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

AB 2866 (Cunningham)
Version: February 18, 2022
Hearing Date: June 8, 2022
Fiscal: No
Urgency: No
AWM

## SUBJECT

Dependent children

## DIGEST

This bill modifies 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.

## EXECUTIVE SUMMARY

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 their parent's custody, the primary objective of the child welfare system is to reunify the child with their family, if doing so is consistent with the best interests of the child. To that end, in most cases a juvenile court orders reunification services—such as counseling for the family, and parenting classes or drug or alcohol treatment for the child's parents—before making a final determination regarding parental rights. Depending on the circumstances, these services may be provided for a period of as little as six months and up to two years.

While dependency proceedings are ongoing, a court must hold regular review hearings at least every six months and, if necessary, a permanency hearing to permanently place the child with someone else other than the parent. At each hearing, the court must find that the parent was adequately provided reunification services; the statute is silent as to the standard of proof at the review hearings, but provides that, at the final hearing, the court must find by clear and convincing evidence that reunification services were provided. In the absence of a statutory standard of proof for the earlier hearings, some

courts have applied the lower "preponderance of the evidence" standard for those proceedings. (*See*, *e.g.*, *Katie V. v. Superior Court* (2005) 130 Cal.App.4th 586, 594-595.)

This bill would revise the relevant statutes to require that the court apply the higher clear and convincing evidence at each review hearing when determining whether a parent was provided with adequate reunification services. According to the author and sponsors, there is no good reason for the inconsistency between standards of proof, particularly on an issue as important as whether parents are provided adequate reunification services designed to help them regain custody of their children.

This bill is sponsored by the Children's Advocacy Institute at the University of San Diego School of Law and Dependency Legal Services and supported by ACLU California Action, Juvenile Court Judges of California, and Los Angeles Dependency Lawyers, Inc. There is no known opposition. If this bill is passed by this Committee, it will then be heard by the Senate Human Services Committee.

## PROPOSED CHANGES TO THE LAW

Existing law:

1) Establishes the juvenile court, which has jurisdiction over minors who are suffering or at substantial risk of suffering harm or abuse and may adjudge the minor to be a dependent of the court. (Welf. & Inst. Code, § 300.)

2) 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.)

3) Requires, at an initial hearing following the removal of a child from their parent's custody:[1]
    a) The social worker to report on, among other things, the available services and the referral methods to those services that could facilitate the return of the child the custody of their parent (Welf. & Inst. Code, § 319(b).)
    b) The court to make a determination on the record as to whether reasonable efforts were made to prevent or eliminate the need for removal of the child from their home, and whether there are available services that would prevent the need for further detention. Services to be considered are case

[1] This analysis uses "parent" to refer to a parent, parents, guardian, or Indian custodian.

management, counseling, emergency shelter care, emergency in-home caretakers, out-of-home respite care, teaching and demonstrating homemakers, parenting training, transportation, and any other child welfare services authorized by the State Department of Social Services (DSS). (Welf. & Inst. Code, § 319(f)(1).)

c) The court, if it determines that the child can be returned to the custody of their parent through the provision of the services in 3)(b), to place the child with their parent and order that the services be provided. (Welf. & Inst. Code, § 319(f)(3).)

4) Requires, at a dispositional hearing held after the child has been removed from the parent's custody, the court to order the social worker to provide child welfare to the child and the child's mother and statutorily presumed father or guardians. In advance of the hearing, the social worker must prepare a report that discusses whether reunification services shall be provided.
   a) The services ordered may include family reunification services, which shall be provided for up to 12 months, or six months if the child was under three years of age when removed from the custody of their parent.
   b) The duration of the services may be extended for 18 months if the court finds that there is a substantial probability that the child will be returned to the physical custody of the parent within that extended time period or that reasonable services were not provided; or for 24 months if the court determines that it is in the child's best interest to have the time period extended and there is a substantial probability that the child will be returned to physical custody of the parent within that period, or that reasonable services were not provided to the parent.
   c) The court need not order reunification services if certain conditions are met, generally relating to the parent's fitness, unless the court finds, by clear and convincing evidence, that reunification is in the best interest of the child. (Welf. & Inst. Code, § 361.5.)

5) Requires the court to periodically review the status of every dependent child in foster care, no less frequently than once every six months, until the court makes a final adjudication to permanently terminate parental rights or establish legal guardianship for the child. (Welf. & Inst. Code, § 366.)

6) Requires, for the status hearing held six months after the initial dispositional hearing:
   a) Prior to the hearing, the social worker to file a report with the court regarding, among other things, the services provided or offered to the parent to enable them to assume custody, the progress made, and the recommendation for disposition of the case.
   b) At the hearing, the court to order the return of the child to the physical custody of their parent unless the court 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; the social worker has the burden of establishing that detriment.

c) In making the determination under 6)(b), the court to consider, among other things, the effort, progress, or both demonstrated by the parent and the extent to which they availed themselves of services provided.
d) If ordering that the child should not be returned to their parents, the court to determine whether reasonable services that were designed to aid the parent in overcoming problems that led to the initial removal and the continued custody of the child have been provided or offered to the parent, and to order that the services be initiated, ordered, or terminated. (Welf. & Inst. Code, § 366.21(a)-(e).)

7) Requires, not later than 12 months after the child entered foster care, the court to hold a permanency hearing at which it determines the permanent plan for the child, including whether the child will be returned to their home. The court must order the child to be returned to the physical custody of their parent unless the court finds, by a preponderance of the evidence, that the return of the child would create a substantial risk of detriment to the child's safety, protection, or physical emotional well-being. (Welf. & Inst. Code, § 366.21(f)(1).)

8) Requires, at the permanency hearing in 7), the court to consider, among other things, whether reasonable services that were designed to aid the parent to overcome the problems that led to the initial removal and continued custody of the child have been provided or offered to the parent, whether the parent or guardian made effort or progress, and whether they availed themselves of services provided. (Welf. & Inst. Code, § 366.21(f)(1)(A), (C).)

9) Requires, at the permanency hearing to determine the permanent placement of the child, the court to determine whether the child should be returned to the physical custody of their parent; if the court determines, by a preponderance of the evidence, that the return would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child, the court must determine whether adoption, guardianship, or continued placement in foster care is the most appropriate plan for the child, unless certain conditions are met. (Welf. & Inst. Code, § 366.22(a).)

10) Provides, as part of the determination in 9), the court to determine whether reasonable services have been offered or provided to the parent. (Welf. & Inst. Code, § 366.22(a).)

11) Requires, prior to ordering a hearing for the termination of parental rights, that a court determine, by clear and convincing evidence, that reasonable services have been provided or offered to the parent. (Welf. & Inst. Code, § 366.22(b)(3)(B).)

12) Provides that evidence of the below circumstances that shall not, in and of themselves, be deemed a failure to provide or offer reasonable services:
    a) The child has been placed with a foster family that is eligible to adopt a child, or has been placed in a preadoptive home.
    b) The case plan includes services to make and finalize a permanent placement for the child if efforts to reunify fail.
    c) Services to make and finalize a permanent placement for the child, if efforts to reunify fail, are provided concurrently with services to reunify the family. (Welf. & Inst. Code, §§ 366.21(l), 36622.(a).)

This bill:

1) Requires a court, at the review hearing held six months after the dispositional hearing, to determine by clear and convincing evidence whether reasonable services that were designed to aid the parent in overcoming the problems that led to the initial removal and the continued custody of the child have been provided or offered to the parent.

2) Requires a court, at the permanency hearing, to determine by clear and convincing evidence whether reasonable services that were designed to aid the parent to overcome the problems that led to the initial removal and continued custody of the child have been provided or offered to the parent.

3) Requires a court, when determining whether adoption is the most appropriate plan for a child, to determine by clear and convincing evidence whether reasonable services have been offered or provided to the parent.

4) Makes certain nonsubstantive conforming changes.

## COMMENTS

1. Author's comment

According to the author:

> My aim in authoring AB 2866 is to keep more parents and children together in families simply by ensuring that the standard of proof we use to ensure that counties are offering troubled families the services they need is consistently applied at all the phases parents need those services, thereby also avoiding arbitrary and absurd results between parents and restoring the law to what most stakeholders for years sensibly thought it was.

2. This bill raises the evidentiary bar for a court's finding in dependency proceedings that a parent was provided with reasonable services

The overarching purpose of the juvenile court is to provide for the protection and safety of the public and each child under the court's jurisdiction and, where possible, to preserve and strengthen the child's family ties so that a child is removed from their parent's custody only when necessary for the child's welfare or the safety and protection of the public.[2] To that end, when a child has been removed from a parent's physical custody but the parent's parental rights have not been terminated, a juvenile court generally must order reunification services for the parent to try and remedy the issues that led to juvenile jurisdiction in the first instance, such as parenting classes or drug or alcohol treatment.[3] These "[f]amily reunification services play a critical role in dependency proceedings" and should be "tailored to the particular needs of the family."[4] The parent must be offered services for at least 12 months, or six months if the child was under three years of age when the child was removed from custody, and may be extended for up to 24 months depending on circumstances such as the parent's progress.[5]

As part of the court's ongoing oversight into a case where a child has been removed from a parent's custody, the court must determine whether the necessary reunification services are being offered to the parent. "To support a finding that reasonable services were offered or provided to a parent, 'the record should show that the supervising agency identified the problems leading to the loss of custody, offered services designed to remedy those problems, maintained *reasonable* contact with the parents during the course of the service plan, and made *reasonable* efforts to assist the parents in areas where compliance proved difficult.' "[6]

While the court must make this factual determination regarding reunification services at multiple points in the dependency proceedings, the burden of proof for this determination is inconsistent. For review hearings—which exclude the permanency and permanency review hearings—the statute is silent on the standard of proof for finding that adequate reunification services were provided.[7] Some courts have filled in this gap by applying the general civil preponderance of the evidence standard.[8] Once the court has determined that permanency review is appropriate, however, the statute expressly

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[2] Welf. & Inst. Code, § 202(a).
[3] *Id.*, § 361.5.
[4] *In re M.F.* (2019) 32 Cal.App.5th 1, 13.
[5] Welf. & Inst. Code, § 361.5.
[6] *In re M.F.*, *supra*, 32 Cal.App. 5th at p. 14.
[7] *See* Welf. & Inst. Code, §§ 366.21, 366.22.
[8] *See Katie V. v. Superior Court* (2005) 130 Cal.App.4th 586, 594-595. It appears that other courts have assumed, without an examination of the statutory text, that the clear and convincing evidence standard applies at review hearings. (*See*, *e.g.*, *In re A.G.* (2017) 12 Cal.App.5th 994, 1000-1001; *David B. v. Superior Court* (2004) 123 Cal.App.4th 768, 794.) Thus, to the extent there is a split of authority on the appropriate standard of proof for review hearings, this bill would resolve that split.

provides that a judge must make the finding that reunification services were provided by clear and convincing evidence.[9]

The result is that there is a lower standard of proof for whether a parent was provided with reunification services at intermediate hearings than at permanency hearings. The preponderance of the evidence standard "simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence."[10] The clear and convincing evidence standard, by contrast, requires "that the evidence be so clear as to leave no substantial doubt" or "sufficiently strong to command the unhesitating assent of every reasonable mind."[11]

According to the author and sponsors, there is no basis to have a lower burden of proof for the provision of reunification services earlier in the proceedings. Given that reunification services include services that may take time to take effect—such as therapy or drug and alcohol treatment—it is vital that adequate, individually tailored services are provided early on in the case, when there is still time for the parent to benefit from those services. As it stands, the burden of proof is highest when the parent can do the least about the lack of services and lowest when the services can do the most good. This bill would eliminate the inconsistency and require clear and convincing evidence of the provision of reunification services in review hearings as well as in permanency proceedings.

3. Arguments in support

According to the co-sponsors of the bill, the Children's Advocacy Institute at the University San Diego School of Law and Dependency Legal Services:

> Most lawyers and judges have long presumed that the county has the same clear and convincing evidence burden of showing that it made reasonable efforts to provide services to help keep families together at the periodic hearings as it has to set a final hearing to terminate parental rights. The reason for this presumption is it makes sense*: why would we permit counties to make less of an effort to preserve a family from months one through six than in the months immediately before the hearing to terminate rights?* Indeed, if anything, it makes more sense to ensure services are quickly provided, early in the process, to promote the earliest possible reunification of parent and child…
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> Yet, technically speaking, if a termination-of-rights hearing is not the hearing being set, the Code is, except for [Welfare and Institutions Code] section 366.22(b)(3)(C) regarding a few sets of parents, otherwise silent regarding the

[9] Welf. & Inst. Code, § 366.22.
[10] *In re Angela P.* (1981) 28 Cal.3d 908, 918 (internal quotation marks omitted).
[11] *Id.* at p. 919.

standard of proof. (*See*, *e.g.*, Welf. & Inst. Code, § 366.21(f)(1)(A).) And, commonly, when a statute is silent on the standard of proof, the lowest evidentiary standard in the law -- preponderance of the evidence -- ordinarily applies. (*Katie V. v. Superior Court* (2005) 130 Cal.App.4th 586, 594; Evid. Code, § 115).[12]

As a result, for all these reasons, when it comes to ensuring whether we are offering reasonable services to keep families together and out of the government program of foster care, a few courts are not agreeing with what has been presumed about the standard of proof required all along the process. Citing the absence of an explicit standard of proof, these courts have held that the standard of evidence to be used in adjudicating whether reasonable services have been offered in periodic review hearings (6, 12, and for most parents 18 months) is different than the evidentiary standard used to adjudicate ***the very same question but at a hearing held at the end of the road, when we are poised to give up on efforts to reunify the family***. (*Katie V. v. Superior Court* (2005) 130 Cal.App.4th 586, 595 (holding standard is preponderance of the evidence).) Other courts have ruled differently. (*David B. v. Superior Court* (2004) 123 Cal.App.4th 768, 795 (holding clear and convincing evidence is the standard).)

Because there is no justification for trying less hard to keep families together early in the dependency process, AB 2866 simply clarifies that a county has exactly the same burden to show it is offering reasonable services at early stage periodic reviews as it has at the final hearing when a court decides those services haven't worked and termination of parental rights is the only option to keep the child safe.

## SUPPORT

Children's Advocacy Institute at the University of San Diego School of Law (co-sponsor)
Dependency Legal Services (co-sponsor)
ACLU California Action
Juvenile Court Judges of California
Los Angeles Dependency Lawyers, Inc.

## OPPOSITION

None known

[12] Notably, the recent enactment of WIC section 366.22(b)(3)(C) referenced in the preceding paragraph clarifying that clear and convincing evidence is the governing standard at the 18-month hearing was to correct the holding in this case that the preponderance standard governed 18-month hearings.

## RELATED LEGISLATION

Pending Legislation: AB 2159 (Bryan, 2022) prohibits the denial of reunification services for parents and guardians who are in custody before conviction, as specified. AB 2159 is pending before the Senate Judiciary Committee.

Prior Legislation:

AB 670 (Calderon, Ch. 585, Stats. 2021) provided additional protections to parents under the jurisdiction of the juvenile court, including by providing that specified exemptions to reunification services do not apply to parents when reunification services or parental rights were terminated for a previous child when the parent was in foster care.

AB 2805 (Eggman, Ch. 356, Stats 2020) expanded the scope of evidence that a court may consider when determining whether to order reunification services for a young child who has been made a dependent of the juvenile court because the child suffered severe physical abuse by a parent or by any person known by the parent.

AB 1702 (Stone, Ch. 124, Stats. 2016) provided that reunification services need not be provided when the court finds that the parent or guardian participated in, or consented to, the sexual exploitation of the child, as prescribed, except if the parent or guardian was coerced into consenting to, or participating in, the sexual exploitation of the child

## PRIOR VOTES:

Assembly Floor (Ayes 61, Noes 0)
Assembly Human Services Committee (Ayes 7, Noes 0)
Assembly Judiciary Committee (Ayes 10, Noes 0)

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