October 28, 2021

Hon. Rob Bonta
Attorney General
1300 I Street, 17th Floor
Sacramento, California 95814

Attention: Ms. Anabel Renteria
Initiative Coordinator

Dear Attorney General Bonta:

Pursuant to Elections Code Section 9005, we have reviewed the proposed statutory initiative regarding child custody and juvenile dependency (A.G. File No. 21-0019).

Background

Jury Trials. Both the U.S. Constitution and the California Constitution state that individuals possess the right to a jury trial in criminal cases and certain civil cases. Under current law, in civil cases where individuals are pursuing the recovery of property or compensation for damages, issues of fact must be tried by a jury unless the jury trial is waived. The California Constitution specifies that juries in criminal and civil cases will typically consist of 12 individuals. Jury decisions in criminal cases must be unanimous, while jury decisions in civil cases can be made with the agreement of 75 percent of the jurors. Currently, jury trials are not used in California for family law cases (such as child custody proceedings) or juvenile dependency cases.

Child Custody. Child custody broadly refers to an individual's rights and responsibilities related to children. There are two types of child custody:

- ***Legal Custody.*** Legal custody refers to who has the authority to make decisions related to the child's health, education, and welfare. This can include decisions about where the child lives and goes to school, as well as decisions about certain activities, such as those related to religion or travel. If two people (such as the child's parents) have joint legal custody, then both are able to make the above decisions either separately or together. An individual with sole legal custody is the only one who can make such decisions.
- ***Physical Custody.*** Physical custody refers to whom the child lives with. If two people have joint physical custody, then the child lives with both individuals. An individual with sole physical custody lives with the child all or most of the time. Often, individuals who do not have physical custody of the child have specified visitation rights with the child instead.

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Child Custody Proceedings. Child custody proceedings can arise as part of other legal proceedings (such as divorce or legal separation proceedings) or as separate legal proceedings (such as when a parent without custody of a child seeks to obtain it from someone who has custody). Decisions about child custody can be reached in an uncontested or contested manner. In uncontested cases, individuals negotiate a contractual agreement between themselves on custody and visitation and choose to submit it to the courts. A judge will then issue a court order formally documenting the agreement. This allows the agreement to be enforced if it is violated in the future.

In contested cases, state law authorizes trial courts to make decisions about child custody based on the "best interest of the child." The court considers various factors, such as the age of the child and the ability of the individuals seeking custody to care for the child. State law directs courts to consider the health, safety, and welfare of the child as the primary factor in its decision. In cases involving parents, the court is to ensure that the child has frequent contact with both parents and to encourage parents to share responsibility for the child, unless contact with one or both of the parents is not in the best interest of the child. Accordingly, parents in contested cases are generally first required by the court to go to mediation to reach agreement. The court may also appoint (1) a specially trained mental health professional to conduct a custody evaluation and/or (2) an attorney to represent the child in court proceedings. State law authorizes the court to make temporary custody decisions at any time while such activities are in progress. Under certain circumstances, custody may also be granted to individuals other than the parents. The court has the authority to modify custody decisions until the child turns age 18.

Juvenile Dependency Proceedings. Juvenile dependency proceedings involve a determination of whether the court should assume authority over children (also known as making children dependents of the court) due to allegations of child abuse or neglect. Such allegations are generally first reported to and investigated by a county child welfare department. The department can either immediately remove the child from his or her home and place the child in protective custody or leave the child in the home. If the department believes that there is sufficient evidence of child abuse or neglect, it will file a petition—often represented by county attorneys—requesting that the child become a dependent of the court.

After a petition is filed, the court will hold various hearings. An initial hearing is held where various decisions are made, including whether to leave a child in protective custody and the appointment of separate state-funded attorneys for the child and the parents (if the parents cannot afford an attorney). A jurisdictional hearing is then held to determine whether the allegations of abuse and neglect are substantiated and if the child should be made a dependent of the court. If the child is made a dependent of the court, a disposition hearing is held to determine the conditions or requirements that must be fulfilled in order for the court to terminate the child's dependency status. Such conditions could include temporarily removing the child from his or her home and requiring parents to attend certain programs (such as substance abuse programs or counseling). Review hearings are generally held every six months to monitor the family's progress in meeting the specified conditions. If the conditions are not met, a permanency hearing is conducted to determine the long-term plan for the child, which could include long-term foster care, legal guardianship, or adoption.

Proposal

Under this measure, an individual has the right to demand a jury trial during any child custody proceeding. The measure also specifies that the court may not contradict a jury's verdict. In addition, the measure states that in civil cases where individuals are seeking "to retain legal rights to their child(ren)," issues of fact must be tried by a jury unless a jury trial is waived. Finally, the measure grants individuals the right to seek a jury trial in juvenile dependency jurisdictional hearings. As discussed earlier, these particular hearings are held to determine whether allegations of child abuse or neglect are substantiated and if the child should be made a dependent of the court.

Fiscal Effects

This measure would have varying fiscal impacts on state and local governments. These impacts would depend on how this measure is interpreted and implemented by the courts, as well as the number of jury trials that would occur as a result of the measure.

State Court Impacts. This measure would result in both one-time and ongoing fiscal impacts on the state courts. Since jury trials are currently not available in child custody proceedings or jurisdictional hearings, the courts would incur minor one-time costs to develop regulations and procedures to allow for such jury trials. It is also likely that some courts could incur one-time costs to modify some existing courtrooms that currently hear such cases, but are not constructed to accommodate a jury. The ongoing fiscal effect of this measure is less certain as it would significantly depend on how the measure is interpreted and implemented by the courts, as well as how individuals respond to its provisions. For example, the measure does not specify whether there is a limit on the number of times a single individual may demand a jury trial in child custody proceedings.

On the one hand, the measure would increase state court costs to the extent that proceedings which currently are decided by a judge are instead decided by a jury. This is because courts would incur additional workload to select and instruct the jury, as well as to rule on what information may be presented to the jury. Longer jurisdictional hearings could also add to the workload of state-funded attorneys representing children and/or parents in juvenile dependency cases. In addition, the measure could result in individuals who otherwise would have reached agreement in uncontested child custody cases now choosing to go to court. To the extent that the measure results in a substantial number of jury trials for child custody proceedings or jurisdictional hearings, the various costs above could potentially reach the tens of millions of dollars annually.

On the other hand, the measure could reduce court costs to the extent that the ability to demand a jury trial serves as an incentive for individuals to (1) resolve child custody disputes outside of court or (2) reach agreement on custody decisions more quickly—thereby reducing court involvement and workload.

In view of the above, the ongoing net fiscal impact of this measure on state courts is uncertain.

Other Fiscal Impacts. This measure could result in an ongoing increase in county workload to the extent that jurisdictional hearings that currently are decided by a judge are instead decided by a jury. For example, child welfare departments and/or county attorneys may need to spend more time preparing for jury trials because of the different rules related to how and what information can be presented to a jury. In addition, they may need to spend more time in court because jury trials generally take more time. To the extent that the measure results in a substantial number of jury trials for jurisdictional hearings, these costs could potentially reach the low millions of dollars annually. However, some or all of the county costs resulting from increased workload could potentially be shifted to the state. This is because the California Constitution generally requires that the state fund child welfare-related cost increases resulting from state legislation. However, the actual costs are unknown and would depend on the number of individuals who choose a jury trial in jurisdictional hearings.

Summary of Fiscal Effects. This measure would have the following major fiscal effects:

- Unknown ongoing net fiscal impact on state courts that would depend significantly on (1) how the measure is interpreted and implemented by the courts and (2) how individuals respond to the ability to demand a jury trial in child custody and juvenile dependency jurisdictional hearings.
- Potential ongoing increase in county costs that could reach the low millions of dollars annually related to juvenile dependency jurisdictional cases—some or all of which could be shifted to the state.

Sincerely,

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for Gabriel Petek
Legislative Analyst

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for Keely Martin Bosler
Director of Finance