



# California CHILD CUSTODY LAWS

An In-Depth Guide for  
Mothers and Fathers

Written by B. Robert Farzad, president of Farzad Family  
Law, a professional corporation



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## INTRODUCTION

I wrote this California child custody e-book to bring clarity to an often misunderstood and sometimes confusing area of family law. Our State's child custody laws were not supposed to be complex. The laws were written by focusing on one overriding factor, the children's "best interest," and giving the family court broad discretion to determine that best interest. Did it work out that way? Yes, to the extent the best interest standard remains the most important factor in any California child custody case. No, in the sense how the court arrives at best interest is not as clear as parents may want it to be. Add issues like domestic violence, substance abuse, move aways, and throw in forensic psychologists, lawyers for the children, a child's preference, etcetera to the mix and child custody is not as simple as it may seem or should be.


This e-book assumes a few things. The first is a [California court has jurisdiction \(power\)](#) over the child custody case. That means no other State is involved. We do not discuss jurisdictional issues in this e-book. The second is the expectation the parents have now or may have in the near future one or more disputes regarding child custody or parenting time. That does not mean the parents will have a child custody battle on their hands. It simply means they may not agree on everything. Third, it assumes the reader of this book (you) are smart enough to hire an experienced family law attorney. If you are reading this e-book with the expectation it will help you represent yourself, you are making a mistake. Do not do it. No book can replace legal advice and the value that comes from effective representation.

**- B. Robert Farzad**  
*President of Farzad Family Law,  
a professional corporation*

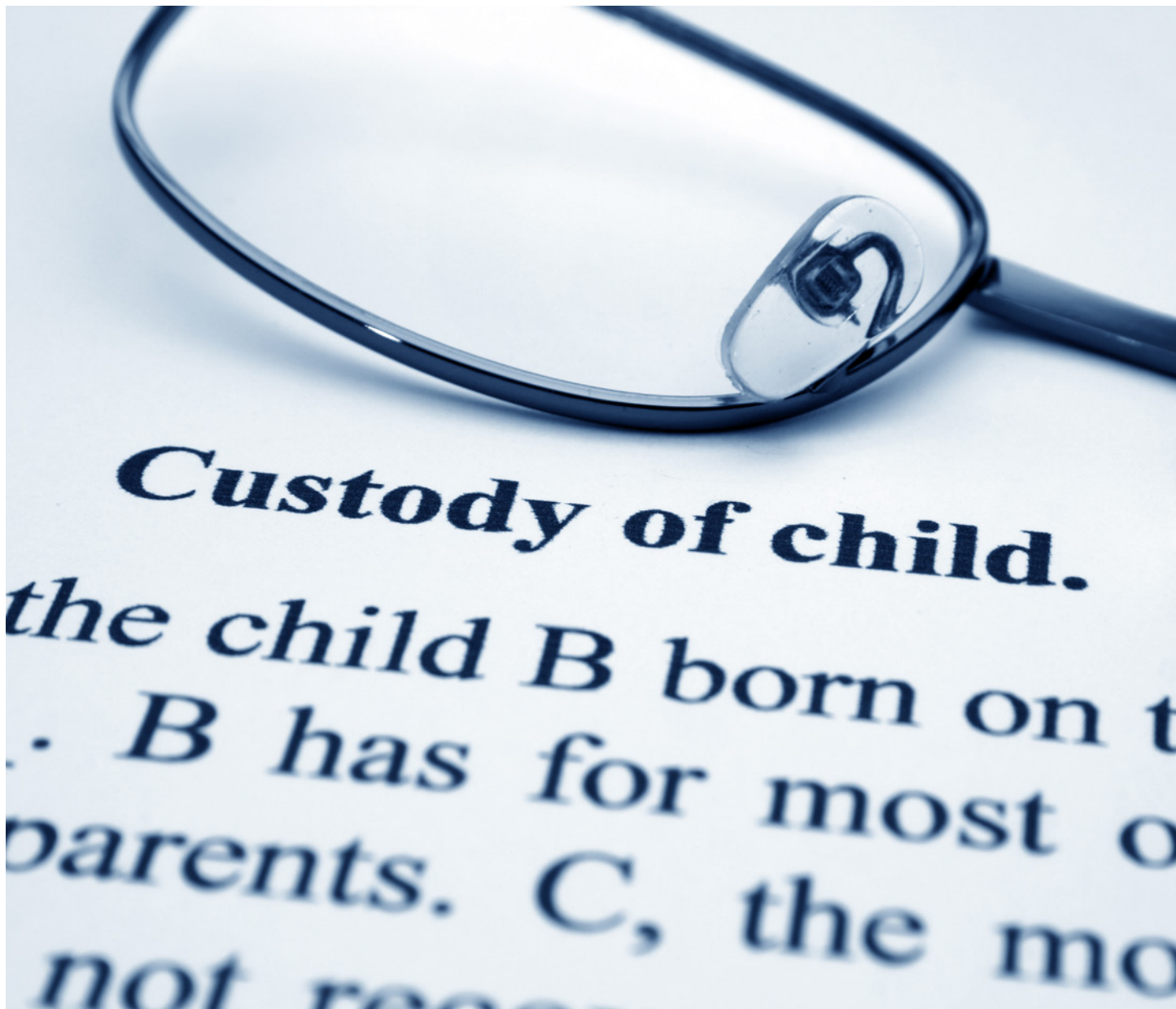


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# The Children's Best Interest Standard

# 1



# 1

## CHAPTER 1

### *The Children's Best Interest Standard*

*The children's best interest is the single most important factor in every single child custody case. The purpose of the California best interest standard is to give the court broad discretion to order a custody and visitation plan that is consistent with the child's health, safety, welfare and education.*

*That word "discretion" is very important. It gives the family court reasonable latitude such that there is not often a strict right or wrong decision unless the judge abuses his or her discretion when making a ruling.*

#### CO-PARENTING AND COMMUNICATION

One of the foundational elements a family law judge should take into consideration before making a decision on the children's best interest is whether one parent is frustrating or preventing communication or refusing to engage in co-parenting.

#### INTERFERING WITH THE PARENT-CHILD RELATIONSHIP

If one parent has been uncooperative (and that phrase is not specifically defined by California law) and that has adversely affected or may adversely affect the children's relationship with the other parent, the court should take such misconduct into consideration. The weight the court gives such behavior will depend on how serious the misconduct is.

This is good news for parents who communicate and co-parent and bad news for those that do not.

Uncooperative parenting and interfering with the other parent's rights may not only lead to a change in custody but a [contempt action against the interfering parent](#). Court ordered joint legal custody and parenting time are not suggestions. They are directives. Willfully violating them can lead to fines, community service and even jail time.

#### THE BOND BETWEEN THE PARENT AND CHILD AS A BEST INTEREST FACTOR

The level of emotional bonding the children have with the parents is a strong "best interest" consideration. Bonding isn't just an issue of parenting time. Sure, the days a parent spends with the kids is important but bonding goes deeper. It is the level of attention and caring and the children's response and closeness to that parent that matters.



Read more about contempt actions against a parent who violates court orders.



Parents who are not bonded with their children as a result of their own neglect may face a tough time in custody and visitation cases but bonding isn't a hard-line rule. Even if it has not been established, it can be. If it is weak, it can be strengthened. Bonding is also a function of a child's age, maturity, temperament and a parent's personality and stability.

Let's take a hypothetical to illustrate these points. Let's assume there is a working dad who is at the job 60 or more hours per week. Assume further there is a stay-at-home mom and two children ages two and four. In such a situation, it is not uncommon for the children to be more bonded with the mother. That is simply a function of the mother spending more quality time with the young children than the father. Does that mean the dad in our hypothetical is out of luck? Of course not.

If these two spouses go through a divorce, the father will have to make some adjustments to his schedule or his life to spend more quality time with the children – the emphasis being on the word “quality.” With that, the father will have an opportunity to build the bond between he and his children. So long as the mother does not interfere with that bonding, the father should be able to enjoy that quality time with the kids within a very short period of time.

#### WHAT ABOUT GENDER, RACE, RELIGION, SEXUAL ORIENTATION, HANDICAP AND A PARENT'S FINANCIAL STATUS?

***There cannot be a preference for gender of one parent over another. California law simply forbids it.***

The issue of race is not and cannot be a consideration.

Regarding religion, family courts are not permitted to deny to a parent custody or visitation on the basis of that parent's religious beliefs or practices unless there is compelling evidence the beliefs and practice will be harmful to the child in some significant way. Courts generally will not prevent a parent from talking to a child about religion or engaging the child in a religious practices so long as the religious practice itself does not amount to a crime or place the child in physical danger or subject the child to psychological abuse. A person's religious practice is protected by the First Amendment to the United States Constitution and no California family law judge has the right to interfere with that practice in a family law case without compelling evidence the child is being placed in danger.

As for sexual orientation, since 1988 when important California appellate decisions came down, California courts have consistently held a parent's homosexuality cannot by itself be a determining factor in a custody case. That is because sexual behavior, whether heterosexual or homosexual, is deemed by family courts as irrelevant to a child's best interests. Unless

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*A person's religious practice is protected by the First Amendment to the United States Constitution and no California family law judge has the right to interfere with that practice in a family law case without compelling evidence the child is being placed in danger.*

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the sexual conduct places a child in physical danger, such as sexual abuse, or other harm, family law judges should not place weight on sexual orientation.

How about physical handicap? Family courts are prohibited from basing custody decisions solely on one parent's physical handicap. It can be nothing more than one factor the court considers when it looks at the entire family dynamic and the care necessary for the children. Unless there is compelling evidence a parent with a physical handicap cannot care for the a child's basic needs, courts should not make physical handicap a relevant factor.

The family court also cannot consider as a sole or primary factor the financial position of the parents. Wealthy parents are not afforded any advantage over less financially capable ones.

*The family court also cannot consider as a sole or primary factor the financial position of the parents. Wealthy parents are not afforded any advantage over less financially capable ones.*

### **EDUCATIONAL CHOICES WHEN EVALUATING THE CHILDREN'S BEST INTEREST**

Where will the child go to school? Will it be a public school or a private one? Will the child be homeschooled?

California courts generally do not become over-involved in such decisions although this can vary from county to county. The court usually will not "pick" a school unless there is a compelling reason to do so. However, if the parents cannot agree and the court is asked to make a decision between two schools, what more commonly happens is the court will designate one parent as the one who should pick the school at issue. That does not mean the parent makes that choice forever.

### **THE IMPORTANCE OF "STATUS QUO" IN THE BEST INTEREST STANDARD**

What "is" the status quo sometimes remains the status quo in a child custody case. In other words, if there has been a schedule the parents have been followed for any significant period of time and that has worked for the kids, courts will look to that status quo as the basis for any ongoing orders.

Does that mean the family law court will always keep things the same? No, it does not. What it does mean however is the court will want a good reason why the status quo should be changed.

This is important for both the custodial and noncustodial parent.





### Options for noncustodial parents

If a parent is the custodial parent who faces a modification request, that parent may wish to consider whether the status quo has worked and how his or lawyer will advocate to the court things should say the same.

If the parent is the noncustodial parent, that parent's lawyer should be prepared to explain to the court why the status quo is not consistent with the children's best interest. This is especially true if the status quo on the custody and visitation has been a temporary departure from how it used to be or is something which has been forced upon the children over that parent's objections.

Noncustodial parents have more options than they realize and they are not as stuck with the status quo as they may think.

## TWO COMMON EXCEPTIONS TO "STATUS QUO" UNDER CALIFORNIA CHILD CUSTODY LAWS

### Temporary absence or relocation of a parent from the family residence.

Reasonable efforts to maintain parenting time with a child is critical for a parent that moves out of the family home. Fortunately, child custody laws in California do not permit a family law judge to consider one parent's absence or relocation from the family residence so long as the absence or relocation was of a short duration, the parent who was absent demonstrated an interest in maintaining custody or visitation, the parent maintained or made reasonable efforts to maintain contact with the child and that parent's behavior is not consistent with an intent to abandon the child.

The above is very common shortly after separation - one parent moves out, the other stays home with the child or children. The parent who stayed at the home often becomes the custodial parent and the other parent allows this to occur. This is not wise for the parent who moved out but so long as he or she moves quickly to secure reasonable child custody and parenting time orders, the absence or relocation should not be a factor.

Another exception to the status quo rule is if that absent parent was absent as a result of the other parent's actual or threatened domestic violence or family violence.

These laws exist to avoid temporary absences from being used against a parent unfairly when that temporary absence is not an important factor in the child's best interest.



## Military service and its impact on California child custody orders

Let's start with a hypothetical.

Assume a father has joint (50/50) custody and parenting time. That father then goes into military service, active duty. The mother gets primary custody although no modification to the court order was made. The child is simply left with the mother. The father serves his time in active duty and then returns.

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*Our State's child custody laws, both codes and cases, are protective of military personnel.*

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The father wants to return custody and parenting time to how it was. The mother does not and now wants sole custody. What does the family court do? First, let's discuss what a family court cannot do.

The family court should not make a modification to custody or visitation solely on a parent's absence or relocation or failure to comply with the order that resulted from active military service and deployment outside the State of California. The key word there is "solely." So just because the father was gone does not mean he automatically loses joint custody and equal parenting time. If there are other reasons that affect a child's best interest on the issue of custody and parenting time, that should get evaluated.

If a custody modification does need to be made (before the parent leaves) as a result of a parent's military deployment, mobilization or temporary duty, the order will usually be temporary. That means the family law judge will review it when the service member is back home and potentially reconsider the temporary custody order. Under some circumstances, there is even a presumption in effect the order should go back to the way it was before deployment. However, like nearly everything else in California child custody law, the child's best interest is of paramount importance when evaluating it.

Our State's child custody laws, both codes and cases, are protective of military personnel. Serving in the military and carrying out the duty is not justification for depriving that parent of custody and the law arguably gives flexibility to an absent parent in this area more than any other.



## How Do California Family Law Judges Deal with a Child's Preference?

# 2



# 2

## CHAPTER 2

### *How Do California Family Law Judges Deal with A Child's Preference?*

Ever since [California Family Code section 3042](#) went into effect in January of 2012, the child's preference has become a more significant factor than ever before.

California Family Code 3042, subsections (a) through (d) specifically state:

- (a) If a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody or visitation, the court shall consider, and give due weight to, the wishes of the child in making an order granting or modifying custody or visitation.
- (b) In addition to the requirements of subdivision (b) of Section 765 of the Evidence Code, the court shall control the examination of a child witness so as to protect the best interests of the child.
- (c) If the child is 14 years of age or older and wishes to address the court regarding custody or visitation, the child shall be permitted to do so, unless the court determines that doing so is not in the child's best interests. In that case, the court shall state its reasons for that finding on the record.
- (d) Nothing in this section shall be interpreted to prevent a child who is less than 14 years of age from addressing the court regarding custody or visitation, if the court determines that is appropriate pursuant to the child's best interests.

#### **A CHILD'S PREFERENCE IN CUSTODY FOR CHILDREN AGE 14 AND OLDER**

Pursuant to Family Code section 3042, when evaluating a child's choice regarding custody and visitation, the court must listen to a child who is 14 years or older unless the court determines that it is not in the child's best interest to do so. When a child is under the age of 14, the court must first determine whether or not it is in the child's best interest to listen to him or her.

While there is no magical significance to the age of 14, the California legislature drew that line at that age because the legislature believed at age 14, the child has enough emotional maturity and capacity to reason and articulate relevant and appropriate reasons for a preference.



See  
California  
Family Code  
Section 3042



For those of you that have teenage children, this may surprise you because this is also the age children go through some emotional turmoil as they try and find their place in the world. It is not unusual for a child at this age to engage in rebellion and use the “preference” option as a means to escape discipline. Before you fret too much, keep reading...

### **A CHILD’S PREFERENCE IN CUSTODY DOES NOT RULE THE DAY IN FAMILY COURT**

Do not assume a child’s preference, regardless of the age, will carry the day in court. Family law judges have the discretion to listen to a child’s preference but not necessarily follow it.

For example, with a child who is a teenager and older than age 14, the court is not required to follow the child’s preference if it believes the choice is not sincere and a means to play one parent against the other and therefore not in the child’s best interest.

Even in the context of a sincere choice and good reasons for a change, the family court is not mandated to cut off all visitation even if the child requests it from the court. If a child comes to court and he or she states a preference to be in the sole custody of one parent and not be required to see the other, the family court has wide discretion to still order visitation with the other parent. The court can even make orders such as counseling, reunification and other remedial measures to restore the relationship between the child and the parent the child no longer wishes to visit.

### **HOW DOES A CHILD VOICE HIS OR HER CHOICE?**

More family law judges are choosing a direct approach and hearing from a child directly in chambers or in open court. In such situations, the Family Code and the California Rules of Court give the court the following options to consider:

1. The location of the testimony, including the option of closing the courtroom to the public or hearing the testimony in chambers;
2. Whether the parents, attorneys or neither of them should be present when the court takes the child’s testimony. Regardless, it is almost assured a court reporter will be present and take down the testimony so there is a record of it. The court can allow for a listening device for the benefit of the parents and the lawyers if neither are present when the child’s testimony is taken; and



3. The manner in which the child will be questioned including whether it will just be the judge or whether the lawyers or the parents will be allowed to question the child. The parents will almost certainly not question the child if they are represented by a lawyer.

The family law judge does not have to do it this way and both **Family Code 3042** and **California Rules of Court 5.250** give the court many options to hear the child's preference in custody. These include:

1. Participation in mediation under Family Code section 3180;
2. Appointment of a child custody evaluator or investigator. If the child's preference is not as straightforward as it may seem and there are issues regarding undue influence, alienation, or other emotional or psychological abuse or the court simply believes the child's preference must be investigated further because of the case's particular facts including the history of care and control of the child, the court has the power to appoint an independent child custody evaluator to investigate these issues and make recommendations to the court;
3. Admissible evidence and testimony of the parents or witnesses;
4. Through a child custody recommending counselor pursuant to Family Code section 3183(a); and
5. Through a child interview center or professional. The family court can also appoint minor's counsel which is a lawyer for the child or children.

Regardless of the court's alternative approach, the report back to the court must be:

1. In writing and fully document the child's views on the matter.
2. Describe the child's input in sufficient detail so the court can make an informed decision.
3. Be provided to the parents and their lawyers.
4. Be filed in the confidential portion of the family law file.

For a child's preference in custody to be heard, the most common way to do it is for the parent who seeks custody to file a formal request for order with the court and state in his or her moving papers the child has expressed a preference to live with that parent or has stated a preference to spend more time with that parent.



Read more  
on parental  
alienation

Here, the parent, through a delicate balancing of stating the child's preference in custody but not pressuring the child to choose, should state specific facts as to the living arrangements between the parents and why it would be in the child's best interest to live with that parent, consistent with the child's preference. The experience of a child custody lawyer is very helpful here to ensure the information is properly presented to the court through admissible evidence.

### CONDITIONING AND PARENTAL ALIENATION AS UNDUE INFLUENCE OVER THE CHILD'S PREFERENCE IN CUSTODY

A child may express a preference to live with the other parent but that does not mean the stated preference is a voluntary or intelligent one. A preference can be the result of pressure by one parent, undue influence, coercion or even [parental alienation](#). For those reasons, if a parent believes any of these or other misdeeds by the other parent, have resulted in the "preference," a parent should be diligent in bringing this to the court's attention.



# Domestic Violence and Its Impact on Child Custody

# 3





# 3

## CHAPTER 3

### *Domestic Violence and Its Impact on Child Custody*

A parent with a history of perpetrating domestic violence or child abuse generally faces an uphill battle in seeking joint legal and joint physical custody. That is because California family law states, under certain circumstances, a parent who has been found to have perpetrated domestic violence must overcome a presumption it is not in the children's best interest for him or her to share joint custody.

If the court finds a parent who seeks custody of a child (joint or otherwise) "perpetrated domestic violence" against the 1) other parent, 2) the child or 3) the child's brothers or sisters, within the last five years, there is a presumption the parent who committed the acts should not receive joint or sole legal or physical custody of the child.

**California Family Code 3044** helps us understand what it means by "perpetrated domestic violence." Sections (c) through (f) of this code section state:



#### California Family Code Section 3044

- (c) For purposes of this section, a person has "perpetrated domestic violence" when he or she is found by the Court to have intentionally or recklessly caused or attempted to cause bodily injury, or sexual assault, or to have placed a person in reasonable apprehension of imminent serious bodily injury to that person or to another, or to have engaged in any behavior involving, but not limited to, threatening, striking, harassing, destroying personal property or disturbing the peace of another, for which a Court may issue an ex parte order pursuant to Section 6320 to protect the other party seeking custody of the child or to protect the child and the child's siblings.
- (d) (1) For purposes of this section, the requirement of a finding by the Court shall be satisfied by, among other things, and not limited to, evidence that a party seeking custody has been convicted within the previous five years, after a trial or a plea of guilty or no contest, of any crime against the other party that comes within the definition of domestic violence contained in Section 6211 and of abuse contained in Section 6203, including, but not limited to, a crime described in subdivision (e) of Section 243 of, or Section 261, 262, 273.5, 422, or 646.9 of, the Penal Code. (2) The requirement of a finding by the Court shall also be satisfied if any Court, whether that Court hears or



has heard the child custody proceedings or not, has made a finding pursuant to subdivision (a) based on conduct occurring within the previous five years.

- (e) When a Court makes a finding that a party has perpetrated domestic violence, the Court may not base its findings solely on conclusions reached by a child custody evaluator or on the recommendation of the Family court Services staff, but shall consider any relevant, admissible evidence submitted by the parties.
- (f) In any custody or restraining order proceeding in which a party has alleged that the other party has perpetrated domestic violence in accordance with the terms of this section, the Court shall inform the parties of the existence of this section and shall give them a copy of this section prior to any custody mediation in the case.

This “presumption” is important because it places a greater burden on the parent who was found to have committed the domestic violence to show why he or she should even get joint custody. The parent is required to “rebut” the “presumption.”

The presumption does not replace the best interest analysis. It requires the parent who seeks custody with a domestic violence finding to carry a bigger burden to show it is in the child’s best interest to share legal and physical custody.

How does a parent who has been found to have committed domestic violence overcome this presumption?

The family law judge is required to look at the following factors in the child custody case:

1. Is it in the child’s best interest to give the parent joint or sole custody?
2. Did the parent complete a batterer’s treatment program that meets the criteria of the California Penal Code.
3. If alcohol or drug use was involved, one factor is whether the parent completed an appropriate counseling program to address those issues.
4. Whether the parent completed a parenting class, if the family court determines that was appropriate.
5. Whether the parent is on probation or parole, and whether he or she has complied with those terms.
6. Whether the parent has complied with the restraining order terms that were issued.
7. Whether there has been further or other domestic violence.



# Legal and Physical Custody

# 4



# 4

## CHAPTER 4

### *Legal and Physical Custody*

#### JOINT LEGAL AND JOINT PHYSICAL CUSTODY ORDERS UNDER CALIFORNIA CHILD CUSTODY LAW

**Joint physical custody** gives both parents equal or close to equal control over the child and the decisions related to him or her.

Joint physical custody is typically synonymous with a 50-50 parenting time arrangement but it is not required for there to be 50-50 parenting time for there to be joint physical custody. So long as each parent has significant periods of time with the children, joint physical custody is appropriate.

How much time amounts to joint? Based on the case law that exists as of today, it generally has to be more than 35% and typically 40% or more but take those percentages with a grain of salt. There are not yet any hard and fast rules regarding this issue.

**Joint legal custody** in California means the parents must share the decision-making regarding the child's health, safety, education and welfare. Neither parent can make decisions that are important in a child's life without involving the other parent and, under certain circumstances and depending on how the court order is worded, obtaining the other parent's consent. These include decisions regarding health and medical, education, extracurricular activities, and anything that is of significance to the child. Even attendance in religious activities can be covered under a joint legal custody order.

California judicial council form 341(E) is very instructive in this regard. Read it to understand the breadth and scope of joint legal custody in California.

Parents will sometimes ask whether joint legal custody is an all or nothing proposition such that the family law judge cannot order one parent to have exclusive decision-making authority over one or more topics. The answer is no and the judge can make certain aspects of legal custody sole without making a complete order for sole legal custody. This is sometimes seen in the context of medical and/or educational decisions when one parent is far better equipped or the other parent is simply unfit to deal with such issues. California courts should however proceed with caution here because making these limited sole custody order can be highly prejudicial to the non-custodial parent. They should be the rare exception and not the rule.

#### *Definition:*

#### **Join Physical Custody**

gives both parents equal or close to equal control over the child and the decisions related to him or her.

#### **Joint Legal Custody**

in California means the parents must share the decision-making regarding the child's health, safety, education and welfare. Neither parent can make decisions that are important in a child's life without involving the other parent.



## CALIFORNIA'S PUBLIC POLICY MANDATE OF FREQUENT AND CONTINUING CONTACT

California child custody laws require that custody orders ensure the children have frequent and continuing contact with both parents and to share in the rights and responsibilities of raising the child. The exception to that rule is when such an order is not consistent with the child's best interest.

This frequent and continuing contact rule is not specifically defined and does not have specific elements the court must follow. Once again, the court is given discretion to determine how much frequency and continuity should occur.

That however does not mean the family law judge can do whatever he or she wants. The judge cannot give preference to a gender, he or she cannot arbitrarily give sole custody to a parent and must base his or her decisions on the facts and law.

## SOLE LEGAL AND PHYSICAL CHILD CUSTODY ORDERS

### Definition:

### Sole Physical Custody

gives a parent the right to be the primary custodial and caretaker role.

### Sole legal custody

orders give one parent the exclusive right to make decisions concerning a child's health, education and welfare.

**Sole physical custody** gives a parent the right to be the primary custodial and caretaker role. Sole physical custody orders do not necessarily take away all parenting time from the noncustodial parent. It is common for a sole physical custody order to be granted to one parent while visitation (parenting time) is ordered for the other.

**Sole legal custody** orders give one parent the exclusive right to make decisions concerning a child's health, education and welfare. That does not mean the parent who obtained sole legal custody gets to make all of the decisions at all times. That is because the parent who has visitation (but not custody) does still have supervisory responsibilities while the child is in his or her control. Sole legal custody orders are the exception and not the rule.

## WHAT ARE SOME COMMON CUSTODY SCHEDULES THAT FAMILY LAW JUDGES WILL ORDER?

There are many different types of parenting plans out there. There is no one-size fits all. The following are some of the more common schedules although there are many more than just these.

### Common for joint physical custody:

- Week on and week off schedule. On this schedule, one parent has the child for 7 days, followed by the other parent having the child for 7 days.
- 2-2-3, which comprises of Monday and Tuesday to parent A, Wednesday and Thursday to parent B, Friday, Saturday and Sunday to parent A and then a switch of that schedule the following week.



- Fixed 2-2-3, such that Monday and Tuesday goes to parent A, Wednesday and Thursday to parent B, and Friday, Saturday and Sunday alternate. This is sometimes called a 2-2-5.
- An extended every other weekend schedule whereby parent A has two weekday overnights, an every other weekend schedule that goes from Thursday to Sunday or Monday and the parents equally share the summer.

### **Common for sole or primary physical custody:**

Every other weekend schedule from Friday to Sunday or Monday to parent A plus one or two weekday dinner visits that are non overnight.

### **Holidays and vacation:**

Depending on the age of the children, whether or not they are in school and the level of bonding and attachment, holidays are traditionally split equally between the parents and each parent is afforded a set number of vacation days per year with the children. However, it does not have to be like that and the court has discretion to divert from an equal division of holiday time. That is especially true if there is considerable distance between the parents where the court can give the non-custodial parent more holiday time to make up for the lack of regular (non-holiday) time.

## **WILL THE FAMILY COURT SEPARATE SIBLINGS IN CHILD CUSTODY CASES?**

California child custody laws favor the preservation of siblings' relationship and bond with each other. Generally, significant evidence needs to be submitted to separate siblings.

One of the more interesting cases that has come down on this issue was ruled upon in the year 2004 and remains good law. The case is called *Marriage of Steiner and Hosseini*. In that case, the family court ruled the mother had so badly poisoned the relationship between the father and the older son that separating the siblings and giving the father custody of the younger son was possibly the only way to prevent that kind of alienation from occurring with the younger son.

The Steiner and Hosseini case is a good example of how parental alienation can destroy a parent-child relationship and highlights that in appropriate cases and with the right evidence, a court can mitigate alienation and protect the children.



# Filing Your Child Custody Papers

# 5



# 5

## CHAPTER 5

### *Filing Your Child Custody Papers*

#### EX PARTE CHILD CUSTODY ORDERS

Ex Parte (emergency) child custody requests are common in California. Unfortunately, they are too common and many parents and far too many lawyers bring these emergency child custody requests without the proper basis in fact or law.

Emergency child custody requests are appropriate where there is a threat of child abduction, an actual abduction or other circumstances where the child is facing imminent risk of harm. Notice the word “imminent.” Notice the word “harm.”

Emergency child custody requests are not appropriate simply because a parent thinks the court should address the issue immediately even though there is no threat of immediate harm to the child. In cases where the need for the order does not involve imminent risk of harm to the child but there is still an emergency that involves the need for a faster hearing, the family court does have the power to shorten the time to set a hearing. In other words, the court can set a hearing date earlier than it usually would. However, that also requires a good reason.

In cases that involve domestic violence, emergency child custody orders are appropriate when the domestic violence is of a recent origin or is part of a demonstrated and continuing pattern. Sexual abuse of a recent origin or part of a demonstrated and continuing pattern is also appropriate for emergency relief.

It is sometimes difficult to determine what is and is not an emergency. The advice of an experienced child custody lawyer is important because not only can emergency requests cost parents a lot of money in fees but bringing a frivolous emergency request may also damage a parent’s credibility with the family court.



**What is an  
Ex Parte  
Child  
Custody  
Order?**





## FILING THE CHILD CUSTODY “REQUEST FOR ORDER”

If it is not an emergency, then it starts with filing a child custody request for order, whether that is for the initial request or a modification of a child custody order. Requests for order are judicial council forms (preprinted forms where boxes are checked and information is provided) as well as one or more declarations under penalty of perjury that lay out for the court the factual basis of the requests. The factual basis means why it is in the children’s best interest for the parent to get what he or she request and the evidence in support.

In cases that involve factual disputes, a well-drafted declaration is important. Parents should not take attention to detail and good writing for granted.

## MANDATORY MEDIATION

### Attendance and participation in mediation

Every contested California child custody and visitation case (not including domestic violence cases) must go through a mandatory court mediation process. The same rules apply in every single court within the State of California. Our laws do not provide an exception to this rule no matter how much a parent may think the matter cannot settle or that mediation may be a waste of time.

Typically, once the parents files the paperwork, the court will assign a mediation date and the parent will be required to attend and participate in the mediation process. Good-faith participation in the mediation process is a requirement before the family court will take on and hear the custody case. A parent cannot simply attend a mediation and refuse to participate. This does not mean the parents have to reach an agreement in mediation. Good-faith disputes between parents regarding custody and parenting time are normal.

Mediation also does not need to be a one and done process. If the parents were unable to resolve the matter in the first mediation session but made good progress, the mediator can set a second session before the court date.

“So what happens if the other parent fails to show up?” First, the family law judge will want to know why. Second chances are typical but third chances are not and if one parent refuses to attend or participate, that parent may not be given much of a voice at the child custody hearing.

*Every contested California child custody and visitation case (not including domestic violence cases) must go through a mandatory court mediation process.*



### **Is a child custody mediation confidential?**

Yes. The communication with the mediator is a confidential one and protected by California Evidence Code section 1040 and California Family Code 3177. There are exceptions which we will discuss below.

### **Are lawyers involved in the mediation process?**

Generally, no. Especially in Orange County and Los Angeles, lawyers do not get involved and the parents attend mediation alone. Part of the reason is because mediation is not really a place for advocacy.

Excluding lawyers does not mean that everyone else is also excluded from the process. In custody cases that involve domestic violence where the court has issued a restraining order, California law gives the victim a right to bring a “support person” with them to the mediation session. In Orange County, they will simply separate the parents.

### **Can the child custody mediator make a report to the family law judge?**

Yes, where such a rule has been adopted by the local court. While we do not see this in every case (and it is mostly the exception and not the rule), the mediator may report to the judge his or her recommendations based on the conversation that took place in a mediation session. However, before doing so, the mediator must provide a recommendation in writing to both parents and the lawyers.



# Abuse Allegations

# 6



# 6

## CHAPTER 6

### *Abuse Allegations*

#### HOW DOES THE FAMILY COURT HANDLE CHILD ABUSE ALLEGATIONS?

Child abuse allegations are taken seriously, as they should be. The court has many options available to it when faced with an allegation of abuse to a child.

Typically, the allegation comes from one of the parents. When such an allegation is made, the court can do any of the following:

1. Handle the matter in a hearing and take testimony of the parties and witnesses. These hearings can be lengthy especially if the abuse has been ongoing for a significant period of time or the abuse is serious.
2. Refer the matter to a social services agency for investigation and reporting to the court. This is very common in Orange County Family Court. If there is a serious abuse allegation, child protective services has likely gotten involved and is conducting an investigation. Deference, sometimes too much, is given to the social services agency and a liaison of that agency reports to the court.
3. Order a child custody investigation, called a CCI in Orange County. This is an in-house investigation that is conducted by an employee of the court who has social services and investigative education and experience. The child custody investigator interviews the parents, witnesses and reviews relevant documents. The investigator can also request documents and obtain them in anticipation of the court date. The investigator will then come to the court and make a report of his or her findings. The parents or the lawyers have an opportunity to conduct a cross-examination of the investigator.
4. Appoint a child custody evaluator to investigate the allegations and report back to the court, with recommendations. It is important to note when there are general allegations of child abuse made, the family court has wide discretion to appoint an evaluator. However, if the court determines there has been a serious allegation of child sexual abuse, the court must order an evaluation assessment or investigation pursuant to California Family Code 3118.



## HOW DOES THE FAMILY COURT DETERMINE THE BEST INTERESTS OF THE CHILD IN LIGHT OF ABUSE OR NEGLECT?

As we discussed, health, safety, education and welfare are the primary concerns of the family law court. The court therefore will look at a history of physical, sexual or psychological abuse by either parent.

Allegations of physical abuse, to withstand scrutiny, need to be more than “he said, she said.” In fact, the family court may require substantial independent corroboration of physical abuse. This includes reports from social welfare agencies, medical facilities, law enforcement, or other places that can verify the nature or extent of the abuse.

California child custody laws require the court to make certain factual findings before it makes a determination. These laws exist because parents must be protected from false allegations of abuse whenever reasonable, as false allegations are very easy to make and could, at least on a temporary basis, deprive an innocent parent from custody and visitation.

## WHAT IF A PARENT MAKES FALSE ALLEGATIONS OF CHILD ABUSE?

It happens way too often and, unfortunately, it is not punished enough.

Fortunately, family law has finally grown teeth in dealing with false child abuse and neglect cases. The law states that any witness, party (which typically includes just the father and mother but may also include others who were joined in the case, such as grandparents), party’s attorney who knowingly make a child abuse or neglect accusation that is false during a child custody proceeding may be monetarily sanctioned in a reasonable amount.

The sanction may include all of the costs that were incurred in defending against the false allegations and that includes the reasonable attorneys fees.

All of this is laid out in [California Family Code section 3027.1](#).

### Supervised visitation for false child sexual abuse allegations

The family court has the discretion to order supervised visitation or otherwise limit a parent’s custody and visitation if the court finds there has been substantial evidence the parent has made a report of child sexual abuse during the custody proceeding, or at any other time, and the parent knew the report was false.

The parent must have the intent to interfere with the other parent’s custodial rights although such an intent is all but assumed when dealing with knowingly false allegations of sexual abuse.



Read more  
on California  
Family Code  
Section  
3027.1



# Independent Child Custody Evaluations

# 7



# 7

## CHAPTER 7

### *Independent Child Custody Evaluations*

#### APPOINTMENT OF A CHILD CUSTODY EVALUATOR

While they are typically called “[730 evaluations](#)” (named after California Evidence Code section 730), that is a bit of a misnomer. There are several statutes that permit independent child custody evaluations and only one of them is section 730. Regardless of the code sections, these child custody evaluations take place with a court-appointed evaluator who is generally on an approved court list.

The great majority of child custody evaluators are forensic psychologists although a Ph.D. is not necessary to be an evaluator. The purpose of an evaluation is to do a thorough and objective analysis of the parents, the children as well as the facts that have led to the contested case.

Evaluations usually involve psychological testing of the parents, interviews with the parents, children and any collateral witnesses, review of documents and other information submitted by the parents or the lawyers, review of any medical or other psychiatric or psychological records as well as records from any law enforcement or social services agency, all of which culminate in a confidential report to the family court and the lawyers for consideration.

The forensic psychologist does not take the place of the judge. He or she does nothing more than make recommendations to the court. However, those recommendations are taken seriously and the court has the discretion to give the recommendations great weight.

Great weight however does not mean blindly following the recommendations and making them an order. There is a difference despite what some within the family law community may think.

#### WHEN IS A CHILD CUSTODY EVALUATOR APPOINTED?

A contested child custody case starts with the filing of a request for order by one parent. Once the other parent has filed a responsive declaration (essentially an opposition) to the request for order, the family court has the discretion to appoint an evaluator.



What is a 730 evaluation?



## WHAT ISSUES DOES THE EVALUATOR COVER?

An evaluator does not get to cover any and every issue he or she wants. His or her duties are governed by the court order, which means the judge in its order will tell the evaluator what issues the court wants the evaluator to look into and report back to the court.

Usually though, the orders are broad and will cover issues such as a proposed parenting plan, which of course would include the specific schedule the evaluator recommends.

## THE CHILD CUSTODY EVALUATOR'S REPORT

At least 10 days before the contested child custody hearing, the court appointed evaluator must file with the court clerk and serve on the parents, or the parents' lawyers if they are represented by counsel, his or her confidential report.

The confidentiality of the report is a significant factor in the process and closely regulated by California statutes.

If the parent is represented by a lawyer, he or she cannot have a copy of the report. The rules specifically forbid it, absent a further order of the court. What about the self-represented parent? The general rule is a self-represented parent has a right to a copy of the report, absent an order of the court stating otherwise. Otherwise a self-represented parent would not be able to adequately represent him or herself at the hearing. There are exceptions to the rule. However, possession of that report does not authorize the parent to submit it to others and certainly not the children or witnesses to the proceeding. The parent who receives the report has the same duty to preserve its confidentiality as a lawyer does.

The California Family Code specifically states law enforcement officers, judicial officers, Court employees or a local family court facilitator as well as a lawyer appointed for the children are also entitled to the report.

If there is a violation of the confidentiality, the court has the discretion to monetarily sanction any person who made an unwarranted disclosure of the report.





### IS THE REPORT ADMISSIBLE EVIDENCE?

Yes, but with a slight catch. It is very common in contested proceedings for the lawyers to stipulate the report shall come into evidence without the necessity of the child custody evaluator testifying. While common, some thought should be given as to whether or not this is wise.

There are certain child custody matters that are so complex that stipulating to the admissibility of the report that neither the parents nor the lawyers have seen may complicate things more than just requiring the evaluator to show up and testify.

Even if the report is admitted into evidence, that does not in any way prevent either parent from subpoenaing and requiring the evaluator to come to court and be cross-examined on his or her recommendations and the basis for them. Of course, there is a cost with that and the parent whose lawyer is issuing the subpoena generally has to bear the burden of the cost. For most evaluators, this cost will be in the thousands.

### HOW IS THE CUSTODY EVALUATOR PAID?

Evaluators are paid professionals. One or both parents will be ordered to take the responsibility of payment. Typically, the court will look at all of the relevant circumstances in determining whether or not one or both parents should pay for the evaluator's services. Allocating the cost depends on each parent's need and ability to pay as well as the nature of the allegations (who is making the allegations, what evidence is there in support of it, etcetera).

Regardless of what the family court orders in advance, the court has the discretion to reallocate the costs of the evaluation. That means, at the end of the case or evaluation, the court can order one parent to reimburse the other parent, split it 50/50 or order one parent to pay for the entire cost of the evaluation.



# Appointing Minor's Counsel

# 8



# 8

## CHAPTER 8

### *Appointing Minor's Counsel*

#### HOW DOES THE COURT APPOINT A LAWYER FOR THE CHILDREN?

Back to the best interest standard, if the court determines a lawyer (traditionally called “minor’s counsel”) should be appointed for the child or children, California child custody statutes give the court the discretion to make that order.

We see such appointments in cases where the issues are not significant enough to get a court ordered evaluator involved but still need an investigation which includes an interview with the children, review of documents and any witnesses.

Distinguishing between minor’s counsel and a custody evaluator is important. A minor’s counsel is not really in a position to do a psychological assessment of the situation and give a recommendation to the court based on such analysis. The lawyer appointed for the child is more of an investigator of the facts to determine how serious the issues are and what, if any, changes need to take place to the status quo custody and visitation arrangement.

Factors that the family court takes into consideration include how contested or complex the issues are, what effect it is having on the children, and whether a lawyer appointed for the children could provide the court with the relevant information it needs to make decisions.

#### IS MINOR’S COUNSEL APPROPRIATE IN A CHILD PREFERENCE CASE?

Minor’s counsel is probably most often used in child preference cases. When a child desires to have his or her preference heard, minor’s counsel is often appointed to present to the family law judge the child’s wishes.

#### IS MINOR’S COUNSEL A GOOD IDEA IN ABUSE CASES?

There are varying opinions as to whether or not minor’s counsel is appropriate in physical, emotional or sexual abuse cases. The answer to this question largely depends on the individual facts of each case.

The more serious the abuse allegations are, the more a child custody evaluator (preferably an experienced psychologist) may be necessary. The seriousness of the abuse also includes how recent in time it is and how likely it is to be repeated, which requires an analysis of the parents’ history of abuse or neglect.



## THE ATTORNEY-CLIENT PRIVILEGE APPLIES TO CASES INVOLVING MINOR'S COUNSEL

Because minor's counsel has an attorney-client relationship with the child, all of the typical aspects of that relationship and the protections that go with it are included within the relationship. This includes attorney-client confidentiality. If the parent does not like what a minor's counsel has to say, that parent cannot call the child's lawyer as a witness in the case.

## HOW IS MINOR'S COUNSEL PAID?

How a minor's counsel is paid and which parent pays for it is within the discretion of the court and dependent on both the issues (allegations, need for minor's counsel, cooperation with him or her) as well as the needs and ability to pay of each parent. The Court also has the discretion to fix the compensation of minor's counsel so that it does not become an unreasonable financial burden on the parents.



# Court Ordered Counseling

# 9



# 9

## CHAPTER 9

### *Court Ordered Counseling*

#### CAN THE FAMILY LAW JUDGE ORDER A PARENT TO ATTEND COUNSELING?

So long as the court has the proper statutory reasons for doing so, the court can require one parent, both parents or one or both parents and the child to participate in counseling with the appropriate professional. California Family Code section 3190 addresses this issue and does limit the counseling to outpatient services.

#### **Family Code 3190 states:**

- (a) The court may require parents or any other party involved in a custody or visitation dispute, and the minor child, to participate in outpatient counseling with a licensed mental health professional, or through other community programs and services that provide appropriate counseling, including, but not limited to, mental health or substance abuse services, for not more than one year, provided that the program selected has counseling available for the designated period of time, if the court finds both of the following:
  - (1) The dispute between the parents, between the parent or parents and the child, between the parent or parents and another party seeking custody or visitation rights with the child, or between a party seeking custody or visitation rights and the child, poses a substantial danger to the best interest of the child.
  - (2) The counseling is in the best interest of the child.
- (b) In determining whether a dispute, as described in paragraph (1) of subdivision (a), poses a substantial danger to the best interest of the child, the court shall consider, in addition to any other factors the court determines relevant, any history of domestic violence, as defined in Section 6211, within the past five years between the parents, between the parent or parents and the child, between the parent or parents and another party seeking custody or visitation rights with the child, or between a party seeking custody or visitation rights and the child.



- (c) Subject to Section 3192, if the court finds that the financial burden created by the order for counseling does not otherwise jeopardize a party's other financial obligations, the court shall fix the cost and shall order the entire cost of the services to be borne by the parties in the proportions the court deems reasonable.
- (d) The court, in its finding, shall set forth reasons why it has found both of the following:
  - (1) The dispute poses a substantial danger to the best interest of the child and the counseling is in the best interest of the child.
  - (2) The financial burden created by the court order for counseling does not otherwise jeopardize a party's other financial obligations.
- (e) The court shall not order the parties to return to court upon the completion of counseling. Any party may file a new order to show cause or motion after counseling has been completed, and the court may again order counseling consistent with this chapter.

Thus, Family Code section 3190 requires the dispute between the parents pose a substantial danger to the child's best interest and for the court to deem the counseling order to be in the child's best interest. Per the code, the duration of this counseling may be up to a one year period of time and the cost of the counseling, including its allocation, is well within the court's discretion.

**Family Code 3191 states:**

The counseling pursuant to this chapter shall be specifically designed to facilitate communication between the parties regarding their minor child's best interest, to reduce conflict regarding custody or visitation, and to improve the quality of parenting skills of each parent.

The section is self-explanatory - communication, reduction of conflict and improving the quality of the parenting skills is the goal of such counseling orders.

**Family Code 3192 states:**

In a proceeding in which counseling is ordered pursuant to this chapter, where there has been a history of abuse by either parent against the child or by one parent against the other parent and a protective order as defined in Section 6218 is in effect, the court may order the parties to participate in counseling separately and at separate times. Each party shall bear the cost of his or her own counseling separately, unless good cause is shown for a different apportionment. The costs associated with a minor child participating in counseling shall be apportioned in accordance with Section 4062.

The goal of section 3192 is to separate an abused spouse from his or her abuser and to apportion the costs of such counseling. Otherwise, the counseling may not be productive toward the goals stated in section 3191.





# Medical and Mental Health Record Disclosure

# 10



# 10

## CHAPTER 10

### *Medical and Mental Health Record Disclosure*

#### DOES A PARENT HAVE A RIGHT TO PRIVACY IN HIS OR HER MEDICAL AND MENTAL HEALTH RECORDS IN A CONTESTED CHILD CUSTODY CASE?

The need for mental health and medical records sometimes collide with California child custody cases. If a parent's mental health is an issue in the case, the court has the discretion to order that parent to submit to a mental examination. This is fairly unique in family law cases and is really reserved for those situations where a formal child custody evaluation is not the better choice. The court-appointed psychologist will often conduct a psychological examination of both parents.

Similarly, one parent's medical or mental health records can become a contested issue in a child custody case. Here we run into a general rule and the exceptions to it.

As a general rule, a parent's medical condition does not allow the other parent the right to obtain the medical records through the discovery process and use them in the custody case. The discovery process is a process in which information is formally gathered in the divorce and/or child custody litigation. It includes, as one example, subpoenas to medical providers. There are however exceptions.

Let's assume for the sake of this discussion the parent who resists production of the medical records is the father. If the father has directly made his medical or mental health condition an issue in the case, then he is generally deemed to have waived the doctor-patient or psychotherapist-patient privilege that protects disclosure of the records. In other words, the father cannot on the one hand make his medical condition an issue and, under the other, claim a right of privacy to prevent production of those records.

Making that medical condition an issue has to be direct. It is not enough that, using our hypothetical, the mother has made it an issue and the father has responded to the mother's allegations.

#### *Definition:*

#### **Discovery Process**

is a process in which information is formally gathered in the divorce and/or child custody litigation.



## WAIVER OF PRIVACY RIGHTS OR PRIVILEGE

Like most privileges in California, the doctor-patient or psychiatric-patient privilege can be waived. Waiver can come in a variety of forms but one of the more common ones is by agreement.

Another form of waiver is having the other parent involved in the actual consultation or meeting with the doctor or therapist. So, for example, if the father in our hypothetical had the mother in the room when the discussion took place with the doctor about the father's condition, that may act as a waiver of the doctor – patient privilege.

Will that happen every time? No. The rules are not that black and white and the nature and extent of the mother's involvement in the communication and the necessity of her presence (versus convenience) would need to be explored.

## WHAT IF THE INFORMATION IS IMPORTANT TO EVALUATION OF THE CHILD CUSTODY CASE?

Another broad exception involves the need for the information actually outweighing the right to privacy. The court is mandated by California child custody statutes and case law to protect a child's best interest. If one parent has a medical or mental health condition that has an impact on the child's best interest, that impact and necessity for the information may outweigh any privacy interest that exists. This is very common in substance abuse cases including the abuse of prescription drugs for a known medical condition.

Even in such situations, the parent may still have a limited right of privacy in the manner the information is disclosed and to whom it is disclosed. For example, the judge can order only part of the records to be produced, the judge can review the records "in-camera," which means the judge will be the only one that sees the records before you she makes a decision, or the judge can issue protective orders that keep dissemination of the records to the parties and lawyers. The judge can place other limitations on their production and use.



# Substance Abuse

# 11



# 11

## CHAPTER 11

### *Substance Abuse*

Evidence one parent is habitually or continually using illegal drugs, abusing alcohol or abusing controlled substances such as prescription medication does factor into the court's decision-making process. Family Code 3111 does state, "before considering these allegations, the Court may first require independent corroboration, including, but not limited to, written reports from law enforcement agencies, Courts, probation departments, social welfare agencies, medical facilities, rehabilitation facilities, or other public agencies or nonprofit organizations providing drug and alcohol abuse services. As used in this subdivision, 'controlled substances' has the same meaning as defined in the California Uniform Controlled Substances Act, Division 10 (commencing with Section 11000) of the Health and Safety Code."

Notice the words are "may first require" and not "shall." The difference is the "may" gives the court discretion in this regard.

#### DRUG AND ALCOHOL TESTING

A common issue in child custody cases that involve substance abuse is the [alcohol or drug testing](#). Assuming the court has made a finding there is habitual, frequent or continual illegal use of alcohol or drugs by the parent, the family court may order drug and/or alcohol testing.

Despite this power, the court cannot order intrusive testing and is required to pick the least intrusive testing method available. The most common testing is urinalysis although such testing can be ineffective unless it is randomly administered with minimal notice (which can vary in hours depending on the order). While lawyers often argue for hair follicle testing, family courts are not yet able to order such a test absent an agreement of the parents.

If a parent tests positive, the parent does have a right to a hearing to contest the positive test. As a practical matter, so long as the testing is done by a licensed facility, a positive drug test or alcohol test typically means the Court will limit or otherwise modify custody and visitation to protect the minor child, even if it is for a temporary time.



Read more  
on alcohol  
and drug  
testing



Finally, the court's orders regarding drug and alcohol testing generally should not be perpetual (unmodifiable). This is a due process issue. Of course, the testing may go on for many years (so long as the child is a minor) if the substance abuse issue persists and there is sufficient evidence of that as well as the abuse's danger to the children or impact on the child's best interest.

Because the court must use the least intrusive methods, courts typically assign drug and alcohol abuse cases to forensic experts to conduct an evaluation and examination of the parent to determine the seriousness of the abuse as well as to obtain recommendations the court can take in consideration. The family court will generally give credibility to such reports because such forensic experts, who are sometimes medical doctors and often hold a Ph.D., are often more qualified to determine the nature and extent of substance abuse than a judge.



# Criminal Convictions

# 12



# 12

## CHAPTER 12

### *Criminal Convictions*

#### **A PARENT'S CONVICTION OF CERTAIN CRIMES AND ITS IMPACT ON CUSTODY AND VISITATION.**

Certain specific child abuse crimes, including but not limited to those that require registration as a sex offender, trigger a whole different standard pursuant to our state's statutes.

In such situations the court must not award custody or unsupervised visitation to a convicted parent unless the court makes a finding there is no significant risk to the child. California child custody laws are strict in such cases.

The laws regarding registration as a sex offender include those situations where the parent has residing in his or her house a registered sex offender as a result of a felony conviction and where the victim in that crime was a minor child, although not necessarily the minor child that is part of the case. California Family Code section 3030 states this felony conviction shall be actual evidence the child is at significant risk and a presumption is created that it is not in the child's best interest to have unsupervised contact with this individual.

#### **WHAT ABOUT OTHER CRIMES THAT ARE NOT CHILD RELATED?**

California courts should not turn a blind eye to a parent's criminal history and record. When a parent has a significant criminal history, including but not limited to one that involves violence or substance abuse, the family law judge has the discretion to take that into consideration when assessing the child's best interest and whether or not the parent with the criminal history should receive joint legal and physical custody, or significant time with the children. However, such a finding does require the parent pose a risk of harm to the child. It is not enough to point to a parent's history and based on that alone conclude or assume that the parent is a danger to the child. Like most issues, the end result does depend greatly on the individual facts of the case.





# Threatened or Actual Abduction of Children

# 13



# 13

## CHAPTER 13

### *Threatened or Actual Abduction of Children*

#### ABDUCTION AND FAMILY CODE SECTION 3048

**California Family Code section 3048** addresses the issue of abduction. The court must consider the following factors when evaluating the risk:

1. Has the parent previously taken the child away, or enticed, withheld or concealed the child in violation of the other parent's custody and visitation rights?
2. Does that parent lack strong ties to the State of California?
3. Does that parent have strong familial, emotional or cultural ties to another state or another country?
4. Does the parent have financial reasons to stay in California? Courts typically will look at the parent's employment, both the nature and extent of it, and whether the parent can work from anywhere, is financially independent, or whether that employment is or is not strongly connected to the State of California.
5. Has a parent engaged in activities that are consistent with planning a removal of the child. This can include selling a residence, terminating a lease, quitting a job, closing bank accounts or liquidating assets, applying for a passport, purchasing airline tickets or making other travel arrangements as well as related flight risk factors. It is rarely one factor or another. It is the culmination that matters.
6. Does that parent have a history of parental noncooperation, child abuse or the domestic violence?
7. Does a parent have a criminal record?

The focus of California Family Code 3048 and the cases that have interpreted it is to prevent the unlawful removal of children in violation of the other parent's rights. It does not apply to situations where victims of violence, including domestic violence, escape their abusers with the children. However, simply making an allegation of domestic violence and taking a child does not shield that parent from our rules. The threat of violence or the violence itself had to be provable.



## WHAT IS THE CALIFORNIA FAMILY LAW COURT'S DISCRETION WHEN MAKING ORDERS AGAINST CHILD ABDUCTION?

The Court may:

1. Order supervised visitation, which is typically professional as opposed to a family member or a friend,
2. Require a parent to post a bond as a means of financial deterrent,
3. Make orders that restrict the parent from removing the child from the State,
4. Place restrictions on travel,
5. Require the parent to surrender travel documents such as a passport or anything else that the Court deems is necessary,
6. Prevent a parent from applying for a new or replacement password,
7. Make orders that require the parent to notify a foreign consulate or embassy of the passport and travel restrictions,
8. Require the parent to register the California custody order in the other state (or country, if the country will do so and will comply with California's child custody laws),
9. Make orders that require the traveling parent to provide an itinerary, copies of round-trip airline tickets, a list of all the addresses and phone numbers that the child can be reached and even an open airline ticket for the parent who did not travel in the event the child is not returned in violation of the court order, and
10. The Court may also include in the child custody order provisions that facilitate using the Uniform Child Custody Jurisdiction and Enforcement Act (called the UCCJEA) as well as the Hague Convention on the Civil Aspects of International Child abduction.

Regarding the issue of the Hague Convention, that can get complex depending on whether the other country is a signatory to the Hague Convention. That is beyond the scope of this e-book.



# Choosing Your Advocate

# 14



# 14

## CHAPTER 14

### *Choosing Your Advocate*

We sincerely hope you enjoyed this e-book on California child custody laws. In this chapter, we will discuss several suggestions when you search for a California family law attorney. The following suggestions are especially helpful if you believe your child custody case may become contested or complex.

#### **Find an experienced family law attorney**

There are two types of experience. The first is actual family law experience as a practicing lawyer in California. The second is local experience in the county where the California case is pending. What experience is right for you of course depends on your case and also your budget. Highly skilled and experienced attorneys may have higher hourly rates and larger retainer deposit requirements.

One aspect of experience you should carefully consider is whether the attorney you hire only practices family law. If you find your attorney handles more than one area of law (criminal law, personal injury, immigration, etc.) along with family law, what does that potentially tell you about that lawyer's expertise in family law compared to an experienced attorney whose practice is limited solely to family law?

#### **Reputation**

Reputation is hard to gauge. Here are some tips:

Check the attorney's California State Bar profile to make sure he or she has an active license. Look for any indication of past discipline by the State Bar. Such information is usually stated on the online State Bar profile.

Researching an attorney on the internet may be helpful although an online persona may be misleading. Regardless, the testimonials / reviews an attorney or law firm receive may help you understand how that attorney is perceived by his or her former clients. But be careful here because it is not uncommon for an opposing party on a case (not the attorney's client) to write a negative review, pretending to be a client. The same can happen with a former disgruntled employee, etc. Major websites do not know who is writing the post and do not carefully screen it. The same can be said about positive reviews.



Ask the attorneys with whom you consult for references. Surely, a highly skilled attorney should be able to give you a few references of former clients who have had situations similar to yours and you can contact them. Of course, the attorney will need to get those clients' permission before doing so.

### Resources

Is your case complex? If so, carefully consider whether you should hire a family law firm with multiple lawyers and staff to represent you, versus a solo practitioner who may be just one or two attorneys and a secretary. A law firm's resources can go a long way in ensuring proper time is dedicated to your case.

### Fees

If you go cheap, you will likely get cheap. Lawyers whose hourly rates are very low and who take a small retainer deposit may lack the skill and experience you need. Do not let the fee issue be your sole, deciding factor. It should be one factor and not the only one. And while flat fee options make sense on certain limited scope family law cases, be very careful when a lawyer tells you he or she will handle your entire case from beginning to end for a flat fee. Find out what that involves and get it in writing.

Also, do not get yourself caught up in a "free" consultation. We know plenty of lawyers who offer a free consultation. Some of them are focused on one thing at consultation – selling the client to retain. Is that what you want? To be "sold" on the lawyer? Or are you there to get answers to questions, discuss strategy and figure out how you should proceed forward. Your consultation should be a strategy session that involves a real discussion about your facts, your issues, your concerns and needs and an honest dialogue about what the lawyer or law firm can do for you.

### Beware the cheerleader or barking suit

If your goal is for the attorney to tell you what you want to hear, then you have already gotten off to a bad start. Lawyers who become cheerleaders or overaggressive, barking suits do not do their clients any service. What you want is someone who will give you thoughtful and objective advice. Advice is not always good news or what you hoped to hear. A lawyer who tells you the strengths and weaknesses in your position and speaks with you about strategy and budget is a keeper.



## ABOUT THE AUTHOR

B. Robert Farzad is the president of Farzad Family Law, a professional corporation. Farzad Family Law is one of the larger family law firms in Orange County, California with offices in Santa Ana, Mission Viejo and Newport Beach.

Mr. Farzad has been licensed to practice law in the State of California since 1996. He is an experienced, respected and trusted family law attorney. His experience includes the handling of complex divorce and parentage matters including high conflict child custody cases.

Mr. Farzad is a published writer on divorce and a featured blogger on the Huffington Post. His writing has been featured in Orange County Lawyer Magazine and he has been interviewed by writers and radio hosts on his family law knowledge and experience.

B. Robert Farzad remains actively involved in handling family law matters at his law firm.

### Web

[farzadlaw.com](http://farzadlaw.com)



[robert@farzadlaw.com](mailto:robert@farzadlaw.com)



(714) 937-1193

(949) 616-3772

(877) 857-6500

## Farzad Family Law

A Professional Corporation

### SANTA ANA

1851 East 1st Street, #1150  
Santa Ana, California 92705  
(714) 937-1193

### MISSION VIEJO

27201 Puerta Real, #240  
Mission Viejo, California 92691  
(949) 616-3772

### NEWPORT BEACH

4400 MacArthur Blvd., #380  
Newport Beach, California 92660  
(949) 478-7107