse drugs or alcohol.

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