

First Supplement to Memorandum 92-60

Subject: Study F-1090 - Child Custody Issues (Inclusion of 1992
Legislation and Other Technical Changes)

Attached to this supplement is draft legislation necessary to add to the Family Code child custody provisions added by 1992 legislation. Sections 2 and 3 of Chapter 1136 of the Statutes of 1992 add Civil Code Sections 4612 and 7009, each containing the same provisions. These are repealed and consolidated in proposed Family Code Section 3031.

Two related changes are proposed. First, a section prohibiting custody and unsupervised visitation where a parent has been convicted under certain Penal Code provisions is moved. This puts these two provisions regarding custody and visitation in domestic violence situations next to each other. Second, duplicative language in Section 7604 is eliminated.

If the Commission approves these provisions, they will be integrated into the draft legislation attached to the main memorandum, before a tentative recommendation is circulated.

Respectfully submitted,

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RECOMMENDED LEGISLATION

Outline

Staff Note: The repeal of Civil Code Sections 4612 and 7009 and the addition of Family Code Section 3031 implement changes made by Sections 2 and 3 of Chapter 1336 of the Statutes of 1992. These sections and the related proposals contained here will be integrated into the draft legislation attached to the main memorandum, before circulating a tentative recommendation.

CIVIL CODE

§ 4612 (repealed). Custody or visitation order should not be inconsistent with domestic violence orders

§ 7009 (repealed). Custody or visitation order should not be inconsistent with domestic violence orders

FAMILY CODE

§ 3030 (added). Custody and visitation prohibited where parent convicted under certain Penal Code provisions

§ 3031 (added). Custody and visitation orders should not be inconsistent with domestic violence orders

§ 3044 (repealed). Parent convicted under Penal Code provisions

§ 7604 (technical amendment). Custody and visitation orders during pendency of proceeding

CIVIL CODE

Civ. Code § 4612 (repealed). Custody or visitation order should not be inconsistent with domestic violence orders

SEC. ____. Section 4612 of the Civil Code is repealed.

~~4612. In a proceeding concerning the custody of, or visitation with, a minor under this title, the court is encouraged to make a reasonable effort to ascertain whether or not any civil restraining orders or criminal protective orders are in effect which concern the parties or the minor. The court is encouraged not to make a custody or visitation order which is inconsistent with the civil restraining order or criminal protective order, unless the court makes all of the following findings:~~

~~(a) The custody or visitation order cannot be made consistent with the civil restraining order or criminal protective order.~~

~~(b) The custody or visitation order is in the best interest of the minor.~~

Comment. Section 4612 [as added by 1992 Cal. Stat. ch. 1336, § 2] is continued in Family Code Section [3031] without substantive change.

Civ. Code § 7009 (repealed). Custody or visitation order should not be inconsistent with domestic violence orders

SEC. ____. Section 7009 of the Civil Code is repealed.

~~7009. In a proceeding concerning the custody of, or visitation with, a minor under this part, the court is encouraged to make a reasonable effort to ascertain~~

~~whether or not any civil restraining orders or criminal protective orders are in effect which concern the parties or the minor. The court is encouraged not to make a custody or visitation order which is inconsistent with the civil restraining order or criminal protective order, unless the court makes all of the following findings:~~

~~(a) The custody or visitation order cannot be made consistent with the civil restraining order or criminal protective order.~~

~~(b) The custody or visitation order is in the best interest of the minor.~~

~~Comment. Section 7009 [as added by 1992 Cal. Stat. ch. 1336, § 3] is continued in Family Code Section [3031] without substantive change.~~

FAMILY CODE

Fam. Code § 3030 (added). Custody and unsupervised visitation prohibited where parent convicted under certain Penal Code provisions

SEC. _____. Section 3030 is added to the Family Code, to read:

3030. No parent shall be awarded custody of, or unsupervised visitation with, a child if the parent has been convicted under Section 273a, 273d, or 647.6 of the Penal Code unless the court finds that there is no significant risk to the child.

Comment. Section 3030 continues former Civil Code Section 4610 without substantive change. See also Sections 3100(b) (visitation limited to situations where third party present in case involving domestic violence), 3101 (limitation on stepparent or grandparent visitation in case involving domestic violence).

Interim Comment. Section 3030 continues Section 3044, but moves it to the general provisions chapter. The section is moved because it deals with both custody and visitation. This also allows it to be next to related Section 3031.

Fam. Code § 3031 (added). Custody and visitation orders should not be inconsistent with domestic violence orders

SEC. _____. Section 3031 is added to the Family Code, to read:

3031. The court is encouraged to make a reasonable effort to ascertain whether or not any civil restraining orders or criminal protective orders are in effect which concern the parties or the minor. The court is encouraged not to make a custody or visitation order which is inconsistent with the civil restraining order or criminal protective order, unless the court makes all of the following findings:

(a) The custody or visitation order cannot be made consistent with the civil restraining order or criminal protective order.

(b) The custody or visitation order is in the best interest of the minor.

Comment. Section 3031 continues former Civil Code Sections 4612 and 7009 [as added by 1992 Cal. Stat. ch. 1136, §§ 2-3] without substantive change. The former reference to "a proceeding concerning the custody of, or visitation with, a minor" has been omitted as unnecessary. See Section 3021 (scope of part). See also Section 3011 (factors in determining best interest of child).

Fam. Code § 3044 (repealed). Parent convicted under Penal Code provisions

SEC. _____. Section 3044 of the Family Code is repealed.

~~3044. No parent shall be awarded custody of, or unsupervised visitation with, a child if the parent has been convicted under Section 273a, 273d, or 647.6 of the Penal Code unless the court finds that there is no significant risk to the child.~~

Interim Comment. Section 3044 is continued in proposed Section 3030 without substantive change.

Fam. Code § 7604 (technical amendment). Custody and visitation orders during pendency of proceeding

SEC. ____ . Section 7604 of the Family Code is amended to read:

7604. (a) A court may order pendente lite relief, consisting of an award of custody or the grant of reasonable visitation rights pursuant to Part 2 (commencing with Section 3020) of Division 8, if the court finds both of the following:

(1) (a) Based on the tests authorized by Section 7501, a parent and child relationship exists pursuant to Section 7500.

(2) (b) The award of custody or the granting of visitation rights would be in the best interest of the child.

~~(b) In making an award authorizing visitation pursuant to this section, if a domestic violence prevention order has been directed to a parent, the court shall consider whether the best interest of the child requires that any visitation granted to that parent shall be limited to situations in which a third person, specified by the court, is present. The court shall include in its deliberations a consideration of the nature of the acts from which the parent was enjoined and the period of time that has elapsed since that order. A parent may submit the name of a person to the court that the parent deems suitable to be present during visitation.~~

Comment. Section 7604 continues the first paragraph of former Civil Code Section 7004.5 without substantive change. The references to former Civil Code Sections 4600 and 4601 have been omitted. This is not a substantive change. See Section 3021 (Part 2 of Division 8 applicable to Uniform Parentage Act action to determine custody or visitation) & Comment. There is no comparable provision in the Uniform Parentage Act (1973).

See also Sections [75] ("domestic violence prevention order" defined), 200 (jurisdiction in superior court), Section 3011 (factors considered in determining best interest of child), 3021 (Part 2 of Division 8 applicable to determination of custody in Uniform Parentage Act action), [3030] (custody and visitation prohibited where parent convicted under certain Penal Code provisions), [3031] (custody and visitation orders should not be inconsistent with domestic violence orders), 3100(b) (when visitation limited to situations where third party present), 3131 (action by district attorney where child taken or detained in violation of visitation order), 3160-3186 (mediation of custody or visitation issues); Code Civ. Proc. § 917.7 (order not automatically stayed by appeal).

Interim Comment. Section 7604 is amended to omit language duplicated in the custody division. This is not a substantive change, since the rule that is omitted is part of Part 2 (commencing with Section 3020) of Division 8 which is cross-referenced in the section. See Section 3100 (b) (when visitation limited to situations where third party present).

Staff Note. This version of Section 7604 supersedes the version in the original memorandum. The bracketed reference will need to be revised, if the Commission's tentative recommendation regarding the reorganization of the domestic violence provisions is approved.