

TEMPLATE

Memorandum of Points of Authorities on Family Code section 3044

Under Family Code section 3044, a parent who committed abuse in the past five years cannot be awarded sole or joint custody of the child(ren) unless the person proves that certain requirements are met. You can learn more about Family Code section 3044 and these requirements in FVAP's resources here [Know Your Rights: Family Code section 3044](#).

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 case law 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.

This packet includes a template memorandum of points and authorities (MPA) that can be filled out electronically and a template MPA that can be printed and filled out by hand. If you use the electronic template:

- 1) Where you see brackets (“[]” and highlighted text) click your mouse in the bracket. You will then be able to erase what is in the bracket and type in your information. Make sure that you unhighlight the text.
- 2) Where it says “Choose an item” click on this area. An arrow will appear after you click on this area. A drop-down menu will then appear. Click on the answer you want.
- 3) Where it states date or there is a date already showing click on the area. An arrow will appear after you click on the date. Click the arrow and a calendar will appear. You will then be able to choose the date that you need.

Note: This electronic template and template that can be filled out by hand are for cases where your request for custody is being heard in a restraining order case. If you are filing this request in a divorce, custody, parentage or other case, you will have to create a new document and use the one provided here as a guide so that the caption and titles in the new document(s) are correct.

When using the template letters that can be printed and filled out by hand, you should use the electronic template as a guide to know what information can be used to fill in the blank lines.

How do I get more assistance? Contact FVAP at info@fvaplaws.org or (510) 380-6243 for questions.

1 [Petitioner]
2 [Address line 1]
3 [Address line 2]
4 Phone: [Phone Number]
5 Email: [Email address]

6
7
8 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**

9
10 **FOR THE COUNTY OF [Name of County]**

11
12
13 [Name] _____)
14)
15 Petitioner,)
16)
17 v.)
18)
19 [Name] _____)
20)
21)
22 Respondent.)
23 _____)

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

CASE NUMBER: [Case Number]

24
25
26
27 A hearing was held on [Date] where a domestic violence restraining order
28 was granted to protect Petitioner from Respondent for a period of [Type in the
29 number of years, months, or days the order was entered for], which constitutes a
30 finding that Respondent has perpetrated domestic violence against Petitioner. The
31 most recent incident of abuse occurred on [Date], which is less than five years ago.
32 This triggers Family Code section 3044's rebuttable presumption that it is not in
33 the best interests of the Choose an item._for Respondent to have sole or joint legal or
34 physical custody of them. Should the court be inclined to grant Respondent sole or
35 joint legal or physical custody of the_Choose an item., the court may only do so if
36 Respondent can demonstrate both 1) that sole or joint legal or physical custody to
37 the Respondent is in the Choose an item. best interests and, 2) that the additional six

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

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

50 Respondent must also rebut Family Code section 3044 before the court may
51 make a visitation order that provides de facto joint custody, such as a “roughly
52 equal” visitation schedule. (*Celia S. v. Hugo H.* (2016) 3 Cal.App.5th 655, 658 (*Celia*
53 *S.*), *City and Co. of San Francisco v. H.H.* (2022) 76 Cal.App.5th 521, 535.) In *Celia*
54 *S.*, the trial court granted a restraining order protecting the petitioner and applied
55 Section 3044, granting sole legal and physical custody of the children to the parent
56 who was the victim of domestic abuse; however, the trial court also awarded a 50/50
57 visitation schedule between the parties. (*Ibid.*) The court of appeal reversed that
58 decision, holding that such a schedule was a de facto joint physical custody award,
59 and that the other parent had to rebut the presumption before the court could make
60 that order. (*Ibid.* See also *City and Co. of San Francisco v. H.H.* (2022) 76
61 Cal.App.5th 421, 535 [finding de facto joint custody when trial court maintained the
62 custody schedule giving father three overnights a week with the minor child].)

63 While the Family Code does not precisely define “joint physical custody,” the
64 Court of Appeal in *Celia S.* addressed how to evaluate physical custody orders. (*Id.*
65 at p. 663.) The court cited *In re Marriage of Lasich*, which noted that, “Where

66 children ‘shuttle[] back and forth between two parents’ [citation] so that they spend
67 nearly equal times with each parent, or where the parent with whom the child does
68 not reside sees the child four or five times a week, this amounts to joint physical
69 custody.” (*In re Marriage of Lasich* (2002) 99 Cal.App.4th 702, 715 [disapproved on
70 other grounds in *In re Marriage of LaMusga* (2004) 32 Cal.4th 1072, 1097].) In
71 contrast, where “a father has a child only 20 percent of the time, on alternate
72 weekends and one or two nights a week, this amounts to sole physical custody for
73 the mother with ‘liberal visitation rights’ for the father.” (*Ibid.*) The Court of
74 Appeal thus concluded that in *Celia S.*, where the trial court ordered “the children
75 to continue to evenly split their time with Celia and Hugo on alternating weeks, the
76 trial court necessarily awarded Hugo joint physical custody regardless of the label
77 the court attached to the arrangement.” (*Celia S., supra*, 3 Cal.App.5th at p. 664.)

78 Petitioner therefore requests that the court award Choose an item. sole legal
79 and physical custody of the Choose an item. and create a visitation schedule that is in
80 compliance with *Celia S.* that prioritizes the Choose an item. right to be safe and free
81 from abuse, and prioritizes the health, safety, and welfare of the Choose an item.

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

95 that any visitation orders protect the health, safety and welfare of all family
96 members, including the parent who is a survivor of domestic abuse. (Fam. Code §
97 3020, subd. (c).)

98 Based on these considerations, Petitioner believes that Choose an item. request
99 for [type again what you are asking for in the custody and visitation order] is
100 appropriate under the law.

101

102

103 Dated: November, 27, 2023

Signed: _____

104

[Type your name]

105

Petitioner

106

1 _____
2 _____
3 _____
4 _____
5 _____

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

10 **FOR THE COUNTY OF _____**

13 _____)
14)
15 Petitioner,)
16)
17 v.)
18)
19 _____)
20)
21)
22 Respondent.)
23 _____)

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

CASE NUMBER: _____

25 A hearing was held on _____ where a domestic violence restraining
26 order was granted to protect Petitioner from Respondent for a period of
27 _____, which constitutes a finding that Respondent has perpetrated
28 domestic violence against Petitioner. The most recent incident of abuse occurred on
29 _____, which is less than five years ago. This triggers Family Code section
30 3044's rebuttable presumption that it is not in the best interests of the Choose an
31 item_for Respondent to have sole or joint legal or physical custody of them. Should
32 the court be inclined to grant Respondent sole or joint legal or physical custody of
33 the_Choose an item., the court may only do so if Respondent can demonstrate both
34 1) that sole or joint legal or physical custody to the Respondent is in the _____
35 best interests and, 2) that the additional six factors on balance support the
36 legislative findings under Family Code section 3020. (Fam. Code § 3044, subd.

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76 Petitioner therefore requests that the court award Choose an item. sole legal
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95 3020, subd. (c).)

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97 item.request for [type again what you are asking for in the custody and visitation
98 order] is appropriate under the law.

99

100

101 Dated: _____

Signed: _____

102

103

Petitioner

104

105

