

**SENATE JUDICIARY COMMITTEE**  
**Senator Thomas Umberg, Chair**  
**2023-2024 Regular Session**

AB 3072 (Petrie-Norris)  
Version: May 20, 2024  
Hearing Date: June 4, 2024  
Fiscal: No  
Urgency: No  
AWM

**SUBJECT**

Child custody: ex parte orders

**DIGEST**

This bill clarifies that a court, when determining whether there is a showing of immediate harm to the child warranting an ex parte custody order, should consider a parent's illegal access to firearms and ammunition, as defined; and clarifies that a court, when making an ex parte custody order, should consider whether the best interests of the child warrant suspending visitation or ordering supervised or virtual visitation with the parent whose conduct gave rise to the need for the ex parte order.

**EXECUTIVE SUMMARY**

Under current law, a court generally may not issue an order granting or modifying a child custody order on an ex parte basis, i.e., without giving both parents notice and an opportunity to be heard. This general rule is consistent with the Constitutional right to parent one's children. There is a narrow exception to the rule, however: the court may make an ex parte custody order when there has been a showing of immediate harm to the child, as defined, or if there is an immediate risk that the child will be removed from California. These narrow circumstances permit the court to take emergency action when the child's safety or security are at risk.

This bill clarifies that a court, when determining whether there has been a showing of immediate harm that warrants an ex parte custody order, to consider a parent's illegal access to firearms and ammunition. The bill defines "illegal access to firearms and ammunition" to include the possession, purchase, or receipt of a firearm in violation of state or federal law, various court orders, or conditions of probation or parole. The bill also provides that, when a court finds that the circumstances warrant issuing an ex parte custody order, the court should consider whether the best interest of the child requires supervised visitation with a parent, including virtual visitation. The author has agreed to nonsubstantive amendments to clarify the provisions setting forth the court's

consideration of whether, and under what circumstances, to award visitation with the parent whose conduct gave rise to the need for the ex parte order.

This bill is sponsored by the author and is supported by Advocates for Child Empowerment and Safety, the California Protective Parents Association, the Center for Judicial Excellence, the Legislative Coalition to Prevent Child Abuse, and the Sacramento Regional Family Justice Center. The Committee has not received timely opposition to this bill.

### **PROPOSED CHANGES TO THE LAW**

Existing law:

- 1) States that it is the public policy of this state to ensure that:
  - a) The health, safety, and welfare of children is the court's primary concern in determining the best interests of children when making any orders regarding the physical or legal custody or visitation of children;
  - b) Children have the right to be safe and free from abuse, because the perpetration of child abuse or domestic violence in a household where a child resides is detrimental to the health, safety, and welfare of the child; and
  - c) Children have frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, or ended their relationship, and parents are encouraged to share the rights and responsibilities of child rearing in order to effect this policy, except when the contact would not be in the best interests of the child, as provided. (Fam. Code, § 3020(a), (b).)
- 2) Provides that, when the policies set forth in 1a) and c) above are in conflict, a court's order regarding physical or legal custody or visitation must be made in a manner that ensures the health, safety, and welfare of the child and the safety of all family members. (Fam. Code, § 3020(c).)
- 3) Requires a court, when determining the best interest of the child in a proceeding to determine child custody and visitation rights, to consider all of the following and any other factors it finds relevant:
  - a) The health, safety, and welfare of the child.
  - b) A history of abuse by one parent or any other person seeking custody against a child to whom the parent is related or with whom the parent has a caretaking relationship, as specified; by the other parent; or by a parent or current spouse, of the parent, or a person with whom the parent has a dating or engagement relationship.
  - c) The nature and amount of contact with both parents.

- d) The habitual or continual illegal use of controlled substances and the habitual or continual abuse of alcohol or prescribed controlled substances, as specified. (Fam. Code, §§ 3011, 3021.)
- 4) Provides that, upon a finding by the court that a party seeking custody of a child has perpetrated domestic violence within the previous five years against the other party seeking custody of the child, against the child, or other specified individuals, there is a rebuttable presumption that an award of sole or joint physical or legal custody of a child to that party is detrimental to the best interest of the child. This presumption may be rebutted only by a preponderance of the evidence. (Fam. Code, § 3044(a).)
  - 5) Provides that, to overcome the presumption in 4), the court must be satisfied and find that the perpetrator of domestic violence has demonstrated that giving sole or joint legal or physical custody of the child to the perpetrator is in the best interest of the child, and that the following factors, on balance, support the legislative findings set forth in 1):
    - a) The perpetrator has successfully completed a batterer's program that meets the criteria outlined in section 1203.097 of the Penal Code.
    - b) The perpetrator has successfully completed a program of alcohol or drug abuse counseling, if the court determines that counseling is appropriate.
    - c) The perpetrator has successfully completed a parenting class, if the court determines the class to be appropriate.
    - d) The perpetrator is on probation or parole, and has or has not complied with the terms and conditions of probation or parole.
    - e) The perpetrator is restrained by a protective order or restraining order, and has or has not complied with its terms and conditions.
    - f) The perpetrator has committed further acts of domestic violence.
    - g) The court has determined that the perpetrator is a restrained person in possession or control of a firearm in violation of the Domestic Violence Prevention Act (DVPA) (Fam. Code, div. 10, §§ 6200 et seq.). (Fam. Code, § 3044(a), (b).)
  - 6) Provides that a person has "perpetrated domestic violence" for purposes of 5) when the person 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 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 the DVPA to protect the other party seeking custody of the child or to protect the child and the child's siblings. (Fam. Code, § 3044(c).)
  - 7) Requires a court, when a protective order has been directed to a parent pursuant to the DVPA or under section 136.2 of the Penal Code, to consider whether the best

interest of the child requires that visitation by that parent should be limited to supervised visitation or whether visitation should be suspended, limited, or denied.

- a) The court must consider, as part of its deliberation, the nature of the acts that led to the protective order, the period of time that has elapsed since that order, and whether the restrained party has committed further acts of abuse.
  - b) A parent may submit to the court the name of a person that the parent deems suitable to supervise visitation; however, the court is not required to order supervised visitation, and the submission of a name does not constitute a stipulation to supervised visitation. (Fam. Code, § 3100(b).)
- 8) Requires, where the court issues an order for visitation in a case in which domestic violence is alleged and an emergency protective order, protective order, or other restraining order has been issued, the visitation order to specify the time, day, place, and manner of the transfer of the child so as to limit the child's exposure to potential domestic conflict or violence, to ensure the safety of all family members, and to minimize the opportunity for abuse. (Fam. Code, § 3100(c).)
- 9) Provides that a court shall refrain from making an order granting or modifying a custody order on an ex parte basis unless there has been a showing of immediate harm to the child or immediate risk that the child will be removed from the State of California. "Immediate harm" includes, but is not limited to:
- a) Having a parent who has committed acts of domestic violence, where the court determines that the acts of domestic violence are of recent origin or are a part of a demonstrated and continuing pattern of acts of domestic violence.
  - b) Sexual abuse of the child, where the court determines that the acts of sexual abuse are of recent origin or are a part of a demonstrated and continuing pattern of acts of sexual abuse. (Fam. Code, § 3064.)

This bill:

- 1) Clarifies that a court, in determining whether there is a showing of immediate harm to a child for purposes of making an ex parte order granting or modifying a custody order, must consider a parent's illegal access to firearms and ammunition, including, but not limited to, whether a parent is prohibited from having firearms and ammunition.
- 2) Defines "illegal access to firearms and ammunition" to include the possession, purchase, or receipt of a firearm or ammunition in violation of state or federal law, a restraining order, a protective order, or an injunction, or a condition of probation or parole.
- 3) Requires a court that has found that circumstances warrant making an order granting or modifying a custody order on an ex parte basis to consider whether the best interest of the child requires that any visitation by that parent be suspended,

denied, or limited to situations in which a third person, specified by the court, is present, including virtual visitation.

### COMMENTS

#### 1. Author's comment

According to the author:

It is well known that the risk to victims during instances of domestic violence rises dramatically when there is a firearm present. In addition, during custody battles, children are put at enhanced risk when a parent has access to a firearm. There have been several recent high-profile cases where a child was murdered during an in-person court-ordered visitation.

Under existing law, California Family Code § 3064 restricts the court's ability to alter ex-parte custody orders unless there has been a showing of immediate harm to the child or immediate risk that the child will be removed from California. This restriction, however, does not require the court to consider a parent's illegal access to firearms. Furthermore, existing law also does not allow courts to consider safer alternatives to in-person contact with children during these situations.

AB 3072 will enhance the protections afforded to children during ex-parte custody orders by requiring that a court consider a parent's illegal access to firearms when determining if there is an immediate risk to the child. This will help prevent violence and keep children safe during custody battles.

#### 2. Child custody and visitation determinations

"Under California's statutory scheme governing child custody and visitation determinations, the overarching concern is the best interest of the child."<sup>1</sup> That scheme "allows the court and the family the widest discretion to choose a parenting plan that is in the best interest of the child."<sup>2</sup> When determining the best interest of a child, a court may consider any relevant factors, and must consider the following: the health, safety, and welfare of the child; any history of abuse or neglect by the party seeking custody; the nature and amount of contact with the parents; and substance abuse by a parent.<sup>3</sup> The analysis is always informed by the fact that the right to participate in the raising of

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<sup>1</sup> *Montenegro v. Diaz* (2001) 26 Cal.4th 249, 255; see §§ 3011, 3020, 3040 & 3041.

<sup>2</sup> Fam. Code, § 3040.

<sup>3</sup> *Id.*, §§ 3011, 3020.

one's child is a protected constitutional right that cannot be cast aside without good cause.<sup>4</sup>

In the past several years, several measures enacted by the Legislature have been focused on "requir[ing] family courts to give due weight to the issue of domestic violence."<sup>5</sup> Intimate partner violence and child abuse are closely correlated and present a clear threat to the safety of a child: "several studies show that [domestic violence and intimate partner violence] offenders kill their partners' children to retaliate against them, often after separation or threat of separation."<sup>6</sup> The goal of the State's legislation, therefore, has been to require courts to take domestic violence seriously as a risk to a child's safety and escape the status quo wherein " 'it has been too easy for courts to ignore evidence of domestic abuse or assume that it will not happen again.' "<sup>7</sup> Accordingly, while California law still establishes joint custody as the preferred custodial framework,<sup>8</sup> when a parent has been accused of or found to have committed domestic violence or abuse, courts must take extra precautions in order to ensure that the child's safety and welfare are paramount.<sup>9</sup>

Another factor that is increasingly, and depressingly, relevant in child custody determinations is a parent's illegal access to firearms, particularly when the parent is in possession of a firearm in violation of a protective order or restraining order. An abuser's access to firearms dramatically increases the danger of further abuse or death: a victim or survivor of intimate partner violence is five times more likely to die when an abusive partner has access to a gun;<sup>10</sup> nearly two-thirds of child fatalities occurring in a domestic violence setting are committed with firearms; and of firearm homicides of children under 13 years of age, 85 percent occur in the home and nearly one-third are related to intimate partner violence.<sup>11</sup>

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<sup>4</sup> E.g., *Troxel v. Granville* (2000) 530 U.S. 57, 65-66.

<sup>5</sup> *Jaime G. v. H.L.* (2018) 25 Cal.App.5th 794, 806.

<sup>6</sup> Ellyson, et al., *Threats, Violence, and Weapon Use Against Children in Domestic Violence Protection Orders*, *Pediatrics* (2024) 153 (3), p. 2.

<sup>7</sup> *Ibid.* Even with the mandatory presumption that joint or sole custody should not be awarded to a parent who has been found to have committed domestic violence or child abuse against specified persons in the prior five years, trial courts have repeatedly failed to apply the presumption or explain its order granting custody to an abuser using the mandatory factors set forth in statute. (E.g., *City and County of San Francisco v. H.H.* (2022) 76 Cal.App.5th 531, 544; *Celia S. v. Hugo H.* (2016) 3 Cal.App.5th 655, 664; *In re Marriage of Fajota* (2014) 230 Cal.App.4th 1487, 1499-1500.)

<sup>8</sup> Fam. Code, § 3040.

<sup>9</sup> *Id.*, §§ 3044, 3100.

<sup>10</sup> Tobin-Tyler, *Intimate Partner Violence, Firearm Injuries and Homicides: A Health Justice Approach to Two Intersecting Public Health Crises*, *J. Law. Med. Ethics* (2023 Spring) 51(1) 64-76, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10209983/> (link current as of May 30, 2024).

<sup>11</sup> Ellyson, *supra*, at p. 2.

3. This bill clarifies the circumstances under which a court may issue, and the factors a court should consider when issuing, an ex parte custody order

This bill is intended to provide clarity to the courts with respect to ex parte custody orders. First, the bill expressly states that, when determining whether there is a risk of immediate harm to the child that warrants the issuance of an ex parte order, the court should consider whether a parent has illegal access to firearms and ammunition. The bill defines “illegal access to firearms and ammunition” to include the possession, purchase, or receipt of a firearm or ammunition in violation of state or federal law, a restraining order, a protective order, an injunction, or a condition of probation or parole. This provision makes it clear that the court’s consideration should reach only circumstances where the parent is already prohibited from possessing a firearm, thereby avoiding any Second Amendment issues.<sup>12</sup>

Second, the bill clarifies that, when a court determines that an ex parte custody order is warranted due to a risk of immediate harm to the child or immediate risk that the child will be removed from the state, the court shall consider whether the best interest of the child warrants suspending or limiting visitation with the parent whose actions gave rise to the risk of harm or removal. The bill further specifies that the court should consider whether the best interest of the child warrants visitation with that parent under supervised conditions or through virtual visitation, which is visitation through audiovisual means rather than in person. While a court is always charged with determining the type of custody or visitation that is in the child’s best interest, these provisions are intended to make clear that, when a parent’s actions are so severe as to warrant an ex parte custody order, the court should seriously consider whether, and in what setting, continued visitation with that parent is in the child’s best interest. These additions bring the court’s determination regarding visitation in an ex parte order into conformity with the court’s determination regarding visitation with a parent who is the subject of a protective order; given that both circumstances involve a high degree of risk to the child, the parity appears reasonable.

4. Amendments

The author has agreed to nonsubstantive amendments to Section 2 of the bill to clarify the court’s obligations when considering whether to allow visitation, and what form of visitation is appropriate, in an ex parte custody order. As currently in print, the bill’s changes to Family Code section 3100 create some confusion with the existing subject

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<sup>12</sup> In November 2023, the United States Supreme Court heard oral argument in *United States v. Rahimi*. (See *United States v. Rahimi*, Supreme Court Docket No. 22-915.) The case arises from an opinion of the United States Court of Appeals for the Fifth Circuit holding that a federal law prohibiting a person subject to a domestic violence restraining order from possessing a firearm violated the Second Amendment of the United States Constitution. (See *United States v. Rahimi* (5th Cir. 2023) 61 F.4th 443, 448.) The outcome in *Rahimi* could implicate California’s ability to prohibit the subject of a restraining order or protective order from possessing a firearm, but for the time being, the State retains that authority.

matter and create ambiguities with the statute's current reference to "the restrained party." The amendments agreed to by the author will create a new subdivision for the court's grant of visitation, if any, in circumstances when the court has determined that an ex parte custody order is appropriate; these provisions will mirror the existing provisions in subdivision (a) of Family Code section 3100, but with specific references to the considerations at issue in the ex parte context.

5. Arguments in support

According to the California Protective Parents Association:

This important bill will help ensure the safety and well-being of children by requiring family court judges to consider alternatives to in-person contact, including virtual visitation, during emergency hearings where there is a plausible showing of immediate harm to the child. In cases of escalating parental violence, an immediate temporary no-contact order can be crucial in protecting a child from harm...

Importantly, AB 3072 also requires that judges consider a parent's access to illegal firearms and ammunition when assessing the level of potential danger/lethality to the child. This consideration is vital to safeguarding children, particularly in those cases where a parent who may have visitation rights to a child is prohibited from possessing firearms under a prior court determination.

**SUPPORT**

Advocates for Child Empowerment and Safety  
California Protective Parents Association  
Center for Judicial Excellence  
Legislative Coalition to Prevent Child Abuse  
Sacramento Regional Family Justice Center

**OPPOSITION**

None known

**RELATED LEGISLATION**

Pending Legislation:

SB 899 (Skinner, 2024) clarifies that the additional factors a court should consider in determining whether to award sole custody of a child to a person with a history of domestic violence includes whether the person is a restrained person in possession or



control of a firearm or ammunition in violation of any civil protective order, as provided. SB 899 is pending in the Assembly.

AB 2759 (Petrie-Norris, 2024) modifies the process by which a court may make an exemption to the DVPA firearm relinquishment requirement. AB 2759 is pending before the Senate Public Safety Committee.

Prior Legislation:

SB 599 (Caballero, Ch. 493, Stats. 2023) clarified and strengthened provisions requiring a family court to take into account a parent's acts of domestic violence or child abuse or the issuance of a protective order against a parent when making orders for custody or visitation, as well as provisions requiring the court to take into account the fact that a party is staying in a domestic violence shelter or other confidential location when issuing orders for the time, day, place, and manner of visitation or transfer of a child.

SB 1265 (Rubio, 2022) would have created a procedure whereby, if a person who is the subject of a restraining order and also has court-ordered custody or visitation with children is arrested for or charged with a crime involving assaultive conduct or use of a weapon on another person, the protected party may file for an ex parte modification to the visitation or custody order. SB 1265 died in the Assembly Judiciary Committee.

SB 654 (Min, Ch. 768, Stats. 2021) required a court that grants unsupervised visitation to parents with histories of abuse, neglect, or substance abuse to state its reasons for doing so in writing or on the record, and provides that if a child addresses a court regarding custody or visitation, they generally must be permitted to do so without the parties being present.

SB 320 (Eggman, Ch. 685, Stats. 2021) codified Rules of Court related to the relinquishment of a firearm by a person subject to a civil domestic violence restraining order and requires the courts to notify law enforcement and the county prosecutor's office when there has been a violation of a firearm relinquishment order.

AB 2044 (Stone, Ch. 941, Stats. 2018) strengthened the presumption against custody for perpetrators of domestic violence by extending the presumption to individuals whom a court found to have perpetrated domestic violence within the previous five years against specified individuals.

**PRIOR VOTES:**

Assembly Floor (Ayes 74, Noes 0)  
Assembly Judiciary Committee (Ayes 12, Noes 0)

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