



California's Statutes Protecting Survivors of Domestic Violence and Their Children in Family Court, and the Science Behind Them

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What is FVAP?



Family Violence Appellate Project provides free appellate representation to low and moderate-income family law litigants throughout California in restraining order or custody matters involving domestic violence (DV).

What is FVAP?

- Screened over 200 requests for assistance since June 2012
 - 9 appeals filed
 - 6 appeals defended
 - 3 amicus (friend of the court) briefs
- In addition to serving individual families where safety is an issue, FVAP seeks to develop a body of published appellate decisions that can be used statewide to help guide trial courts.

Case Publication Project

- FVAP screens all Ca. family law and juvenile court decisions to identify those that merit publication, then requests publication.
- As of mid-March 2014, we have been successful in getting 3 key family law cases published, and have requested publication in a juvenile court case involving DV (request pending).
- We also request publication of cases we win if the court does not indicate it plans to publish the decision.

Overview of Training

- The California Legislature has enacted numerous family law statutes designed to protect survivors of DV and their children.
- However, only a small percentage of family law litigants are represented by attorneys, and there are very few published appellate decisions interpreting these statutes and giving guidance to trial courts, so the statutes are underutilized.
- This training will outline key Family Code statutes applicable in DV cases and briefly explain the social science data on which they are based.

Learning Objectives

Participants will:

- be able to identify the 3 most important Ca. Family Code sections applicable to custody cases involving DV
- be able to describe the scientific data upon which these statutes are based
- be familiar with 5 other significant Ca. Family Code sections and a Ca. Rule of Court that apply in such cases
- be able to apply this knowledge to a hypothetical case

Video



**“First Impressions: Exposure to Violence and A Child’s
Developing Brain”**

Three Key Family Code Sections



1. Family Code Section 3011
2. Family Code Section 3020
3. Family Code Section 3044

Family Code section 3011

1. Family Code Section 3011 – Best interest of the child

In determining best interest of child in custody cases, the court shall consider:

- health, safety, and welfare of child, and
- any history of abuse by one parent, or any other person seeking custody, against:
 - (1) Any child to whom s/he is related or with whom s/he had caretaking relationship,
 - (2) The other parent,
 - (3) A parent, current spouse, cohabitant, boyfriend, girlfriend, or fiancée.

1. Family Code Section 3011 – Best interest of the child

- Before considering allegations of abuse, court may require substantial independent corroboration
- Court must also consider nature and amount of contact with both parents, except as provided in [Section 3046](#) (one parent is gone temporarily, perhaps because of DV or restraining order)
- Court must also consider habitual or continual illegal use of controlled substances or alcohol by either parent; may first require independent corroboration.

1. Family Code Section 3011 – Best interest of the child

- If allegations of DV, elder abuse, child abuse or substance abuse, and court orders sole or joint custody to alleged abuser, must state reasons in writing or on record, unless parties stipulate to custody or visitation in writing or on record.
- Court shall ensure that custody or visitation order specifies time, day, place, and manner of transfer of child to limit exposure to DV and not disclose any confidential address.

Welfare & Institutions Code Section 366.21 – Status Review Hearings

- Similar to Family Code section 3011(e):
- *(e)... Regardless of whether the child is returned to a parent or legal guardian, the court shall specify the factual basis for its conclusion that the return would be detrimental or would not be detrimental.*
- ...
- *(f)... Regardless of whether the child is returned to his or her parent or legal guardian, the court shall specify the factual basis for its decision.*
- ...

1. Family Code Section 3011 – Social Science Data

Social science data on which this is based:

- As many as 80 to 90 percent of children in families where domestic violence is present can provide detailed accounts of the violence in their homes.

1. Family Code Section 3011 – Social Science Data

- While children's reactions to domestic violence span a continuum, some show signs of significant problems and maladaptive adjustment.
- These can include: physical symptoms, emotional symptoms, decreased verbal, motor, and cognitive skills, poor school performance, substance abuse, higher levels of aggression and oppositional behavior, poor peer relationships, acceptance of violent behaviors and attitudes, and higher levels of adult depression and trauma symptoms.

1. Family Code Section 3011 – Social Science Data

- The impact of violence on a specific child depends on many factors:
 - ▣ the severity and nature of the violence,
 - ▣ the coping strategies and skills of the child,
 - ▣ the child's age and gender,
 - ▣ the amount of exposure and the degree to which the child was involved in the violence,
 - ▣ (continued)

1. Family Code Section 3011 – Social Science Data

- The impact of violence on a specific child depends on many factors:
 - ▣ the length of time since the most recent exposure,
 - ▣ the co-occurrence with other forms of violence (such as child abuse or community violence) and other stressors in the child's life, and
 - ▣ how the child understands the violence.

1. Family Code Section 3011 – Social Science Data

- Protective factors that appear to increase a child's resiliency in responding to domestic violence include:
 - ▣ social competence, intelligence, high self-esteem, outgoing temperament, strong sibling and peer relationships, a supportive relationship with an adult (often the abused parent), opportunities for healing and success, and the existence of assets in the community, including social and extended family supports and skilled service providers.

Family Code section 3020

2. Family Code section 3020 – Health, safety and welfare of children

- Subdivision (a)
 - ▣ Health, safety, and welfare of children shall be court's primary concern in determining best interest of children when making any orders regarding physical or legal custody or visitation.
 - ▣ Perpetration of child abuse or DV in household where child resides is detrimental to child.

2. Family Code section 3020 – Health, safety and welfare of children

- Subdivision (b). California’s public policy is:
 - ▣ to assure that children have frequent and continuing contact with both parents, and
 - ▣ to encourage parents to share rights and responsibilities of child rearing,
 - ▣ **except** where contact would not be in best interest of child, as provided in Section 3011.

2. Family Code section 3020 – Health, safety and welfare of children

- Subdivision (c).
 - ▣ Where the policies in (a) and (b) conflict, an order regarding physical or legal custody or visitation shall be made in manner that ensures health, safety, and welfare of child and safety of all family members.

Welfare & Institutions Code section 366.21

- Similar to Family Code § 3020:
- 366.21 (e) and (f)... *the court shall order the return of the child to the physical custody of his or her parent or legal guardian unless the court finds, by a preponderance of the evidence, that the return of the child to his or her parent or legal guardian would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child.*

2. Family Code section 3020 – Health, safety and welfare of children

Legislative analysis of AB 200:

- Proponents believe that existing policy of state, which states that children have continuing contact with both parents after separation, has created presumption that joint custody is necessary even in cases of DV.
- Thus, they contend that while current law requires court to consider DV as factor in assessing best interest of child, policy regarding continuing contact often prevails over serious concerns associated with DV.

2. Family Code section 3020 – Health, safety and welfare of children

Legislative analysis of AB 200 (continued):

- National Council of Juvenile and Family Court Judges states that continued aggression and violence between divorced spouses with joint custody causes most adverse consequences for children because places both abused adult and child in further danger.

2. Family Code section 3020 – Health, safety and welfare of children

Social Science data supporting this assertion:

- 5 studies from AK, PA, AZ, MA, and CA on what happens to protective parents and their children after custody or visitation decision: consistent findings that violence often continued or escalated.
- Violence took many forms: boundary violations, stalking, and physical assaults.

2. Family Code section 3020 – Health, safety and welfare of children

Legislative analysis, continued

- Ca. Alliance Against DV (CAADV) states that cooperation required to jointly parent children is non-existent where DV, not only because of power dynamics between parents, but also because batterers often use children as pawns to control abused parent.

2. Family Code section 3020 – Health, safety and welfare of children

Social science data:

- Perpetrators often used children as continuation of control and/or abuse of protective parents.
- This included manipulating, harassing, and interrogating children to obtain information about protective parent, using visitation to send threats or violent messages, kidnapping children, failing to return them, and refusing to allow other parent court-ordered contact with children.

2. Family Code section 3020 – Health, safety and welfare of children

Social science data (continued):

- Over half of respondents with whom we conducted follow-up surveys or interviews over 2 years after initial survey reported abusive partners continued to use children against them, and children were suffering.

2. Family Code section 3020 – Health, safety and welfare of children

Legislative analysis, continued

- CAADV is also concerned that granting batterers custody subjects children to possibility of
 - ▣ [1] witnessing further violence in abuser's subsequent relationship,
 - ▣ [2] being abused themselves, [and/]or
 - ▣ [3] becoming future perpetrators.

2. Family Code section 3020 – Health, safety and welfare of children

Social science data:

1. Both researchers and counselors of batterers have observed likelihood that batterer will repeat his violent behavior in series of relationships.
2. [Physical and sexual abuse of children by batterers] actually *increases* as result of mother's inability to monitor or to intervene in batterer's parenting and of retaliatory style common to many batterers after separation.

2. Family Code section 3020 – Health, safety and welfare of children

Social science data (continued):

3. Findings suggest that physically violent husbands are generally violent and aggressive within the family and have been exposed to parental violence while growing up.
4. Sons of severe batterers had rates of wife abuse ten times higher than those from non-violent families.

Family Code section 3044

3. Family Code section 3044 – Presumption against custody to batterer

If the court finds:

- The party seeking child custody perpetrated DV against the other party seeking custody, or against child or child's siblings within previous 5 years,

Then:

- Rebuttable presumption that award of sole or joint physical or legal custody of child to perpetrator is detrimental to best interest of child

Welfare & Institutions Section 355.1

- Similar to Family Code section 3044(a)
- Welf & Inst section 355.1 provides:
- Where court finds injury to child or detrimental condition from unreasonable/neglectful acts of caretakers, or where caretaker convicted of sexual abuse,
- Finding = prima facie evidence that child is at substantial risk of abuse or neglect.
- This evidence constitutes a presumption affecting the burden of producing evidence.

3. Family Code section 3044 – Presumption against custody to batterer

Finding of DV satisfied when:

- The party seeking custody was convicted within previous 5 years of any crime against other party defined as DV and abuse in the Domestic Violence Prevention Act, including battery, rape, corporal injury of intimate partner, criminal threats, or stalking, or
- If any court has made finding of DV based on conduct within previous 5 years.

3. Family Code section 3044 – Presumption against custody to batterer



The court may not base findings of DV solely on conclusions of child custody evaluator or recommendation of Family Court Services staff, but shall consider any relevant, admissible evidence submitted by parties.

3. Family Code section 3044 – Presumption against custody to batterer



Presumption against custody may only be rebutted by
preponderance of evidence

(i.e., batterer must demonstrate it is more likely than
not that she or he has satisfied the requirements for
rebutting presumption).

3. Family Code section 3044 – Presumption against custody to batterer

In determining whether presumption has been overcome, court shall consider all 7 of the following factors:

- (1) Whether perpetrator of DV has demonstrated that giving sole or joint physical or legal custody of child to perpetrator is in best interest of child.
- In determining best interest of child, preference for frequent and continuing contact with both parents or with noncustodial parent may not be used to rebut presumption.

3. Family Code section 3044 – Presumption against custody to batterer

- (2) Whether perpetrator has successfully completed batterer's treatment program that meets criteria in Penal Code section 1203.097.
- (3) Whether perpetrator has successfully completed alcohol or drug abuse counseling if appropriate.
- (4) Whether perpetrator has successfully completed parenting class if appropriate.

3. Family Code section 3044 – Presumption against custody to batterer

- (5) Whether perpetrator is on probation or parole, and whether complied with terms and conditions.
- (6) Whether perpetrator is restrained by restraining order, and whether complied with terms and conditions.
- (7) Whether perpetrator has committed any further acts of DV.

3. Family Code section 3044 – Presumption against custody to batterer



In any custody or restraining order proceeding in which party has alleged other party has perpetrated DV, court shall inform parties of existence of this section and give them copy prior to custody mediation.

3. Family Code section 3044 – Social Science Data

Social science data on which this section is based:

- Concept of rebuttable presumption comes from *Model Code on Domestic and Family Violence*, by National Council of Juvenile and Family Court Judges, extensive input from many professionals around U.S.
- Presumption supported by American Bar Association (1994) and U.S. Congress (House Concurrent Resolution 172, "[E]vidence of spouse abuse should create a statutory presumption that it is detrimental to the child to be placed in the custody of an abusive parent.")

3. Family Code section 3044 – Social Science Data

Abusers Are More Likely to Fight for Custody and to Win:

- Battering men are more likely to fight for custody than nonviolent men.
- Batterers often use legal system to pursue new tactics of abuse.
- Batterers are awarded sole or joint custody in majority of litigated cases.

3. Family Code section 3044 – Social Science Data

Most Domestic Violence and Domestic Homicide Occurs After Separation:

- Separation can greatly increase danger to the abused partner.
- One study found 75% of emergency room visits by battered women occurred after separation.
- Another study found 75% of calls to police for assistance in DV occur after separation from batterers.

3. Family Code section 3044 – Social Science Data

Most Domestic Violence and Domestic Homicide Occurs After Separation:

- Battered women are most often killed when attempting to seek legal redress or when leaving an abusive relationship.
- Two studies found that half of all homicides of female spouses and partners were committed by men after separation or divorce.

3. Family Code section 3044 – Social Science Data

DV victims are at significant disadvantage in litigation over child custody:

- Family courts often do not consider history of violence between parents in making custody and visitation decisions. Nonviolent parent may be at a disadvantage, and behavior that would seem reasonable as protection from abuse may be misinterpreted as a sign of instability.
- Many legal and mental health professionals minimize seriousness and lethality of DV.

3. Family Code section 3044 – Social Science Data

DV, as factor in determining best interests of child, should be treated differently than other factors relevant to custody:

- No other important factor (e.g., drug abuse or child neglect) is as routinely ignored as DV.
- DV has greater impact on children than any other factor.

3. Family Code section 3044 – Social Science Data

DV, as factor in determining best interests of child, should be treated differently than other factors:

- In 14 out of 16 studies, witnessing violence between parents or caretakers is more consistent predictor of future violence than being victim of child abuse.
- 79% of violent children in institutions reported witnessing extreme violence by parents; only 20% of nonviolent offenders did so.

3. Family Code section 3044 – Social Science Data

DV, as factor in determining best interests of child, should be treated differently than other factors:

- Children of abused mothers 6X more likely to attempt suicide, and 74% more likely to commit crimes against people. 24X more likely to have committed sexual assault, 50% more likely to abuse drugs and/or alcohol.

Other Useful Laws: W & I § 361

- Welfare & Institutions Code section 361(c)(1):
- *...The court shall also consider, as a reasonable means to protect the minor, allowing a nonoffending parent or guardian to retain physical custody as long as that parent or guardian presents a plan acceptable to the court demonstrating that he or she will be able to protect the child from future harm.*

...

Other Useful Laws

1. Family Code section 3031 – Custody order should be consistent with protective order

- Custody or visitation: court encouraged to find out whether any type of restraining order in effect re parties or child. Court encouraged not to make custody or visitation order inconsistent with restraining order, unless court finds:
 - ▣ (1) Custody or visitation order cannot be made consistent with restraining order, and
 - ▣ (2) Custody or visitation order is in best interest of minor.

Other Useful Laws

1. Family Code section 3031 – Custody order should be consistent with protective order

- If protective order in place and visitation ordered, court shall specify time, day, place, and manner of transfer of child, to limit child's exposure to potential domestic conflict or violence and ensure safety of all family members.
- This includes protecting address of shelter or other confidential location.
- If protective order in place, court shall consider ordering supervised visitation, or suspending or denying visitation.

Other Useful Laws

2. Family Code section 3100 – Visitation where protective order is in place (similar to 3031)

- Reasonable visitation shall be granted unless not in best interest of child.
- If protective order in place, court shall consider ordering supervised visitation, or suspending or denying visitation.
- Court shall consider why protective order was granted and how long ago the order was issued.

Other Useful Laws

2. Family Code section 3100 – Visitation where protective order is in place (similar to 3031)

- Same language as section 3031 re specifying time, day, place, and manner of transfer of child, and protecting address of shelter or other confidential location
- Visitation order shall refer to any criminal protective order in place, as criminal orders take precedence over other orders.

Other Useful Laws

3. Family Code section 3042 – wishes of minor child

- Court must consider wishes of child old enough to form “intelligent preference as to custody or visitation”
- If child is 14+ and wishes to address court regarding custody or visitation, s/he shall be permitted to do so, unless not in best interests of child - In that case, court shall state reasons on record
- Children < 14 may also address court if court determines appropriate
- If court doesn't allow child to testify, must provide another way for child to give input

Other Useful Laws

4. Family Code section 3080 – Presumption favoring joint custody where parents agree to this

- Presumption ... that joint custody is in best interest of child, subject to Section 3011, where parents have agreed to joint custody or so agree in open court

Other Useful Laws

5. Family Code section 3110.5 – qualifications of child custody evaluator

[see also 1815 – qualifications of Family Court Services mediator]

- Child custody evaluators must complete DV, child abuse, and child sexual abuse training listed in Family Code section 1816
- Must also complete training listed in Ca. Rule of Court 5.230

Other Useful Laws

5. Family Code section 3110.5 – qualifications of child custody evaluator

Training Must Include 12 hours of formal instruction within 12 months

- Structuring process keeping in mind DV dynamics
- State and federal laws, regulations
- Resources for DV victims - shelters, specialized counseling, drug and alcohol counseling, legal advocacy, job training, parenting classes, battered immigrant victims, welfare exceptions

Other Useful Laws

5. Family Code section 3110.5 – qualifications of child custody evaluator

- Resources for DV perpetrators - arrest, incarceration, probation, applicable Penal Code sections (including Penal Code section 1203.097, which describes certified treatment programs for batterers), drug and alcohol counseling, legal advocacy, job training, parenting classes
- Unique issues in family and psychological assessment in DV cases

Other Useful Laws

5. Family Code section 3110.5 – qualifications of child custody evaluator

- Training also must include 4 hours within 12 months of community networking to acquaint evaluator with DV resources in local area
- Plus 4 hours annual updates: changes in local court practices, case law, state and federal legislation related to DV; update of current social science research and theory, impact on children of exposure to DV
- Evaluators must declare under penalty of perjury that they meet all the requirements and must provide a certificate to the court

Exercise

Questions?

Thank You!

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