

September 7, 2021

The Honorable Gavin Newsom
Governor, State of California
1303 10th Street, Suite 1173
Sacramento, CA 95814
Submitted via email to Leg.Unit@gov.ca.gov

RE: AB 788 (Calderon) –REQUEST FOR SIGNATURE

Dear Governor Newsom:

Dependency Legal Services, a multi-disciplinary, non-profit law firm providing quality representation to parents and children involved with California's Child Welfare System throughout Northern California and the Children's Advocacy Institute at the University of San Diego School of Law which, for over 30 years, has promoted the cause of children through academic analysis, legislative and regulatory advocacy, and litigation, are proud to co-sponsor AB 788 (Calderon) and respectfully ask for your signature on it.

BROAD SUPPORT FOR AB 788

AB 788 was a consent item in the Legislature, has no opposition, and is supported by Alliance for Children's Rights, California Catholic Conference, California Medical Association, Children's Law Center of California, East Bay Family Defenders, Los Angeles Dependency Lawyers, and Public Counsel.

AB 788 enjoys such broad support and has no opposition because it simply aligns dependency law with longstanding and widely accepted medical science on drug and alcohol addiction in a way restorative of the Legislature's intent in enacting current law.

LEGAL BACKGROUND

Existing law (Welfare & Institutions Code (“WIC”) section 300, *et seq.*) establishes the grounds for the conditional removal of a child from the custody of their parents and placement in (hopefully) temporary foster care. An order of removal is typically accompanied by the court also ordering a county to provide services designed to reunify the parent and the child safely. These services are called “reunification services” and can include counseling, drug addiction treatment, and parenting classes.

Under current law if a drug addicted parent “resisted” drug or alcohol treatment in the past, such services do not have to be offered in a subsequent case. In the parlance of child welfare litigation, reunification services are “bypassed” if this happens. In relevant part and with pertinent emphasis supplied, WIC Code section 361.5(b)(13) permits reunification services to be bypassed 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.**”

Whether services can lawfully be bypassed is a question of enormous significance for children and their parents. “It is difficult, if not impossible, to exaggerate the importance of reunification in the dependency system. With but few exceptions, whenever a minor is removed from parental custody, the juvenile court is required to provide services to the parent for the purpose of facilitating reunification of the family.” *In re Luke L.* (1996) 44 Cal.App.4th 670, 678, citation omitted.

Bypassing such services almost inevitably leads to the family by court order being broken up; to a child being permanently removed from the care of their parents, the termination of all parental rights, and the child being raised in foster care or adopted by another family.

Thus, if a parent is “bypassed” the parent is not given an opportunity to reunify and the odds are overwhelming they will lose their children and the children will lose their parents (and often siblings if placed apart) as a result.

What constitutes “resistance”? Some appellate 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 began using again, have “passively” resisted treatment and are eligible to lose their children forever.

First, this interpretation expands the grounds for bypass beyond what the Legislature intended; beyond what the word “resist” actually means. The dictionary definition of the word “resist” excludes passivity and is inherently active. “Resist” means an exertion: “to exert force in in opposition...to exert oneself so as to counteract or defeat.”¹ *“Passive resistance” is therefore an oxymoron that frustrates the Legislature’s use of the word “resist”.*

Second, this interpretation exposes many families of being torn apart permanently for arbitrary reasons. For example, if a childless nineteen-year old unsuccessfully completed a court-ordered drug diversion program from a marijuana possession, that same person could, decades later and after having children, be “bypassed” if substance-related issues caused CPS intervention. A childless nineteen-year old does not have the same motivation or wherewithal to combat addiction as an adult with their parental rights on the line. Yet, “passive” resistance permits the latter to be bypassed by a judge as an adult based on their actions as a teen. Moreover, even if the 19-year-old had *successfully* completed their drug diversion program, that adult could still be found to have resisted treatment if substance use caused their CPS intervention.

A recent California appellate court decision, after a detailed and thoughtful analysis of what constitutes resistance, has clarified that relapse – an inevitable symptom of the disease² – is not the same as “resisting” drug treatment. Pointing to the county’s concession that relapse is a normal part of recovery, the appellate court correctly reasoned:

As [county] acknowledged...relapse is a normal part of recovery. In other words, 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. (2020) 46 Cal.App.5th 932, 934-35.

¹ <https://www.merriam-webster.com/dictionary/resist>

² See, for example, 5 Thomas McLellan, et al., *Drug Dependence, a Chronic Medical Illness*, 284 (13) JAMA 1689 (2000).

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 litigation: family reunification. "Family preservation, with the attendant reunification plan and reunification services, is the first priority when child dependency proceedings are commenced. [Citation.] Reunification services implement 'the law's strong preference for maintaining the family relationships if at all possible.' [Citation.]" *In re Elizabeth R.* (1995) 35 Cal.App.4th 1774, 1787.

Indeed, as relapse is an inevitable part of the disease of drug addiction, then allowing services intended to treat drug addiction to be denied on the basis solely of relapse is the same as refusing to provide addiction services because the person is addicted. The oxymoronic, "passive resistance" interpretation for bypass swallows the rule of offering drug treatment to help parents get better; to help families remain together.

Furthermore, this interpretation is a contributing factor to the disproportionate number of children of color in California who are severed from their parents and placed irrevocably into foster care. Nationally between about a third of children removed from their families had parental drug abuse listed as a reason for their removal.³ While drug addiction rates are overall roughly the same between white and African American communities, in California African American children make up 23% of foster children but only 6% of the general child population⁴. Black children are five times more likely than white children to be in foster care.⁵

AB 788 (Calderon)

Working closely with the Judiciary and Human Services Committees, AB 788's approach is surgical and modest. It codifies the *In re. B.E.* court's narrow decision but without otherwise constraining a judge's discretion to interpret what qualifies as

³ <https://www.childtrends.org/blog/one-in-three-children-entered-foster-care-in-fy-2017-because-of-parental-drug-abuse>

⁴ <https://www.kidsdata.org/topic/22/foster-in-care-race/table#jump=why-important&fmt=2495&loc=2,127,347,1763,331,348,336,171,321,345,357,332,324,369,358,362,360,337,327,364,356,217,353,328,354,323,352,320,339,334,365,343,330,367,344,355,366,368,265,349,361,4,273,59,370,326,333,322,341,338,350,342,329,325,359,351,363,340,335&tf=108&ch=7,11,8,10,9,44&sortColumnId=0&sortType=asc>

⁵ <https://ccwip.berkeley.edu/childwelfare/reports/DisparityIndices/STSG/r/rts/s>

“resistance” and apply that interpretation. The entirety of the bill⁶ is in italics and bolded here:

(b) Reunification services need not be provided to a parent or guardian described in this subdivision when the court finds, by clear and convincing evidence, any of the following:

(13) 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 described in the case plan required by Section 358.1 on at least two prior occasions, even though the programs identified were available and accessible. ***For purposes of this paragraph, “resisted” means the parent or guardian refused to participate meaningfully in a prior court-ordered drug or alcohol treatment program and does not include “passive resistance,” as described in *In re B.E.* (2020) 46 Cal.App.5th 932.***

This single sentence comprising AB 788 uses words that are operatively identical to the court’s key phrasing in *In re. B.E.*. With the operative wording that is the same between the case and the bill bolded, the court held at (2020) 46 Cal.App.5th 932, 934-35 that “[t]he bypass provision was intended for **parents who refuse to participate meaningfully in a court-ordered drug treatment program**, not parents who slip up on their road to recovery.” And, when it comes to AB 788’s wording explicitly rejecting “passive” resistance” (“does not include ‘passive resistance’”), the bill here, too, echoes the court decision at (2020) 46 Cal.App.5th 932, 939 (“... we conclude passive resistance does not satisfy subdivision (b)(13)[.]”) and p. 941 (“We conclude that what the Legislature meant by ‘resisted’ is active resistance, not passive resistance.”)

Not bypassing a parent because of a prior relapse – i.e., providing the parent drug or alcohol addiction recovery services in the current child welfare case so there is a chance the case could result with the parent and the child reunifying -- does not mean

⁶ Other parts are chaptering amendments.

reunification will ultimately occur. A court could still determine that the offered reunification services -- including drug and alcohol services -- failed due to a parent being unable to stop their use of drugs or alcohol or failing to attend to the program. A court could on that basis terminate services, terminate rights, and place the child in permanent foster care or adoption. Not bypassing a parent just means they have a chance to prove themselves to the judge; a chance to reunify with their child.

CONCLUSION

Substance abuse 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.

AB 788 (Calderon) will ensure that families struggling with drug addiction are not forever ruptured due to a tragic misunderstanding of the disease of addiction and a consequent misapplication of current law.

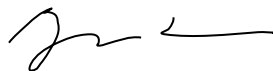
Please join child advocates, parent advocates, and the medical community in supporting AB 788 with your signature.

Sincerely,



Ed Howard

Senior Counsel, Children's Advocacy Institute



Julia Hanagan

Policy Director, Dependency Legal Services

CC: Hon. Lisa Calderon