

Frequently Asked Questions for Courts on Children's Participation in Family Law Matters

This set of frequently asked questions is designed to provide information about implementation of California Rules of Court, rule 5.250 (effective January 1, 2012) and changes to Family Code section 3042 made as a result of AB 1050 (effective January 1, 2011). Recent policy changes in this area grew out of concerns that children's input in family law matters was either not being considered by courts or was only being presented through third party professionals such as minor's counsel or child custody mediators and evaluators. While the law still allows for judicial discretion in taking testimony from minors in these matters, the changes reflect an increased interest in ensuring that this issue is handled on a case-by-case basis given the diverse set of family law cases involving children.

1. Are there ways for children to participate in family law cases without testifying?

Yes. This FAQ views Family Code section 3042 and rule 5.250 as addressing situations in which a child may want to express a preference either through testimony or some other means such as being interviewed by a family court services professional (not as a percipient witness). While testifying in some instances may be appropriate, both the rule and the statute provide for judicial discretion in determining whether to hear such testimony, and provide alternatives methods (other than addressing the court through testimony) for receiving input. Given the complexity of some of these cases, it is crucial that these decisions be made on a case-by-case basis.

It is important to inform families that there are a variety of ways for children to participate in family law cases beyond testifying. Instead of testifying, depending on a child's age, developmental needs, and the specific issues, some children or young adults may be involved in the child custody mediation/recommending counseling process or may learn about the court process through an orientation or participation in a child-focused program.

Families may be interested in looking at *What's Happening in Court?* a resource for children going to court or involved in court cases: <http://www.courts.ca.gov/10408.htm> (also available in Spanish). Additionally, this website, <http://familieschange.ca/>, while not specific for California, provides information on divorce for children and teens and may be a helpful place for families to get information and for children to learn more about the process. This site, www.kidsbc.ca, enables children to create an avatar and walk through "Changeville" to learn more about families going through similar processes. Local courts may have other resources available through self-help centers or family court services. Information on the topic for the public is available on the statewide judicial branch website here: <http://www.courts.ca.gov/selfhelp-custody.htm>

If the court precludes calling a child who wants to testify, the court might receive input from the child through the child custody recommending counseling process, or the involvement of a court-appointed child custody evaluator or minor's counsel. Rule 5.250 (http://www.courtinfo.ca.gov/cms/rules/index.cfm?title=five&linkid=rule5_250) provides information on this as well, including the importance of the court considering whether or not hearing directly from the child may be helpful or harmful to the child and the case.

2. Isn't having children testify in child custody cases harmful to children?

While there is limited research in the U.S. on children's participation in family law child custody proceedings, there is developing evidence that many children actually benefit from being provided with the opportunity to participate in some way in family law proceedings (see <http://aja.ncsc.dni.us/courtrv/cr44-1/CR44-1-2Weisz.pdf> to read American Judges Association Court Review: The Journal of the American Judges Association University of Nebraska - Lincoln Year 2007 Court Review: Volume 44, Issue 1/2 "Children and Procedural Justice," Victoria Weisz, Twila Wingrovey, April Faith-Slakerz, citing a 2007 study noting that, "Despite some reports of negative consequences, there was almost universal opinion by these young adults who had experienced parental divorce as children that children should be involved in custody decisions.").

It is important to consider that children of different ages and developmental stages may have very different experiences with testifying and expectations of the court process. In recognition of current practice in this area suggesting that children's experience with testifying is related to how well prepared they are and how the testimony is handled, CRC 5.250 provides guidance for judges taking children's testimony and suggests that considering how the questions will be asked, who will be present, and where the testimony will be given is important. The court's consideration as to whether minor's counsel may be appointed to assist and whether an orientation to the court room and procedures might be provided can also be helpful.

For more information and examples of court orientations for children and youth testifying, see:

1. Sexual Abuse of Children Volume 4 Number 2 Summer/Fall 1994 (<http://futureofchildren.org/publications/journals/archive.xml>), reviewing studies in juvenile and information on sexual abuse cases in family law and noting: "Although testifying is difficult for most children, the difficulty should not be exaggerated. Children are strong and resilient, and most of them cope with testifying and move on with their lives. Indeed, with proper preparation and support, some children are empowered by testifying. Runyan and his colleagues found that, for many children, "the opportunity to testify in juvenile court may exert a protective effect on the child."

2. Court orientation video for kids from Maricopa County, Arizona; focusing on criminal matters but much of it may be useful in other case types as well:
<http://youtube/EswF5p41Sfs>
3. Information about testifying and preparing for court (British Columbia):
www.courtprep.ca www.courtchoices.ca

3. **Must minor's counsel be appointed in these cases?**

No - there is no requirement that minor's counsel be appointed. However, in some cases, having an attorney for the child may be helpful in talking with the child about how he or she might participate in the process, explaining how testifying will work, and assisting in the court by presenting relevant information as part of the process. In other situations, a child may benefit from meeting with a non-lawyer professional such as a family court services professional who can explain the mandatory child custody mediation process.

4. **How might minor's counsel present information to the court about a child's interest in testifying?**

Minor's counsel may provide information to the court by providing the minor's comments as an offer of proof, in the same way attorneys for parties might provide information to the court. If there are concerns regarding the accuracy of the information, the court can consider how to best address the issue.

5. **If a child does want to testify, is the court required to hear the testimony?**

No; it is important that courts consider this issue on a case-by-case basis. No matter the age of the child, the court retains its ability to consider the best interest of the child. Family Code section 3042 states (in part; emphasis added):

All children: (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.

14 and older: (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.**

14 and younger: (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.**

6. If a judge finds it is not in a child’s best interest to testify, what is required?

Rule 5.250 and FC section 3042 both require that “If the court precludes the calling of any child as a witness, **the court shall provide alternative means of obtaining input from the child and other information regarding the child’s preferences.**” Rule 5.250 provides guidance as to what types of alternatives might be appropriate in these situations.

For children under 14 wishing to testify, no finding is required if the court decides not to hear directly from the child, but for those 14 and older, Family Code section 3042 (c) states: **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.**

7. How does a professional (child custody recommending counselor, evaluator, or minor’s counsel) or party inform the court that a child wants to testify?

A child custody recommending counselor (CCRC) may provide recommendations regarding custody and visitation to the court if those recommendations have been provided in writing to the parties and their attorneys prior to a hearing. Because a CCRC is required to inform the court if they know a child wishes to testify, that information might be contained in the written report. Similarly, a child custody evaluator or investigator could report information about a child’s interest in addressing the court in their report to the court.

8. Is having a child speak with a mediator or child custody recommending counselor the same as having a child speak directly to the judicial officer?

For some children, their interest in addressing the court may be satisfied by being given the opportunity to speak with a court-appointed or connected professional, however, for others, testifying and letting the judge hear from them directly is of great importance.

Amendments to Family Code section 3042 stemmed in large part from concerns that too many children who wanted to speak directly to the judge were not being given the opportunity to testify and were having their input filtered through third-party professionals. If the court is aware that a child wishes to address the court, Family Code section 3042 and CRC 5.250 provide guidance as to how to proceed if 1) the court will take testimony or 2) if the court precludes a child from addressing the court. There are specific requirements in CRC 5.250 for a child addressing the court (providing testimony), including that it be done on the record or in the presence of the parties. There are separate and different requirements for mediators and child custody recommending counselors meeting with children (see CRC 5.250(e)). It is important that this issue be handled on a case-by-case basis.