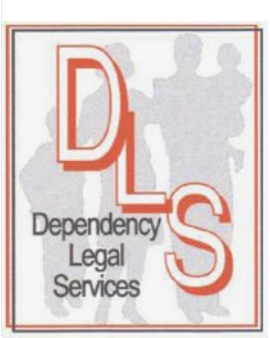


August 9, 2022

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: REQUEST FOR SIGNATURE: SUPORT AND CO- SPONSORSHIP OF AB 2866 (CUNNINGHAM)

Dear Governor Newsom:

The Children's Advocacy Institute at the University of San Diego School of Law, which for 30 years has worked to improve the well-being of children in California through regulatory, legislative, and judicial advocacy, and Dependency Legal Services, a multi-disciplinary, non-profit law firm providing legal representation to parents and children involved with California's Child Welfare System in nine California counties, respectfully requests that you sign AB 2866 (Cunningham). The bill has enjoyed unanimous support in the Legislature and has no opposition.

Background

> *"Reunification services implement 'the law's strong preference for maintaining the family relationships if at all possible.'"*[1]

In the overwhelming majority of cases where it is alleged that a parent has abused or neglected a child, the legally mandated aim of the dependency court is to try to preserve the troubled family by providing to the parents the services they need to be able to raise their child safely. These services are aptly called "reunification services" and to preserve families counties are required to make reasonable efforts to provide those services to parents.

Once a court assumes jurisdiction of the child, the court conducts periodic reviews (usually at six and twelve months) to check on whether the family is getting the family-preserving services the court ordered. So foundational are these services to our policy of trying to preserve families, a court is prohibited from terminating parental rights at a hearing held under WIC section 366.26 unless the court first finds, based on the second highest burden of proof in the law ("clear and convincing evidence"), that the county actually made reasonable efforts to provide family-

[1] *In re Elizabeth R.* (1995) 35 Cal.App.4th 1777 1787, quoting *In re Rebecca H.* (1991) 227 Cal. App. 3d 825, 843.

preserving services to the parents.[2] Thus, the "reasonable efforts" finding is "perhaps the most important finding a court makes in juvenile dependency cases"[3]

Problem Being Addressed

Most lawyers and judges have long presumed that the county has the same clear and convincing evidence burden of showing by 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.

Reinforcing this presumption is that the provision of reasonable services is a substantive and procedural requirement to terminating parental rights. *In re M.F*. (2019) 32 Cal. App. 5th 1, 19, *citing Cynthia D. v. Superior Court* (1993) 5 Cal. 4th 242, 256, *In re Daniel G.* (1994) 25 Cal. App. 4th 1205, 1215–1216 (in order to meet due process requirements at the termination stage, the court must be satisfied reasonable services have been offered during the reunification stage). And, to qualify for federal funding, a child welfare agency must also make reasonable efforts to "[p]revent unnecessary removal [and] [m]ake it possible for a child to safely return to their home." (42 U.S.C. section 671(a)(15).

Indeed, once again reflecting the consensus that the same standard should apply all along the process, the Legislature recently enacted WIC section 366.22(b)(3)(C), which was added to extend services to twenty-four months in certain cases. That statute requires that at an 18 month hearing, "the court shall not order a hearing pursuant to Section 366.26 be held unless there is ***clear and convincing*** evidence that reasonable services have been provided." (Emphasis added).

However, and technically speaking, if a termination-of-rights hearing is not the hearing being set, the code is, except for the just cited WIC section 366.22(b)(3)(C), otherwise silent regarding the standard of proof. *See*, *e.g*., WIC section 366.21(f)(1)(A). And, normally, 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 section 115). [4]

As a result, when it comes to ensuring whether we are offering reasonable services to keep families together, 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 (six month and 12 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

[2] "The court shall not order that a hearing pursuant to Section 366.26 be held unless there is clear and convincing evidence that reasonable services have been provided or offered to the parent or legal guardian." (WIC section 366.21(g)(1)(C)(ii)), (g)(4))
[3] Edwards, *Reasonable Efforts: A Judicial Perspective* (NCJFCJ 2014) Introduction.
[4] 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

courts have ruled differently. *David B. v. Superior Court* (2004) 123 Cal. App. 4th 768, 795 (holding clear and convincing evidence is the standard).

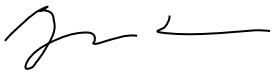
AB 2866

Because there is no justification for trying less hard to keep families together early in the dependency process, and because it doesn't make sense to introduce a higher burden of proof at the end of the process when it is too late to rectify what services were previously provided, AB 2866 simply clarifies that a county has the same burden to show it is offering reasonable services at periodic reviews as it has at the hearing when a court decides those services haven't worked and termination of parental rights is the only option. ***This evidentiary standard works to keep families together and keeps children out of foster care when they don't need to be in foster care.***

Please support consistently trying to reunify families. Please sign AB 2866 (Cunningham).

Sincerely,

Ed Howard
Senior Counsel, Children's Advocacy Institute



Julia Hanagan
Policy Director, Dependency Legal Services