



Family Code Section 3044 Custody and Visitation Toolkit for Domestic Violence Survivors

Many survivors of domestic violence who obtain restraining orders in California are getting custody and visitation orders that provide the restrained party with 50% visitation, or with substantial visitation and frequent exchanges. Such orders are effectively a joint physical custody order which violates Family Code section 3044 and a case called *Celia S. v. Hugo H.* (2016) 3 Cal.App.5th 655. Included in this toolkit are materials designed to address this problem in various ways.

This toolkit includes:

- 1) A “Know Your Rights” explanation of the 2019 changes to Family Code section 3044 and *Celia S.* (Spanish translation forthcoming).

This can be provided to clients who are going to court or mediation when custody and visitation will be an issue, including restraining order hearings. Your clients can use it to advocate for themselves. It explains that they don’t have to agree to a custody and/or visitation order during mediation, and that they have certain rights to custody and visitation if there has been a finding that the other parent perpetrated domestic violence.

- 2) A template letter to friendly mediators / judges explaining the 2019 changes to Family Code section 3044 and how the decision in *Celia S.* affects all trial courts.

This fillable letter can be sent to your mediators or Family Court Services to let them know about the recent changes to Family Code section 3044 and the visitation decision of *Celia S.*, in hopes that it will encourage them not to recommend visitation schedules that create a virtual joint custody situation.

- 3) A template Memorandum of Points and Authorities on Family Code section 3044 and *Celia S. v. Hugo H.* requesting sole legal and physical custody when there has been a finding of abuse.

A parent who has already obtained a restraining order, or other court finding of domestic abuse, can fill in their personal information on this sample memorandum of points and authorities and give it to the court when they have a custody hearing. It explains how the court must weigh the factors in Family Code section 3044 and apply *Celia S.*, and asks that the court award the survivor sole legal and physical custody of their child/ren and make a visitation schedule that doesn’t create a virtual joint custody situation.

If you have any questions about this toolkit or the materials in it, please feel free to contact FVAP at info@fvapl原因.org.

This toolkit is not providing legal advice and should not replace the advice of an attorney. This resource uses only California law. Last updated July 3, 2019.
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Know Your Rights: Family Code section 3044 – Domestic Abuse, Custody and Visitation

What is Family Code section 3044?

Family Code section 3044 is a California law that says that if one parent in a custody case has been found to have committed domestic abuse, also called domestic violence, against the other parent, or their current spouse or dating partner, or against the child(ren) in the custody case or any of the child(ren)'s siblings, or against their own parent in the past five years, there is a rebuttable presumption that it is not in the best interests of the child for the parent who committed abuse to have sole or joint legal or physical custody of the child.

What is Domestic Abuse?

Many behaviors can be domestic abuse under the law, including causing physical harm to someone, sexually assaulting someone, or making someone afraid that they would be hurt or that someone else would be hurt. (Fam. Code § 6203, subd. (a).) However, abuse is not limited to physical abuse. (Fam. Code § 6203, subd. (b).) Other behaviors that can be abuse include threats, making telephone calls, including annoying telephone calls (under Penal Code section 653m), destroying personal property, or disturbing someone's peace, or impersonating someone (under Penal Code sections 528.5 and 529). (Fam. Code § 6320, subd. (a).) For examples of acts courts have found to be abuse, you can go to the "Cases You Can Use" section of FVAP's website: www.fvaplaw.org

What does it mean that one parent has been "found" to have perpetrated domestic abuse in the past five years?

It is not enough for one parent to *say* that the other parent committed abuse against them, a court must make a "finding" that the domestic abuse occurred. This most commonly occurs when a court issues a restraining order after a hearing (not a Temporary Restraining Order) protecting one parent from the other. It can also happen when there has been a criminal case resulting in a guilty finding or plea agreement, but any finding from any court is enough so that a court deciding custody has to apply Family Code section 3044.

In addition, the last act of abuse must have occurred within the previous five years for Family Code section 3044 to apply. For example, if a survivor got a 5-year restraining order in 2010 based on abuse that occurred between 2008-2010, and then tried to get a custody order in 2016, then Family Code section 3044 would not apply because the last act of abuse the court found happened was in 2010, which was more than 5 years before 2016.

What does the “presumption” against custody mean?

The presumption means that the judge has to assume that it is not in the best interests of the child for the parent who committed abuse to have any custody of the child. This means legal custody or physical custody. This does not mean that the parent who has committed domestic abuse cannot have any visitation or see the child, or even that the parent can never have custody of the child. It means that the judge has to make an order that the non-abusive parent has custody of the child unless the parent who committed abuse can show that he or she can “rebut” the presumption.

How can a parent who has committed domestic violence “rebut” or overcome the presumption?

In order to rebut, or overcome, the presumption, the trial court has to find:

- (1) That Joint or sole legal or physical custody to the abuser parent is in the best interests of the child (but the court *cannot* consider the preference for frequent and continuing contact with both parents to make this finding), **and**
- (2) On balance, six additional factors support the child’s right to be safe and free from abuse, and put the child’s health, safety and welfare first. These additional factors are whether the parent who committed abuse:
 - a. has successfully completed a batterer’s treatment program;
 - b. has successfully completed a program of alcohol or drug abuse counseling, if the court determines that counseling is appropriate;
 - c. has successfully completed a parenting class, if the court determines the class to be appropriate;
 - d. is on probation or parole, and whether he or she has complied with the terms and conditions of probation or parole;
 - e. is restrained by a protective order or restraining order, and whether he or she has complied with its terms and conditions;
 - f. has committed any further acts of domestic abuse.

Will the court tell me its reasons for finding the presumption rebutted?

If a court determines that the presumption has been overcome, it must state its specific reasons in writing or on the record as to why sole or joint legal or physical custody to the party found to have perpetrated domestic violence is in the best interests of the child and why the additional factors, on balance, support the child’s right to be safe and free from abuse, and put the child’s health, safety and welfare first. When writing or stating its reasons for granting custody to an abusive parent, the court must address each of the rebuttal factors individually, in writing or on the record. (Fam. Code, § 3044, subd. (f).)

What about visitation?

A parent who has committed domestic abuse against the other parent can still have some visitation with the child, depending on the circumstances. However, judges cannot order a 50/50, or “roughly equal”, visitation schedule without rebutting the Family Code section 3044 presumption because it is really joint custody. (*Celia S. v. Hugo H.* (2016) 3 Cal.App.5th 655.)

An order that is not 50/50 visitation could also be joint custody if it requires children to go back and forth between each parent so that each parent has “significant periods of physical custody,” and the child has “frequent and continuing contact with both parents.” (Fam. Code § 3004.) For instance, if the child sees the non-custodial parent four or five times a week, that is joint physical custody. (*In re Marriage of Lasich* (2002) 99 Cal.App.4th 702, 715.)

In addition, if there has been a finding of abuse, then the court must take certain factors into consideration when making custody or visitation orders. If a domestic violence restraining order is issued after a hearing, or a criminal protective order is issued after a conviction or a plea of guilty or no contest, the court has to consider whether it would be in the best interest of the child to order supervised visits or whether visitation should be suspended or denied for the restrained party. (Fam. Code § 3031, subd. (c).) This means that the court has to consider supervised visitation or suspending or denying visitation altogether for a person who is restrained by a restraining order. The court must also make sure that the orders about transferring children during visitation exchanges ensure everyone in the family is safe and not exposed to domestic abuse. (Fam. Code § 3031, subd. (b).) In all cases involving domestic abuse, the court must ensure that any visitation orders protect the health, safety, and welfare of the child and the safety of all family members, including the parent who is a survivor of domestic abuse. (Fam. Code § 3020, subd. (c).)

Name of Mediator

Address

Address

Dear Name,

I am writing on behalf of my organization, Organization Name, in hopes of addressing a common issue that arises in mediation with my clients. I am truly grateful to be able to have the relationship with Family Court Services that we have, and I hope that we can work together to address this concern.

It has come to our attention that for litigants who are survivors of domestic abuse, some recommendations include custody and visitation schedules that are not compliant with Family Code section 3044 and with a recent case, *Celia S. v. Hugo H.* (2016) 3 Cal.App.5th 655.

Family Code section 3044 creates a rebuttable presumption that it is not in the best interests of a child to be in the custody of a parent who has been found to have committed domestic abuse against the other parent, child, child's siblings, their own parent, current spouse, cohabitant, or a person in a dating or engagement relationship. A court cannot award joint or sole legal or physical custody to a parent who has committed domestic abuse in the past five years unless that parent has demonstrated that he or she can overcome the presumption. In *Celia S. v. Hugo H.* (2016) 3 Cal.App.5th 655, the trial court granted a restraining order and applied Family Code section 3044, granting sole legal and physical custody to the parent who was the victim of domestic violence; however, the trial court also awarded a 50/50 visitation schedule between the parties. The court of appeal reversed that decision, holding that such a schedule was really a joint physical custody award, and that the other parent had to rebut the presumption before the court could make that schedule. It can also be joint custody when a sole custody award is entered in name only, but the child frequently shuttles between both parents, and has such significant contact with both parents, that the reality is both parents are exercising custody of the child.

California courts have also acknowledged the important role that Family Court services play in crafting recommendations and their responsibility in following Family Code section 3044: "It is critical that ... FCS report[er]s be aware of the provisions of Family Code section 3044, and in particular, the mandatory presumption, and in making recommendations to the court, should, at a minimum, acknowledge that the court may be required to consider whether the presumption has been triggered in cases involving allegations of domestic violence." (*In re Marriage of Fajota* (2014) 230 Cal.App.4th 1487, 1500, fn. 9.) In California, domestic violence, also called domestic abuse, has been broadly defined, and includes causing physical harm to someone, sexually assaulting someone, or making someone afraid that they would be hurt or that someone else would be hurt. (Fam. Code § 6203, subd. (a).) However, abuse is not limited to physical

injuries. (Fam. Code § 6203, subd. (b).) Other behaviors that can be abuse include molesting someone, threats, impersonating someone (under Penal Code sections 528.5 and 529), making telephone calls, including annoying telephone calls under Penal Code section 653m, destroying personal property, or disturbing someone's peace. (Fam. Code § 6320, subd. (a).)

We would encourage Family Court Services mediators to keep this in mind as you provide the valuable service of making custody recommendations in family courts.

I hope that by highlighting this issue we can work together to ensure that recommendations comply with the law when domestic abuse is at issue. Please feel free to contact me at [REDACTED] to discuss this issue in more depth.

Thank you for your time and for your difficult and important work.

Sincerely,

Your Name

1 Petitioner: [redacted]

2 Address line 1

3 Address line 2

4 Phone: [redacted]

5 Email: [redacted]

8 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**

10 **FOR THE COUNTY OF [redacted]**

12 **[Note: This caption assumes the request for custody is being heard in the restraining order case, if you are filing this request in a divorce, custody, parentage or other case, make sure the caption states the parties names and titles correctly and change the titles in the whole document.]**

17 [Name])

18)
19 Petitioner,)

20)
21 v.)

22)
23 [Name])

24)
25)
26 Respondent.)
27 _____)

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
SOLE LEGAL AND PHYSICAL
CUSTODY TO THE PETITIONER

CASE NUMBER: [redacted]

31 A hearing was held on [redacted] [date] where a domestic violence restraining order was
32 granted to protect Petitioner from Respondent for a period of [redacted] [number] [years/months], which
33 constitutes a finding that Respondent has perpetrated domestic violence against Petitioner. The
34 most recent incident of abuse occurred on [redacted] [date], which is less than five years ago. This
35 triggers Family Code section 3044's rebuttable presumption that it is not in the best interests of
36 the [redacted] child/ren for Respondent to have sole or joint legal or physical custody of them. Should the
37 court be inclined to grant Respondent sole or joint legal or physical custody of the [redacted] child/ren, the
38 court may only do so if Respondent can demonstrate both 1) that sole or joint legal or physical
39 custody to the Respondent is in the [redacted] child/ren's best interests and, 2) that the additional six factors

40 on balance support the legislative findings under Family Code section 3020. (Fam. Code § 3044,
41 subd. (b)(1)-(2) [prioritizing children’s right to be safe and free from abuse, and children’s
42 health, safety and welfare].)

43 Further, if the court finds that the presumption has been overcome, it must state its
44 findings in writing or on the record as to why sole or joint legal or physical custody to the
45 Respondent is in the **child/ren’s** best interests and why the six additional factors support the
46 legislative findings under Family Code section 3020. (Fam. Code § 3044, subd. (f)(1)-(2).) This
47 requirement is intended to be consistent with the decision in *Jaime G. v. H.L.* (2018) 25
48 Cal.App.5th 794. (Fam. Code §3044(f)(1).) In *Jaime G.*, the court explained that the rebuttal
49 factors in section 3044 are a “mandatory checklist” and trial courts must make specific findings
50 on the record or in writing about each of the rebuttal factors. (*Id.* at 805-806.)

51 Respondent must also rebut Family Code section 3044 before the court may make a
52 visitation order that provides de facto joint custody, such as a “roughly equal” visitation
53 schedule. (*Celia S. v. Hugo H.* (2016) 3 Cal.App.5th 655, 658 (*Celia S.*.) In *Celia S.*, the trial
54 court granted a restraining order protecting the petitioner and applied Section 3044, granting sole
55 legal and physical custody of the children to the parent who was the victim of domestic abuse;
56 however, the trial court also awarded a 50/50 visitation schedule between the parties. (*Ibid.*)
57 The court of appeal reversed that decision, holding that such a schedule was a de facto joint
58 physical custody award, and that the other parent had to rebut the presumption before the court
59 could make that order. (*Ibid.*)

60 While the Family Code does not precisely define “joint physical custody,” the Court of
61 Appeal in *Celia S.* addressed how to evaluate physical custody orders. (*Id.* at p. 663.) The court
62 cited *In re Marriage of Lasich*, which noted that, “Where children ‘shuttle[] back and forth
63 between two parents’ [citation] so that they spend nearly equal times with each parent, or where
64 the parent with whom the child does not reside sees the child four or five times a week, this
65 amounts to joint physical custody.” (*In re Marriage of Lasich* (2002) 99 Cal.App.4th 702, 715
66 [disapproved on other grounds in *In re Marriage of LaMusga* (2004) 32 Cal.4th 1072, 1097].) In
67 contrast, where “a father has a child only 20 percent of the time, on alternate weekends and one
68 or two nights a week, this amounts to sole physical custody for the mother with ‘liberal visitation

69 rights' for the father.” (*Ibid.*) The Court of Appeal thus concluded that in *Celia S.*, where the
70 trial court ordered “the children to continue to evenly split their time with Celia and Hugo on
71 alternating weeks, the trial court necessarily awarded Hugo joint physical custody regardless of
72 the label the court attached to the arrangement.” (*Celia S.*, *supra*, 3 Cal.App.5th at p. 664.)

73 Petitioner therefore requests that the court award her/him/them sole legal and physical
74 custody of the child/ren and create a visitation schedule that is in compliance with *Celia S.* that
75 prioritizes the child/ren's right to be safe and free from abuse, and prioritizes the health, safety,
76 and welfare of the child/ren.

77 In addition, Petitioner urges this court to make the required statutory considerations about
78 whether visitation should be supervised or denied because there has been a finding of abuse as is
79 required by Family Code section 3031 subsection c. (“When making an order for custody or
80 visitation in a case in which domestic violence is alleged and an emergency protective order,
81 protective order, or other restraining order has been issued, the court shall consider whether the
82 best interest of the child, based upon the circumstances of the case, requires that any custody or
83 visitation arrangement shall be limited to situations in which a third person, specified by the
84 court, is present, or whether custody or visitation shall be suspended or denied.”) The court must
85 also ensure that the orders about transferring children during visitation exchanges ensure
86 everyone in the family is safe and not exposed to domestic abuse. (Fam. Code § 3031, subd. (b);
87 see also Fam. Code § 3020, subd. (c).) In all cases involving domestic abuse, the court must
88 ensure that any visitation orders protect the health, safety and welfare of all family members,
89 including the parent who is a survivor of domestic abuse. (Fam. Code § 3020, subd. (c).)

90 Based on these considerations, Petitioner believes that his/her/their request for [re-state
91 what you are asking for in the custody and visitation order] is appropriate under the law.

92
93
94
95
96

Dated: _____

Signed: _____

[Name]

Petitioner