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

SB 654 (Min)
Version: April 5, 2021
Hearing Date: April 13, 2021
Fiscal: Yes
Urgency: No
JT

## SUBJECT

Child custody: preferences of the child

## DIGEST

This bill (1) requires a court that grants unsupervised visitation to parents with histories of abuse, neglect, or substance abuse to state its reasons for doing so in writing or on the record; and (2) provides that if a child addresses a court regarding custody or visitation, they generally must be permitted to do so without the parties being present.

## EXECUTIVE SUMMARY

"[T]he interest of parents in the care, custody, and control of their children -- is perhaps the oldest of the fundamental liberty interests recognized by this Court." (*Troxel v. Granville* (2000) 530 U.S. 57, 65.) The overarching concern in California's scheme for awarding child custody and visitation rights is the best interest of the child. Courts have broad discretion to consider any relevant factor and are required to consider the health, safety, and welfare of the child, among other things. Additionally, existing law details the conditions in which the child may address the court to express their preference with respect to custody or visitation.

This bill seeks to enhance protections for the child in this process. Specifically, the bill:

- Extends to orders granting unsupervised visitation an existing requirement that a court document its reasons for granting an order granting sole or joint custody, despite allegations of abuse, neglect, or substance abuse.
- Provides that the parties should not be present when a child addresses the court regarding custody or visitation, unless the court finds that the presence of the parties is in the child's best interest and states its reasons on the record.
- Requires certain court-connected professionals, if they learn that the child has changed their choice with respect to addressing the court, to inform the judge as soon as feasible.

The bill is sponsored by the Legislative Coalition to Prevent Child Abuse and supported by the Center for Judicial Excellence, the California Women's Law Center, and the California Protective Parents Association.

This bill was recently rewritten in its entirety. The prior version of the bill addressed the same general subject but contained controversial provisions that drew substantial support and opposition. The supporters listed above have confirmed their continued support for this version of the bill. The Committee has continued to receive some opposition letters, but these letters are directed at the prior version of the bill as well as existing law itself.

## PROPOSED CHANGES TO THE LAW

Existing law:

1) 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, because 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 parents are encouraged 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).)[1]

2) Provides that, when the policies set forth in 1a) and c) above are in conflict, a court's order regarding physical or legal custody or visitation must be made in a manner that ensures the health, safety, and welfare of the child and the safety of all family members. (§ 3020(c).)

3) Provides that when determining the best interests of a child, a court may consider any relevant factors and must consider the following: the health, safety, and welfare of the child; any history of abuse or neglect by the party seeking custody; the nature and amount of contact with the parents; and substance abuse by a parent. (§ 3011.) Requires, when allegations about a parent's abuse, neglect, or substance abuse are brought to the attention of the court, that the court, if it grants sole or joint custody, to state its reasons in writing or on the record. (*Id.* at (a)(5)(A).) Requires the court to ensure that any order regarding custody or visitation is specific as to time, day, place, and manner of transfer of the child, as specified. (*Id.*)

[1] All further section references are to the Family Code unless otherwise indicated.

4) Provides that if a 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 wishes of the child in making an order granting or modifying custody or visitation. (§ 3042(a).) Requires a court to permit a child 14 years of age or older to address the court regarding custody or visitation, unless the court makes findings on the record that doing so is not in the child's best interest. (*Id.* at (c).) Gives a court discretion to allow a child less than 12 years of age to address the court. (*Id.* at (d).)

5) Provides that if the court precludes the calling of a child as a witness, the court must provide alternative means of obtaining input from the child and other information regarding the child's preferences. (*Id.* at (e).)

6) Requires the minor's counsel and specified court-connected professionals to indicate to the judge that the child wishes to address the court. Enables the judge to make an inquiry to that effect. Enables the parties or their attorneys to indicate that the child wishes to address the court or judge. (*Id.* at (f).)

7) Establishes, in the Rules of Court, procedures for effectuating these provisions. (Cal. Rule Ct. § 5.250.)

This bill:

1) Extends the requirement that a court state its reasons in writing or on the record when it grants sole or joint custody, despite allegations of abuse, neglect, or substance abuse, to orders granting unsupervised visitation.

2) Prohibits a court from requiring a child who is addressing the court regarding custody or visitation to do so in the presence of the parties. Requires that the court provide an alternative to having the child address the court in the presence of the parties in order to obtain input directly from the child. However, the court may require the presence of the parties if the court determines that it is in the child's best interest and states its reasons for that finding on the record. The court must consider whether this will cause the child emotional distress.

3) Requires certain court-connected professionals, if they learn that the child has changed their choice with respect to addressing the court, to inform the judge as soon as feasible.

## COMMENTS

1. Custody and visitation determinations

"Under California's statutory scheme governing child custody and visitation determinations, the overarching concern is the best interest of the child." (*Montenegro v. Diaz* (2001) 26 Cal.4th 249, 255; *see* §§ 3011, 3020, 3040 & 3041.) 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." (§ 3040(c).) When determining the best interest of a child, a court may consider any relevant factors, and must consider the following: the health, safety, and welfare of the child; any history of abuse or neglect by the party seeking custody; the nature and amount of contact with the parents; and substance abuse by a parent. (§ 3011; see also § 3020.) Custody and visitation orders are reviewed under the deferential "abuse of discretion" standard, under which 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." (*Ed H. v. Ashley C.* (2017) 14 Cal.App.5th 899, 904.)

Family Code Section 3040(a) establishes the following order of preference for a parenting plan in accordance with the child's best interests under Sections 3011 and 3020: (a) both parents jointly sharing custody; (b) if to neither parent, the person or persons in whose home the child has been living; and (c) any other person deemed suitable by the court and able to provide adequate and proper care and guidance for the child. 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. (§ 3040(c); *In re Marriage of Burgess* (1996) 13 Cal.4th 25, 34.)

"[T]he legal issues underlying custody and visitation disputes are necessarily intertwined, both requiring a consideration of the child's best interests." (*In re Marriage of Birdsall* (1988) 197 Cal.App.3d 1024, 1028.) A "visitation" is a limited form of custody that operates during the time visitation rights are being exercised. (*Barkaloff v. Woodward* (1996) 47 Cal.App.4th 393, 398.) The best interest of the child is 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 as defined in Section 3011, and consistent with Section 3020. (§ 3100(a).) The court has the discretion to grant reasonable visitation rights to any other person having an interest in the welfare of the child. (*Id.*)

2. Requires courts to state reasons for granting unsupervised visitation to parents with histories of abuse, neglect, or substance abuse

Existing law provides that when determining the best interests of a child, a court may consider any relevant factors and must consider the following: the health, safety, and welfare of the child; any history of abuse or neglect by the party seeking custody; the

nature and amount of contact with the parents; and substance abuse by a parent. (§ 3011.) When allegations about a parent's abuse, neglect, or substance abuse are brought to the attention of the court and the court grants sole or joint custody, it must state its reasons in writing or on the record. (*Id.* at (a)(5)(A).) The court must ensure that any order regarding custody or visitation is specific as to time, day, place, and manner of transfer of the child, as specified. (*Id.*) This bill extends these requirements to orders granting unsupervised visitation.

The author writes:

> …our laws currently require judges to consider a history of abuse or drug addiction when it comes to placing children in the custody of individuals with these backgrounds. Alarmingly, the same considerations do not apply to unsupervised visitations, which can last days. A 2011 study by the National Institute of Justice found that 47% of custody evaluators continue to recommend unsupervised visitation with a parent, even when there are reports of violence in that home. Another 12-year national study showed that many child homicide victims are murdered by a divorcing or separating parent during court-ordered unsupervised visitation with the murderer, despite the fact that the court has evidence of a history of abuse and evidence of threats to harm the children. By extending existing safety measures related to custody to unsupervised visitation, SB 654 will not only promote consistency in our laws, but it will save lives of innocent children.

In support, the Legislative Coalition to Prevent Child Abuse writes:

> There are many steps we must take to reduce the crisis of violence against children in family courts cases. This statutory change insuring that courts consider a parent's history of abuse or continual substance abuse, and the requirement that the court state reasons in writing or on the record if they chose to place the child in unsupervised visitation with that parent, will further focus the court on evaluating the risk to the child. More respectful and proactive inclusion of youth in the decision-making process will support and protect youth. I ask your aye vote on SB 654, one step toward better protection for children.

3. <u>Protecting the child's ability to express a preference in custody and visitation proceedings</u>

In custody proceedings, 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. (§ 3042(a).) A child over the age of 14 presumptively meets this standard; a child under age 14 presumptively does not, but the court has the discretion to override these

presumptions. (*Id.* at (c), (d).) If the court precludes the calling of a child as a witness, the court must provide alternative means of obtaining input from the child and other information regarding the child's preferences. (*Id.* at (e); *see* Cal. Rule of Court § 5.250(d)(1).)

This bill generally prohibits a court from requiring a child who is addressing the court regarding custody or visitation to do so in the presence of the parties. The court must provide an alternative to having the child address the court in the presence of the parties in order to obtain input directly from the child. However, the court may require the presence of the parties if the court determines that it is in the child's best interest and states its reasons for that finding on the record. The court must consider whether this will cause the child emotional distress. In effect, this would flip the status quo by making it the default rule that if child addresses a court regarding custody or visitation, they generally must be permitted to do so without the parties being present. This is intended to ensure the child is able to be fully candid with the court.

Additionally, existing law requires the minor's counsel and specified court-connected professionals to indicate to the judge that the child wishes to address the court. The judge may make an inquiry and the parties or their attorneys may indicate that the child wishes to address the court or judge. (*Id*. at (f).) This bill would require the court-connected professionals, if they learn that the child has changed their choice with respect to addressing the court, to inform the judge as soon as feasible.

The author writes:

> The safety and wellbeing of children must be our top priority when it comes to family court practices. Current law allows youth ages 14 and up to address courts in contested custody cases, which can involve having a child testify directly in front of their parents. This can be incredibly traumatizing for children. To ensure that children are better protected, SB 654 requires judges to prevent testimony from being given in the presence of parties seeking custody, unless it is absolutely necessary. This bill takes extra measures to protect youth by requiring court professionals to indicate to a judge in a timely manner when and if a child changes their mind about addressing a court.

4. <u>Opposition concerns are based on the prior version of the bill or existing law</u>

This bill was recently rewritten in its entirety. The prior version of the bill addressed the same general subject but contained controversial provisions that drew substantial support and opposition. For opponents of the prior version of the bill, the principal source of concern was an amendment to reduce from 14 to 12 the age at which a child can presumptively address the court. Another source of concern was a provision that would have established a process by which children could be informed of their right to

address the court. The bill no longer contains those provisions or any others specifically described in the opposition letters.

The supporters listed below have confirmed their continued support for this version of the bill. All but one of the organizations (discussed below) that opposed the prior version of the bill have not confirmed their continued opposition. The Committee has continued to receive opposition from several individuals using a form letter directed at the prior version of the bill and existing law itself. Many letters criticize the fact that children are even allowed to testify in custody proceedings and request major changes not contemplated by the bill. Some letters relay personal accounts of manipulative parents who abused this process, traumatizing the children. While these stories are heart-rending, the letters are not responsive to the bill that is before the Committee.

The Association of Family Conciliation Courts opposed the prior version of the bill and has indicated they have not had time to convene to determine an updated position on the latest version of bill. They are willing to go neutral for the time being, but have indicated they may change their position to oppose once they have had time to go through their process and adopt a formal position on the new version of the bill.

**SUPPORT**

Legislative Coalition to Prevent Child Abuse (sponsor)
Center for Judicial Excellence
California Protective Parents Association
California Women's Law Center
One individual

**OPPOSITION**

None known

**RELATED LEGISLATION**

Pending Legislation: None known.

Prior Legislation:

SB 495 (Durazo, Ch. 551, Stats. 2019) prohibits a court from considering sex, gender identity, gender expression, or the sexual orientation of a parent, legal guardian, or relative in making a best interest determination for purposes of awarding child custody or visitation rights.

SB 170 (Leyva, 2017) would have required the court to permit a child who is 10 years of age or older to address the court regarding custody or visitation, unless the court

determines that doing so is not in the child's best interest. The bill died in this Committee.

AB 2098 (Maienschein, 2016) also would have lowered the age for addressing the court to 10 years. That bill died in the Assembly Appropriations Committee.

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