

Good Concept, Bad Outcome: New Law Allows Children to Testify About Custody Preferences

By Mitchell A. Jacobs and Navid Moshtael

The revised Family Code Section 3042, which went into effect on Jan. 1, 2011, directs courts to allow a child age 14 or over to testify about his or her custody preferences unless the court determines that doing so is not in the child's best interest. To the extent the court determines that it is not in the child's best interest to testify, the new law requires the court to make findings on the record in connection with the court's decision not to allow the testimony. It also requires the court to provide an alternate means of obtaining information regarding the child's preferences.

Under the new law, not only is the judge required to determine whether the child wishes to address the court, but minor's counsel, an evaluator, investigators, or mediators who provide custody recommendations to the court are also required to advise the court whether the child wishes to do so.

According to its author, Fiona Ma, prior to being revised, Family Code Section 3042 was not sufficient to address children's custody preferences because it was consistently barring children over a certain age from testifying despite such children having the capacity to express their custody preferences. To the extent a judge decides to listen to the preferences of a child, those preferences were communicated to the court by way of third party evaluators or minor's counsel, and those preferences were not given much weight.

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So what's so bad about asking a child the simple question of which parent they would rather live with (if the child is of a certain age and maturity level)? This is a good concept. On balance, however, the new law will do more harm than good.

In application, the new law will result in parents asking a child to answer questions that are beyond "do you want to live with me or your mother?" Jamie will be asked about what happened at her mother's house, at her father's house, with their girlfriend or boyfriend, or new spouse. Under the pretext of inquiring into the child's custody preferences, parents will attempt to question the child about what underlies the child's preferences and attempt to use the child's testimony to get into alleged conduct and behavior of the other side.

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going to achieve that objective. If parents are so affected by the emotions accompanying custody proceedings that they do not hesitate using their children as weapons to "win" custody, how can we expect their children not to be affected by these emotions and to exhibit composure and objectiveness when testifying about custody preferences?

In application, the new law invites a parent to pressure and alienate his or her child such that the child expresses a preference in favor of that parent. The idea of parental alienation is not new. What is expected is a significant increase of this type of behavior given the revised Section 3042. The new law will have the effect of encouraging behaviors that promote manipulating discussions with children about which parent they should prefer. Few parents will likely resist the challenge of not overstating the child's supposed desires in their own favor.

Also, the new law has the likely effect of favoring mothers over fathers. Statistically, mothers are the primary caretakers of children, and by virtue of being the primary caretakers, have greater control of children. To the extent the mother has been the primary caretaker, it is expected, therefore, that when asked to express custody preferences, the children will likely express a preference towards her.

According to Ma, rather than requiring a child to express his or her custody preferences, the new law seeks to furnish children a better avenue to participate in custody proceedings and express their custody preferences. Accordingly, the new law directs the Judicial Council of California to promulgate standards, guidelines, rules and procedures for the examination of children under the new law, and to suggest alternate and less intrusive methods for obtaining the information about preferences beyond directly questioning them in court.

Pending the Judicial Council promulgating standards, guidelines, rules and procedures in connection with this new law and as directed by the Legislature, it is anticipated that family law judges will seek to avoid having the child testify, struggling to state on the record the basis for concluding that it is not in the best interest of the child to testify. Judges will likely engage in a balancing test that considers the following: the court's obligation to consider the child's expressed wishes; the supposed desire to express those wishes with the need to protect the child from perceived harm from the act and consequences of testifying; and the probative value of the child testifying.

To the extent a child is 14 years or older, a family law litigator should consider the following in requesting or defending a request for the child to testify:

What are the benefits and risk associated with the child being permitted to testify regarding custody preferences?

Before determining whether a child should be permitted to testify, will the court require additional outside assistance/information?

Will determining whether a child should testify require an evidentiary hearing?

Will there be a requirement in connection with when in the proceedings a parent can demand that the child state his or her preference? Will a par-

ent be allowed to demand that the child state his or her preference after a child custody evaluator makes recommendations regarding custody?

Will each judge be given flexibility to determine how and what rules apply in connection with determining child testimony in connection with the new law or will all counties and departments be required to follow the same rules?

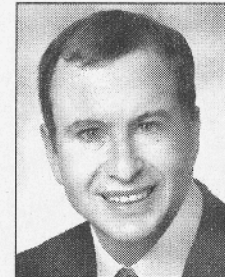
If allowed to testify, will the child testify in open court or in the judge's chambers?

If allowed to testify, who will be allowed to question the child in addition to the judge? The parents? The parent's attorneys?

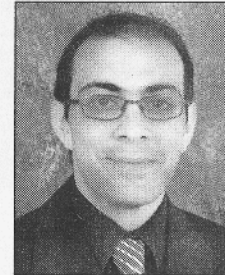
If allowed to testify, will cross examination be allowed? If no cross examination is allowed, how are we to determine the credibility and basis of the child's testimony?

If allowed to testify, to what extent is it appropriate to limit the testimony to a statement of preference as opposed to allowing additional questions regarding the underlying reasons for the stated preference?

Time will tell if this new law works in the best interest of the children or if parents will abuse it and use it to fuel custody disputes. Ultimately, it seems most judges, believing that allowing children to testify will do more harm than help, will reluctantly apply the statute and figure out reasons they can articulate why not to allow the testimony. Nevertheless, to the extent a child is 14 years or older, the chance of having that child testify under the new law is certainly greater than under the old law.



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