

Date of Hearing: April 13, 2021

ASSEMBLY COMMITTEE ON JUDICIARY  
Mark Stone, Chair  
AB 788 (Calderon) – As Amended March 30, 2021

PROPOSED CONSENT

**SUBJECT:** DEPENDENT CHILDREN: REUNIFICATION

**KEY ISSUE:** IN ORDER TO ENSURE THAT A PARENT IS NOT DENIED REUNIFICATION SERVICES WITH THEIR CHILD IN FOSTER CARE BECAUSE OF A DRUG OR ALCOHOL ABUSE RELAPSE, SHOULD “RESISTANCE” TO COURT-ORDERED DRUG OR ALCOHOL TREATMENT EXCLUDE “PASSIVE RESISTANCE,” SUCH AS A RELAPSE?

**SYNOPSIS**

*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 his or her parents, the primary objective of the child welfare system is to safely reunify the child with his or her family. To support that objective, in most cases the juvenile court orders reunification services, such as counseling, parenting classes, and drug or alcohol treatment for the child’s parents. If the child is under the age of three, these reunification services are offered for a period of six months. If the child is over the age of three, the services are offered for twelve months. In some circumstances, the time period for reunification services can be extended to 24 months.*

*However not all children can safely be reunited with their families and the Welfare & Institutions Code allows judges to forgo reunification services when the court finds, by clear and convincing evidence, that one of 17 specific situations exist. These situations include a parent who caused the death of another child through abuse or neglect or, of relevance for this bill, a parent with a history of drug or alcohol abuse who has failed to comply with a required treatment program. In particular, existing law allows a judge to forgo reunification services if 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. This bill clarifies that mere passive resistance, such as relapsing into drug or alcohol use, is not considered resistance for purposes of denial of reunification services.*

*This bill is sponsored by the Children’s Advocacy Institute and Dependency Legal Services and supported by groups representing children and family. It passed out of the Assembly Human Services Committee last week on Consent.*

**SUMMARY:** Prevents a court from denying reunification services for a parent of a dependent child who has a history of extensive, abusive, and chronic use of drugs or alcohol, but has only passively resisted prior court-ordered treatment. **Specifically, this bill** provides that for purposes of the provision in existing law that denies reunification services to a parent or guardian of a dependent child who has a history of extensive, abusive, and chronic use of drugs or alcohol and has resisted prior court-ordered treatment during a three-year period immediately prior to the

filing of the petition that brought that child to the court's attention, "resisted" does not include "passive resistance," such as a relapse.

**EXISTING LAW:**

- 1) Establishes the juvenile court with jurisdiction over children who are subject to abuse or neglect. (Welfare & Institutions Code Section 300. Unless stated otherwise, all further statutory references are to the Welfare & Institutions Code.)
- 2) Establishes that the purpose of the juvenile court dependency system is the maximum safety and protection for children who are currently being abused, neglected, or exploited. Provides that the focus is on the preservation of the family, as well as the safety, protection, and physical and emotional well-being of the child. (Section 300.2.)
- 3) If at the initial hearing the juvenile court orders a child removed from their parent due to abuse or neglect, requires the court to order that child welfare reunification services be provided to the family as soon as possible in order to reunify the child with their family, if appropriate. (Section 319 (e).)
- 4) Requires the court, at the dispositional hearing, to order a social worker to provide child welfare services to a child who has been removed from their parents' custody and to the parents in order to support the goal of reunification, for a specified time period, except under certain circumstances. Provides that children and families in the child welfare system should typically receive a full six months of reunification services if the child is under three years of age, and twelve months if the child is over three years of age, but that may be extended up to 18 or 24 months, as provided. (Section 361.5 (a).)
- 5) Provides that reunification services under 4), above, need not be provided if the court finds, by clear and convincing evidence, that specified conditions exist, including 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, or has failed or refused to comply with a program of drug or alcohol treatment, as provided, on at least two prior occasions, even though the programs identified were available and accessible. (Section 361.5 (b).)
- 6) Prevents a court from ordering reunification services for a parent in specified situations, including the situations set forth in 5), above, unless the court finds, by clear and convincing evidence, that reunification is in the child's best interest. (Section 361.5 (c).)

**FISCAL EFFECT:** As currently in print this bill is keyed non-fiscal.

**COMMENTS:** 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 his or her parents, the primary objective of the child welfare system is to safely reunify the child with his or her family. To support that objective, in most cases the juvenile court orders reunification services, such as counseling for the family, and parenting classes and drug or alcohol treatment for the child's parents. If the child is under the age of three, these reunification services are offered for a period of six months. If the child is over the age of three, the services are offered for twelve months. In some circumstances, the time period for reunification services can be extended up to 24 months.

However not all children can safely be reunited with their families and the Welfare & Institutions Code allows judges to forgo reunification services when the court finds, by clear and convincing evidence, that one of 17 specific situations exist. These situations include a parent who caused the death of another child through abuse or neglect or, of relevance for this bill, a parent with a history of drug or alcohol abuse who has failed to comply with a required treatment program. In particular, existing law allows a judge to forgo reunification services if 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. This bill clarifies that mere passive resistance, such as relapsing into drug or alcohol use, is not considered resistance for purposes of denial of reunification services.

In support of the bill, the author states:

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 appellate court decision has clarified that relapse is not the same as actively resisting drug treatment. Assembly Bill 788 would adopt the holding of this decision by clarifying that a parent must be refusing or actively resisting drug use treatment to become disqualified for family reunification services.

***Parents generally offered reunification services, but exemptions exist in order to protect foster children from further abuse.*** Since the goal of the dependency system is, whenever possible, to reunite children with their families, parents are generally provided services in order to safely reunify with their children in foster care. These services are designed to address the circumstances that caused the child to be removed from the parents in the first place, such as drug or alcohol treatment, anger management counseling, or parenting classes, so that the child can be safely returned to their home.

However, there are currently 17 instances when a parent or guardian can be denied reunification services, generally because the parent's or guardian's behavior is such that denial of services is necessary in order to protect children from further harm. In particular, if the juvenile court finds, by clear and convincing evidence, that one of these 17 instances exists reunification services can be denied. These instances include when the parent is suffering from a mental disability that renders the parent incapable of using the reunification services; the parent caused the death of another child through abuse or neglect; the child was conceived as the result of rape or incest with a minor and the parent seeking services committed the rape or incest; the child or a sibling had previously been adjudicated a dependent as the result of physical or sexual abuse and the child is now being removed due to additional physical or sexual abuse; and the parent has been convicted of a violent felony.

However, even in these cases, a court may still choose to grant reunification services to the parent if the court determines that it is appropriate. In most cases, though, the court may only do so if it finds, again by clear and convincing evidence, that reunification is in the child's best interest. (Section 361.5 (c).) Foregoing reunification services generally speeds up the timeframe for finding an alternative

permanency plan for the child, whether adoption or tribal customary adoption, guardianship, or even long-term foster care, but cuts off the child from the parents.

***Reunification exemption for drug or alcohol abuse has been interpreted differently by different courts.*** In addition to the examples listed above, existing law allows a court to forgo reunification services to a parent who has a history of extensive, abusive, and chronic use of drugs or alcohol and has either (1) resisted prior court-ordered treatment for this problem during a three-year period immediately prior to the filing of the petition that brought the child to the court's attention, or (2) failed or refused to comply with a program of drug or alcohol treatment, as provided, on at least two prior occasions, even though the programs identified were available and accessible. While failure or refusal to comply with a drug or alcohol treatment program seems clear enough, courts have been divided over what is meant by "resisted prior court-ordered treatment." Some courts have found that merely relapsing into drug or alcohol abuse after successfully completing a program is sufficient for a court to find that the parent has resisted treatment. (See, e.g., *Randi R. v. Superior Court* (1998) 64 Cal.App.4<sup>th</sup> 67; *In re William B.* (2008) 163 Cal.App.4<sup>th</sup> 1220.) A recent appellate court disagreed, finding that the Legislature did not intend that mere passive resistance to court-ordered drug treatment by relapsing should be used to deny reunification services:

[H]ad the Legislature intended to *implicitly* bypass services for a mere relapse, there would have been no need to include the word "resisted" at all. It could have simply applied a bypass where the parent was ordered to treatment in the past three years and subsequently became the subject of a new case involving drug use. The word "resisted" is surplusage if the Legislature meant to apply a bypass to simple relapse. Thus, for "resisted" to mean anything at all in this context, it must mean something more than relapse. We conclude that what the Legislature meant by "resisted" is active resistance, not passive resistance. (*In re B.E.* (2020) 46 Cal.App.5<sup>th</sup> 932, 941.)

The court in *In re B.E.* went on to explain its concerns that some courts have not used this reunification exemption to bypass the worst cases, but have used it to bypass parents who may have had only one relapse. (*Id.* at 944, citing *In re William B.* (2008) 163 Cal.App.4<sup>th</sup> 1220.) However, relapsing is a normal part of the recovery process, with 40-60 percent of people treated for substance use disorders experiencing relapses. (Thomas McLellan, *et al.*, *Drug Dependence, a Chronic Medical Illness*, 284 (13) JAMA 1689 (2000).) As the *In re B.E.* court stated, "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.*, 163 Cal.App.5<sup>th</sup> at 941.)

***This bill codifies the court holding in In re B.E. to prevent denial of reunification services to a parent who has simply relapsed.*** This bill seeks to codify the holding in *In re B.E.* by stating that mere passive resistance to court-ordered drug or alcohol treatment programs should not be considered actual resistance for purposes of denying reunification services. And while a court could still determine that reunification services failed because a parent could not stop using drugs or alcohol, and move to find an alternative permanent arrangement for the child, the court would not have foreclosed reunification services – and the generally desired outcome that children reunite with their parents – before the services had even begun.

**ARGUMENTS IN SUPPORT:** In support of the bill, the co-sponsors, Children's Advocacy Institute and Dependency Legal Services, write:

Whether [reunification] services can lawfully be bypassed is a question of enormous significance. Bypassing such services almost inevitably leads to a child being permanently

removed from the care of their parents, the termination of parental rights, and the child being raised in foster care. This “bypassed” parent is not given an opportunity to reunify.

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 begun 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. . . .

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. . . .

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.

## **REGISTERED SUPPORT / OPPOSITION:**

### **Support**

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

### **Opposition**

None on file

**Analysis Prepared by:** Leora Gershenzon / JUD. / (916) 319-2334