California Child Custody Guidelines

Broadly, the California Family Code empowers the court, during the pendency of a marital action or at any time thereafter, to make an order for the custody of a child during minority *"that seems necessary or proper."* [CA Fam § 3022] However, in exercising their discretion under that broad umbrella, courts must be guided by several basic statutory principles. Chief among these policy considerations are the following two:

1. **Safety & Welfare**: The court's "primary concern" is to assure the child's health, safety and welfare. This codified policy is a companion to the Legislature's express finding and declaration that "the perpetration of child abuse or domestic violence in a household where a child resides is detrimental to the child." [Ca Fam § 3020(a) (emphasis added); see also Ca Fam § 3044]

2. "**Frequent and continuing contact" with both parents and shared parenting**: Further, an appropriate custody/visitation award must take into account the codified policy *"to assure that children have frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, or ended their relationship, and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy" . . .* except where the contact would not be in the child's best interest pursuant to Ca Fam § 3011 [Ca Fam § 3020(b) (emphasis added)]

Types Of Child Custody Arrangements

Sole Custody Orders

1. **Exclusive custody** ("legal" and "physical") to one parent: An exclusive custody order gives one parent primary physical control of the child, with the right to make decisions regarding the child's residence, health, education and welfare. The noncustodial parent has secondary visitation rights as ordered by the court [Ca Fam §§ 3006 & 3007]

2. **Sole PHYSICAL Custody**: A parent may be granted exclusive physical custody without exclusive legal custody. This means the child resides with and is supervised by one parent, subject to the other parent's visitation rights; but the custodial parent does not have sole decision-making power regarding other matters affecting the child. [Ca Fam § 3007]

3. **Sole LEGAL Custody**: Conversely, a parent may be awarded the exclusive right and responsibility to make decisions relating to the child's health, education and welfare; but unless exclusive physical custody is also granted, that parent does not have sole control over the child's residence and supervision. [Ca Fam § 3006]

Joint Custody Orders

1. **Pure Joint Custody**: Under a "pure" joint custody plan, neither parent has sole physical or legal custody; both have authority to control and supervise the child, and the child's physical presence is shared. [Ca Fam § 3002]

2. **Joint Legal Custody**: Joint legal custody means that both parents share the right and responsibility to make decisions regarding the child's health, education and welfare. [Ca Fam § 3003]

3. **Joint Physical Custody**: A joint physical custody award means each parent has "significant periods" of physical custody. Physical custody must be shared in such a way as to assure the child "frequent and continuing contact with both parents," subject to Ca Fam §§ 3011 and 3020; but that does not mean the child's time must be equally divided with each parent (i.e., one parent can still be the "primary caretaker"). [Ca Fam § 3004]

4. **Divided Or "Split" Custody**: These are terms of art not defined by the Code. In its commonsense usage, "divided" custody generally means each parent is custodian of the same child for different finite periods of time, with cross rights of visitation. A "split" custody arrangement refers to varying parenting plans for several children, where each parent has custody of at least one child of the marriage at all times (e.g., father awarded custody of son, mother awarded custody of daughter) and both have visitation rights as to the noncustodial child.

Nonparent Custody

Subject to strict statutory standards (Ca Fam § 3041), custody may be granted to a nonparent (who will have exclusive responsibility for the child's care and control); the parents, at most, will have reasonable rights to visitation.

Factors Considered By The California Court In Making Custody Awards In Contested Cases

The Code makes clear that custody and visitation determinations are to be made from the standpoint of the child's best interest (consistent with the § 3020 policies..

[Ca Fam §§ 3011, 3020, 3040, 3041] The equities, feelings and desires of the contesting parties are only a factor to the extent they affect the child's best interest.

In making the "best interest" determination, the court can consider any "relevant" factors. [Ca Fam § 3011] The court "must look to all the circumstances bearing on the best interest of the minor child"

However, among all the relevant factors, trial courts must consider the following (Ca Fam § 3011):

1. **Child's Health, Safety, And Welfare**: A "best interest" determination must take into account the child's health, safety and welfare. [Ca Fam § 3011(a); see also Ca Fam § 3020(a),(c)]. This is a paramount policy concern.

2. **History Of Physical Abuse**: The court must also consider any history of abuse by one parent or any other person seeking custody against (Ca Fam § 3011(b)) the child, the person seeking custody, or the current spouse.

As a prerequisite to consideration of allegations of physical abuse, the court may require "substantial independent corroboration" . . . including, but not limited to, written reports by law enforcement agencies, child protective services, etc.

3. Certain violent crimes restrict custody or unconditional visitation awards

A. Registered Sex Offender Or Child Abuse Conviction:

Neither custody nor unsupervised visitation may be awarded to a parent or any other person who either (i) is required to be registered as a sex offender under Ca Penal § 290 where the victim was a minor, or (ii) has been convicted of specified child abuse offenses (under Ca Penal §§ 273a, 273d or 647.6) . . . unless the court finds there is "no significant risk to the child" and states its reasons in writing or on the record. [Ca Fam § 3030(a)]

B. Child Conceived By Rape:

Without exception, no person convicted of rape pursuant to Ca Penal § 261 may be granted custody or visitation with respect to a child conceived by that act of rape. [Ca Fam § 3030(b)]

C. First Degree Murder Of The Other Parent:

Neither custody nor unsupervised visitation may be granted to a person convicted of first degree murder (Ca Penal § 189) of the child's other parent . . . unless the court finds there is no risk to the child's health, safety and welfare and states its reasons in writing or on the record. [Ca Fam § 3030(c)]

D. History Of Drug And Alcohol Abuse:

In determining the child's best interest, trial courts must also consider either parent's "habitual or continual illegal use of controlled substances" (as defined in Ca Hlth & S § 11000 et seq.) or "continual abuse of alcohol." [Ca Fam § 3011(d)]

Before considering allegations of a parent's drug or alcohol abuse, the court may require "independent corroboration"--such as written reports from law enforcement agencies, courts, probation departments, social welfare agencies, medical and rehabilitation facilities, or other organizations providing drug and alcohol abuse services. [Ca Fam § 3011(d)]

4. **Stability And Continuity Of Environment**: Although not reduced to express statutory terms, a significant component of the "best interest" assessment is the policy goal of protecting a stable custody arrangement. *"As we have repeatedly emphasized, the paramount need for continuity and stability in custody arrangements--and the harm that may result from disruption of established patterns of care and emotional bonds with the primary caretaker--weigh heavily in favor of maintaining ongoing custody arrangements."* [*Marriage of Burgess* (1996) 13 Cal.4th 25, 32-33, 51 Cal.Rptr.2d 444, 449-450 (emphasis added); see Burchard v. Garay (1986) 42 Cal.3d 531, 538, 229 Cal.Rptr. 800, 804-805]

5. **Separation Of Siblings**: California policy affords strong protection to sibling relationships. Absent compelling circumstances, such as extraordinary emotional, medical or educational need, an order separating siblings between custodial households ordinarily will be reversed as detrimental to the children's best interest. [*Marriage of Williams* (2001) 88 Cal.App.4th 808, 814-815, 105 Cal.Rptr.2d 923, 927-998]

6. **Child's Wishes**: The court must "consider" and give "due weight" to the wishes of children who are of "sufficient age and capacity to reason so as to form an intelligent preference as to custody." [Ca Fam § 3042(a); see also Ca Fam § 3030(c)(1)].

Note: this is, by no means, a complete listing of all of the factors the court may decide to take into consideration in making a custody award. The court has very

broad discretion to consider any evidence relevant to the "best interests of the child."

California Child Custody Procedure:

The parties may - and are encouraged to - enter into a written stipulation (agreement) on custody issues.

If the parties cannot agree, custody orders may be made at any time after the filing of an underlying divorce, paternity, or domestic violence action and may be modified at any time until the chilf(ren) turn eighteen. In contested cases, they are most commonly made:

1. At the time of the filing of the initial documents in a "Temporary Restraining Order"
2. Within a few weeks of the filing at a hearing on application for "Order To Show Cause"
3. At the time of trial

Modification Of California Child Custoey Orders:

Child custody orders may be modified at any time before they terminate as long as the party moving for the modification can show that there has been a change in circumstances affecting the welfare of the child(ren) since the last order.

Such changes in circumstances include (but are by no means limited to):

- Change in residence of one of the parents. (This may require a motion for a "move-away order")
- The desire of an older child to increase or decrease visitation.
- Evidence of abuse of a child.
- Alteration of the child(ren)'s school schedule