

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

SB 578 (Ashby)
Version: March 29, 2023
Hearing Date: April 11, 2023
Fiscal: Yes
Urgency: No
AWM

SUBJECT

Juvenile court: dependents: removal

DIGEST

This bill requires a social worker to report on, and a juvenile court to consider, the potential harms that may result from removing a child from their parent, guardian, or Indian custodian's custody; and, if the child is or there is reason to know the child is an Indian child, requires the social worker to report on what efforts have been made to contact the child's tribe.

EXECUTIVE SUMMARY

The juvenile court provides for the protection and safety of minors who are experiencing neglect or abuse, or are at risk of neglect or abuse, from their parents. To this end, the juvenile court is empowered to remove children from their parent's custody and, if the parent fails to improve, terminate parental rights. These measures are intended to protect the child from the parent; however, these measures can also wreak severe short-term and long-term harms on the child. Not only is the removal process itself traumatic, but children placed with a resource family may be forced to change schools or sports teams, not be able to spend time with friends, and lose the comfort of a beloved pet. Without proper safeguards, therefore, removal can cause more trauma than relief. To avoid this perverse result, several states have implemented measures requiring juvenile courts to consider the likely harm of removal and, if removal is necessary, measures that can be taken to alleviate the disruption to the child.

This bill requires a social worker, as part of their report to the juvenile court at an initial hearing on a petition to declare a child a dependent of the juvenile court, to report on the harms that may result from removal and list any measures that could be taken to minimize those harms and alleviate disruption. The bill then requires the court, as part of its determination of whether the child should be removed from the parent's custody, to consider the likely harms from removal and, if it determines that removal is

necessary, set forth its reasoning on the record and include in its order any measures to be taken to minimize the disruption to the child. The court must make those findings on the record or in a written order. This bill also requires a social worker, at the initial hearing, to report on efforts made to contact a child's tribe if the child is, or there is reason to know the child is, an Indian child. The author has agreed to minor amendments to clarify the bill's requirements.

This bill is sponsored by the California Judges Association and is supported by All Of Us Or None Orange County, the California Catholic Conference, Dependency Legal Services, East Bay Family Defenders, Legal Services for Prisoners with Children, the National Center for Youth Law, the National Coalition for Child Protection Reform, Pregnancy Justice, Public Counsel, and one individual. There is no known opposition. If this Committee passes this bill, it will be heard next by the Senate Human Services Committee.

PROPOSED CHANGES TO THE LAW

Existing federal law:

- 1) Establishes the Indian Child Welfare Act (ICWA), which provides guidance to states regarding the jurisdictional requirements, proceedings of tribal courts, and custody proceedings involving the removal of Indian children from their parents. (25 U.S.C., ch. 21, §§ 1901 et seq.)

Existing state 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 minor may become a dependent of the juvenile court and be removed from the custody of their parent or guardian¹ 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.)

¹ Going forward, this analysis uses "parent" to include "guardian" and the single includes the plural.

- 4) Provides that a proceeding to declare a child to be a dependent of the juvenile court is commenced when a social worker files a petition with the juvenile court. (Welf. & Inst. Code, § 325.)
 - a) A social worker may file a petition while the child remains in the custody of their parent. (Welf. & Inst. Code, § 325.)
 - b) If a child has been removed from the custody of their parent without a warrant and remains detained, pursuant to specified requirements, the child must be released within 48 hours, excluding nonjudicial days, unless a petition to declare the child a dependent of the juvenile court is filed. (Welf. & Inst. Code, §§ 305, 309, 313.)
 - c) If it is known or there is reason to know that the child taken into custody under 4(b) is an Indian child, the social worker must comply with additional requirements consistent with the ICWA. (Welf. & Inst. Code, §§ 224, 224.1, 305.5.)
- 5) Requires an initial hearing must be held on a petition to declare a child to be a dependent of the juvenile court. (Welf. & Inst. Code, § 319.)
- 6) Requires a social worker to report information at the initial hearing as follows:
 - a) For all children, the social worker must report to the court on the reasons the child was removed from the parent or Indian custodian's physical custody, the need, if any, for further detention, the available services and referral methods that could facilitate the return of the child to their parent or Indian custodian's custody, and whether there are any relatives willing and able to take temporary physical custody of the child. (Welf. & Inst. Code, § 319(b).)
 - b) If it is known or there is reason to know that the child is an Indian child, the report must include additional information, including efforts taken to assist the parents or Indian custodians so the Indian child may safely be returned to their custody. (Welf. & Inst. Code, § 316(b)(1)-(9).)
- 7) At an initial hearing where the child has already been detained, requires the court to order the release of the child from custody unless a prima facie showing has been made that the child is within the jurisdiction of the juvenile court, the court finds that the continuance in the parent's home is contrary to the child's welfare, and any of the following circumstances exist:
 - a) There is a substantial danger to the physical health of the child or the child is suffering severe emotional damage, and there are no reasonable means by which the child's physical or emotional health may be protected without removing the child from the parent's custody.
 - b) There is substantial evidence that a parent is likely to flee the jurisdiction of the court.
 - c) The child has left a placement in which the child was placed by the juvenile court.

- d) The child indicates an unwillingness to return home, if the child has been physically or sexually abused by a person residing in the home. (Welf. & Inst. Code, § 319(c).)
- 8) If the child is an Indian child, imposes limitations in addition to those in 7) for a court to order that the Indian child remain in detention:
 - a) When the court finds that there is substantial evidence that a parent or Indian custodian is likely to flee the jurisdiction, the court must also find that fleeing the jurisdiction will place the child at risk of imminent physical damage or harm.
 - b) Under all circumstances, the court may detain the Indian child only if it also finds that detention is necessary to prevent imminent physical damage or harm and must state the facts supporting the finding on the record. (Welf. & Inst. Code, § 319(c), (d).)
 - 9) At an initial hearing where a child has not yet been detained, authorizes a court to order the child to be detained, provided that the court does all of the following:
 - a) States the facts on which the decision was based.
 - b) Specifies why the initial removal was necessary.
 - c) References the social worker's report or other evidence relied upon to make its determination whether continuance in the home of the parent or legal guardian is contrary to the child's welfare.
 - d) Makes orders addressing the child's placement and care and the provision of reunification services, as appropriate. (Welf. & Inst. Code, § 319(g).)
 - 10) Establishes, for children who remain out of or are removed from their parent's custody after the initial hearing, a series of review hearings at six-month intervals at which the court may return the child to their parent's custody or continue the child's placement outside their parent's home; these review hearings may culminate in a permanency hearing that terminates parental rights and a permanent placement for the child. (Welf. & Inst. Code, §§ 361.5, 366.21, 366.22, 366.25.)

This bill:

- 1) Requires a social worker, in their report to the court prior to the initial hearing on whether to remove a child from, or keep a child out of, their parent or Indian custodian's custody, to include:
 - a) Information regarding the short-term and long-term harms that may result from the child's removal from custody, including, but not limited to, the factors set forth in 2)(a)-(c), as well as measures to alleviate the disruption and minimize the harms of removal with the least disruptive alternatives.
 - b) If it is known or there is reason to know the child is an Indian child, the steps taken to consult with the tribe and the outcome of the consultation.

- 2) Requires a court, as part of its determination as to whether continuance in the parent's home is contrary to the child's welfare at the initial hearing, to consider the short-term and long-term harms that may result from the continued removal. In making this determination, the court shall review the social worker's report and any other evidence in considering factors that include, but are not limited to:
 - a) The child's attitude towards removal and the existing relationship between the child and their parent or Indian custodian.
 - b) The existing relationship between the child and other members of the household, including, but not limited to, siblings.
 - c) The disruption to the child's schooling, social relationships, and physical or emotional health that may result from placement out of the home.
- 3) Requires a court, if it finds at the initial hearing that removal is necessary, to make a determination of its findings, referencing the social worker's report and other evidence relied upon, and specify the measures to be taken to alleviate the disruption and minimize the harms of removal with the least disruptive alternatives in a written order or on the record.

COMMENTS

1. Author's comment

According to the author:

There is no disputing that children suffer harm when they are separated from their parents. The highly traumatic experience of family separation can cause irreparable harm, disrupting a child's brain architecture and affecting their short- and long-term health. SB 578 is a bill sponsored by the very judges who are charged with this most difficult task. SB 578 seeks to reduce the harm a child must endure by requiring a trauma informed analysis be provided to judges in advance of any removal decision. Judges will make a more informed decision in the best interest of the child when given the requested analysis they need to weigh what is the safest and healthiest outcome given all that is happening in the life of the child before them.

SB 578 will require the court to consider the trauma a child will experience as a result of removal from parental care and weigh that harm against the potential risk of non-removal. The trauma analysis will include connections not only to family, but also to school and community. Judges will have a better opportunity to mitigate harms by having this additional context at the time of deciding how best to proceed. The judge will also be able to ask that the social worker's harm reduction, trauma informed report include suggested mitigation solutions to the impact of removal. Eight states and Washington D.C. require the courts to assess the harm of removal, or include the harm of removal and emphasis on family

preservation in their reasonable efforts criteria or agency guidance. It is time that California follows their lead and requires our own trauma-informed harm reduction model, in so doing, we can better protect children and their families across our great state.

2. The child dependency system and the trauma of removing a child from their parent's custody

The overarching goal of dependency proceedings is to safeguard the welfare of California's children.² Welfare and Institutions Code section 300 sets forth the circumstances that can bring a child within the jurisdiction of the juvenile dependency court. " 'Although the harm or risk of harm to the child [for jurisdictional purposes] must generally be the result of an act, omission or inability of one of the parents or guardians, the central focus of dependency jurisdiction is clearly on the child rather than the parent.' "³

When a child is found to be under the jurisdiction of the juvenile court, the court is determined to be a dependent of that court and the court may begin proceedings to remove the child from the custody of their parent(s); if, after a series of hearings, a parent is found to be unfit, the court can terminate the parent's parental rights.⁴ The overarching inquiry is whether the child would suffer, or is likely to suffer, harm if they remain with their parent.

In recent years, some have questioned whether juvenile courts' inquiries are too narrow because they look only at the harms that could be inflicted on the child if they remain with the parent, and ignore the harms that could be inflicted on the child if they are removed from their parent's custody.⁵ Removing a child from their family and placing them into foster care can harm a child in a variety of ways beyond the obvious pain of separation from their parent, such as forcing them to leave a school where they are happy and separating them from their siblings, pets, and friends.⁶ Removal can also cause a number of psychological harms that can lead to post-traumatic stress disorder and substance abuse issues.⁷ And, as with many aspects of the dependency system, the harms can be worse and more for people of color, particularly Black and Indian children, who are often the victims of conscious and unconscious bias at every stage of the dependency process.⁸

² *In re Josiah Z.* (2005) 36 Cal.4th 664, 673.

³ *In re R.T.*, 3 Cal.5th 622, 626.

⁴ See *Welf. & Inst. Code*, §§ 360, 361.3, 366.26.

⁵ E.g., Trivedi, *The Harm of Child Removal*, 43 N.Y.U. Rev. of Law & Social Change 523, 526 (2019).

⁶ *Id.* at pp. 532-533.

⁷ *Id.* at pp. 528-532.

⁸ *Id.* at pp. 534-541.

3. This bill requires a juvenile court, when deciding whether to remove a child from their parent's custody at an initial hearing, to consider the short-term and long-term harms that the child would likely suffer from removal

At an initial hearing on a petition to declare a child who is not an Indian child⁹ a dependent of the juvenile court and to remove the child from the custody of the parent, a court should order the child released to their parent's custody unless the court finds that "continuance in the parent's or guardian's home is contrary to the child's welfare" and certain other circumstances exist.¹⁰ This determination arguably already requires a court to consider the trauma of removing the child – removing a child from a parent's home would be contrary to the child's welfare if removal would cause more harm than good. The sponsor of the bill reports that some juvenile judges already engage in this implicit calculation.

This bill makes the implicit calculation explicit. Specifically, this bill requires a social worker to include, in their initial hearing report, information about the short-term and long-term harm to the child that may result from their removal from their parent's custody, including the least-disruptive alternative if removal is necessary and other measures that may be taken to alleviate disruption and minimize the harm of removal. The court then must consider, as part of its determination of whether removal is necessary for the child's welfare, the harms that may result from removal. If the court determines that removal is necessary, it must set forth the basis for its determination in a written order or on the record, and specify any measures that must be taken to alleviate disruption and minimize harm. The author has agreed to minor amendments to clarify these provisions. Several other states have adopted laws or implemented guidance instructing judges to consider the trauma of removal as a factor in the decision to remove a child from their parent's custody.¹¹

Relatedly, this bill requires a social worker to include in their initial hearing report, when the child is or there is reason to know the child is an Indian child, information setting forth the steps taken to consult with the Child's tribe and the outcome of that consultation. This provision should assist in compliance with the ICWA.

4. Amendments

As noted above, the author has agreed to amend the bill to clarify its requirements as follows, with deletions in strikethrough and additions in bold and underlined, subject to any nonsubstantive changes the Office of Legislative Counsel may make:

⁹ Proceedings for removing an Indian child are subject to the ICWA, which imposes different standards for removal, different steps that must be taken when an Indian child may be a dependent of the juvenile court, and a higher standard for keeping an Indian child in custody.

¹⁰ Welf. & Inst. Code, § 319(c).

¹¹ Trivedi, *supra*, 43 N.Y.U. Rev. of Law & Social Change, pp. 566-571; Iowa Code Ann., § 232.67; N.M. Stat. Ann., § 32A-4-21; S.C. Code Ann., § 63-7-1660.

Amendment 1

At page 3, in lines 17-24:

...The report shall also include information regarding the short-term and long-term harms to the child that may result from their removal from the custody of their parent, guardian, or Indian custodian, including, but not limited to, the information specified in subparagraph (A) of paragraph (2) of subdivision (c), ~~and measures to alleviate the disruption and minimize the harms of removal with the least disruptive alternatives~~ **the least-disruptive alternatives to returning the child to the custody of their parent, guardian, or Indian custodian, and other measures that may be taken to alleviate disruption and minimize the harms of removal.**

Amendment 2

At page 5, in lines 16-21:

(B) If the court finds that removal is necessary under paragraph (1), the court shall, **in a written order or on the record, set forth all of the following:**
(i) make a determination of The basis for its findings and the evidence relied on, including, where applicable, referencing the social worker's report, and other evidence relied upon, and
(ii) The child's placement and the basis for determining that the placement is the least-disruptive alternative for the child.
(iii) Any other specify the measures to be taken in order to alleviate the disruption and minimize the harms of removal for the child with the least disruptive alternatives in a written order or on the record.

Amendment 3

On page 7, add the requirements of Amendment 2 to when a court orders a child detained under subdivision (g).

5. Arguments in support

According to the sponsor of the bill, the California Judges Association:

Juvenile court judges make critical decisions concerning the well-being of our state's most vulnerable children. While our judges take the harm that children may experience when removed from parental custody into consideration, no statute specifically addresses how the court should consider this harm. SB 578 seeks to provide some guidelines for the court to consider as well as asking the court to consider methods that might reduce that trauma.

SUPPORT

California Judges Association (sponsor)
All Of Us Or None Orange County
California Catholic Conference
Dependency Legal Services
East Bay Family Defenders
Legal Services for Prisoners with Children
National Center for Youth Law
National Coalition for Child Protection Reform
Pregnancy Justice
Public Counsel
One individual

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation:

SB 824 (Ashby, 2023) expands the Department of Social Services' (DSS) authority to grant an exemption to restrictions on a person serving as a resource family for a specific child when that person has a criminal conviction, to permit DSS to grant an exception to a person who is an extended family member or a nonrelative extended family member, provided that DSS finds the exemption is justified and other specified conditions are met. SB 824 is pending before the Senate Human Services Committee.

SB 463 (Wahab, 2023) 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. SB 463 is pending before this Committee and is scheduled to be heard on the same date as this bill.

Prior Legislation:

SB 1021 (Durazo, 2020) would have, in the event a juvenile court ordered a child detained, prohibited the court from restricting visitation between a parent and child any more than necessary to ensure the child's safety and well-being and would have specified facts that do not constitute a basis for requiring supervised visits; and would have, where a court orders a child into foster care, required the court to consider specified factors in making a visitation plan. SB 1021 was held in the Senate Judiciary Committee as a result of COVID-19-related bill limits.

AB 3176 (Waldron, Ch. 833, Stats. 2018) revised a range of dependency-related statutes to reflect changes to the ICWA, including the statute setting forth the procedures and requirements for the initial hearing on a dependency petition.
