Know Your Rights:
Family Code section 3044

What is Family Code section 3044?

Family Code section 3044 is a California law. The law 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 it is not in the best interests of the child(ren) for the parent who committed abuse to have sole or joint legal or physical custody of the child(ren)

This means that the parent who committed domestic abuse must prove certain requirements are met before they can obtain sole or joint custody of the child(ren). These requirements are explained next.

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 section 6203, subd. (a).)

However, abuse is not limited to physical violence. (Fam. Code § 6203, subd. (b).) Other behaviors that can be abuse include stalking, threats, harassing, 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.)

For examples of acts courts have found to be abuse, you can visit this resource found on FVAP's website: http://fvaplaw.org/cases-you-can-use/. The "Restraining Orders" category lists examples of abuse that you can use to support your case: http://www.fvaplaw.org/restraining-orders/.

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What does it mean that one parent has been "found" to have committed 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.

Here are some examples of when a court had made a "finding" of abuse:

- When a court issues a restraining order after a hearing (not a Temporary Restraining Order) protecting one parent from the other.
- When a person is found guilty or pleads guilty in a criminal case involving domestic violence.
- When a parent in a family law case asks the trial judge to decide whether domestic abuse occurred and the court says it did.

BUT *any* finding from *any* court is enough for a court deciding custody to have to apply Family Code section 3044. A finding that domestic abuse has occurred does not need to be made by a California court – it can be made by an out-of-state court.. (*Ellis v. Lyons* (2016) 2 Cal.App.5th 404, 416.)

For 3044 to apply in my case, can the court consider abuse that happened a long time ago?

The last act of abuse must have occurred within the previous five years for Family Code section 3044 to apply.

EXAMPLE

A survivor got a 5-year restraining order in 2019 based on abuse that occurred between 2016-2018. Here, Family Code section 3044 **would not** apply if the survivor tried to get a custody order in 2024. This is because the last act of abuse the court found happened was in 2018, which was more than 5 years before 2024.

Even if a restraining order against the abuser has expired or ended, Family Code section 3044 will still apply if there was a finding of domestic abuse within the past five years.

EXAMPLE

A survivor got a 2-year restraining order in 2020 based on abuse that occurred between 2019-2020. The survivor then tried to get a custody order in 2023. Family Code section 3044 would still apply even though the restraining order expired or ended in 2022 because the abuse occurred within the past 5 years. (*Celia S. v. Hugo H.* (2016) 3 Cal.App.5th 655.)

What does the "presumption" against custody mean?

The presumption means the judge must assume 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.

This does not mean 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 the judge must make an order that the non-abusive parent has sole custody of the child unless the parent who committed abuse can show that he or she can "rebut," or overcome, the **presumption.**

Helpful Definitions

- Physical custody means who the child lives with most of the time.
- Legal custody means who can make important decisions, such as medical decisions, for the child.
- Sole physical custody means that the child(ren) lives with and is under the care of one parent. The court may order visitation with the other parent.
- Sole legal custody means that one parent makes the important decisions for the child(ren).
- Joint physical custody means that both parents have significant amounts of custodial time.
- Joint legal custody means that both parents make important decisions about the child(ren).

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 abusive 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.

What are the six additional factors?

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;

g. is restrained by a protective order or restraining order and is in possession or control of a firearm or ammunition.

What does this all mean?

This means it is not enough for the court to *just* find that awarding custody to the abuser is in the best interest of the child. The court also must explain why the additional factors *also* support giving joint or sole custody to the abuser.

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

If a court decides that the presumption has been overcome, it must state its specific reasons in writing, or explain out loud in court and on the court record two things:

1) Why sole or joint legal or physical custody to the party found to have committed domestic violence is in the best interests of the child;

AND

2) Why the additional factors (a-g listed in previous section), 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. (Family Code, section 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 first deciding the Family Code section 3044 presumption has been "rebutted" or overcome. (*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 often 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.)

What if a restraining order was issued?

If a domestic violence or criminal restraining order exists a court deciding custody must 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).) If visitation is ordered, the court must also specify the time, day, place, and manner (or how) the custody exchange will take place. (Fam. Code § 3031, subd. (b).) This is to ensure that everyone in the family is safe and not exposed to domestic abuse during custody exchanges. (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).)

How do I get more help?
Contact FVAP at info@fvaplaw.org or (510) 380-6243

Legal Information, not legal advice.