

A Child's Testimony and the Law

The Texas Family Code provides for the child to have a voice in the Courtroom. The "voice" appears in many forms and in many places in the Texas Family Code.

Texas Family Code Section 153.008 allows a child to file his/her preference with the Court, if the child is 12 years of age or older. This statute infers that the child's preference is binding if the Court approves the designation. However, the statute is absent any coercive language. Many argue that the age of 12 is too young or too immature to understand the impact of a preference. "12" is not a magical number. The statute also does not state that the Court must make a determination upon the executed preference.

Although one can view the filing of a preference as a "voice" of the child, many litigants view the filing as a starting place, just a request of the child. The same child who may sign a preference for one parent having the right to determine he said primary residence, may also prefer to live with the other parent. The right to determine the primary residence of the child is not necessarily the right to have primary physical possession – or is it?

The code continually strives to be gender neutral and avoid the use of the term: physical custody. The term "primary physical custody" is not contained in the statute, nor is there any language stating where the child lives or resides. Each parent gets possession for a certain period of time. Yet, no where does the code state "I live with mom/dad."

Current law also states that a child may be a witness. The Code makes certain that family law will be conducted as other civil cases. Texas Family Code Section 104.002 gives specific rules for admission of a statement of a child who is under 12 years of age, and in cases that involve abuse. The idea is that the statement of the child will be pre-recorded and not simply a deposition. The statute is designated to give some comfort to the child in an atmosphere that may allow that abused child to feel safe. It is clear that 104.002 is designed for cases dealing with abuse only, as it has "exceptions" to what would otherwise be testimony under simple cross examination. The statute applies to children who are under the age of twelve years, with the idea that the statements are not elicited for purpose of establishing a preference, but for the purpose of establishing fact.

Section 153.009 allows an in chamber interview with the child. In a non-jury trial or at a hearing, on the application of a party, the amicus attorney or the attorney ad litem for the child, the court SHALL interview in chambers a child 12 years of age or older and MAY interview in chambers a child under 12 years of age to determine the child's wishes as to conservatorship or as to the person who shall have the exclusive right to determine the child's primary residence. The court may also interview a child in chambers on the court's own motion for a purpose specified by this subsection.

In a non-jury trial or at a hearing on the application of a party, the amicus attorney, or the attorney ad litem for the child or on the court's own motion, the court may interview the child in chambers to determine the child's wishes as to possession, access or any other issue in the suit affecting the parent-child relationship. Interviewing the child does not diminish the discretion of the court in determining the best interest of the child. In a jury trial, the court may not interview the child in chambers regarding an issue on which a party is entitled to a jury verdict. In any trial or hearing, the court may permit the attorney for a party, the amicus attorney, the guardian ad litem for the child, or the attorney ad litem for the child to be present at the interview. On the motion of a party, the amicus attorney, or the attorney ad litem for the child, or on the court's own motion, the court shall cause a record of the interview to be made with the child is 12 years of age or older. A record of the interview shall be part of the record in the case.

Under current law, the interview of a child in chambers is limited to a non-jury case and does not have any place in a jury trial. However, the statute is clear that the interview can lead to much more information for the Court than simply questioning the child's wishes as to conservatorship. There is very little case law to guide the practitioner on this point.

There is nothing in the Family Code that precludes a child from testifying in a deposition. The use of deposition testimony may be the best approach to obtaining a child's testimony in a jury trial. The parties may even agree to take the deposition at a place other than the law office, allowing a less hostile environment.

The use of pictures and family videos is another way to get a child's voice heard.