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## California Says a Child's Wishes Must Be Considered in Custody Cases

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When parents get divorced and can't agree who gets the kids, it's up to a judge to make the ultimate decision. A new California law attempts to ensure that the child's preference is heard in such cases, if the child wants to speak.

- **Children over 14 now have right to testify in custody hearings**
- **Experts warn of stresses inherent in child testimony**
- **Most states leave child input to judge's discretion**

### A Pitch for Uniformity

**Children over the age of 14 must be allowed to testify in custody proceedings** if they want to in California as long as a judge doesn't rule it contrary to their interest, according to a [law enacted on January 1](#) this year. Children under 14 can testify at the court's discretion, and when barred from testifying children must be given an alternate way to make their preference heard.

The new law is the result of a [state Supreme Court ruling from 2007](#), which struck down local Contra Costa County laws that allowed only written testimony in family law cases, and barred cross examination except in unusual circumstances. Following the ruling, the court formed a task force to conduct a two-year review of how litigants were treated in family law cases statewide. Among other findings, the [final report](#) found that methods for interviewing children to determine their preference were inconsistent and often ineffective.

Attorney Peter Walzer



**"One of the complaints was that children weren't being heard in the court system,"** says Los Angeles-area family law attorney [Peter Walzer](#). "Some courts would never hear children, others would always hear children. There was no uniformity."

The new law is an attempt to address the disparities and provide an assurance that the child gets a chance to speak. If a child doesn't want to testify or is barred by a judge, there are a variety of other ways to state preference. "They can go through a mediator, a special evaluation, an interview from court personnel or custody evaluations," Walzer explains. Evaluations must now be done in writing, contrary to previous practice where the evaluator could talk to a child, then come in and provide oral testimony to the court.

## Pros and Cons

The biggest benefit of the new law is it ensures a child's voice will be heard, which wasn't always happening in the old patchwork system. Of course, even that comes with caveats. "I find preference is subject to child's whims," Walzer says. "They may love one parent one time, then hate you the next day because you didn't give them what they want." A child might also advocate to live with a more permissive parent, as opposed to one who sets rules and limits. However, **in no case is a child's preference binding—the judge must consider all the evidence and make a ruling in the best interest of the child.**

Testimony in court also brings stresses that a child might well avoid, most saliently, the need to publicly and officially take sides in an often-bitter divorce. "Most court jurisdictions make strong efforts to avoid testimony by children in court, believing that this asks children to choose one parent over the other," [states an article written](#) by the Committee on Psychosocial Aspects of Child and Family Health for the American Academy of Pediatrics. "Generally, children will not be asked to testify in a divorce proceeding except those that are hotly contested."



## State by State

Laws vary according to state, but most leave it up to the judge to decide when and how a child's preference should be stated:

- "In **Florida** there is no clear cut answer to this question," writes attorney [Mindy Lasley](#) on her [law blog](#). "Judges have different opinions about whether children should testify. Even if a child was 17 years old a judge wouldn't necessarily allow him/her to testify. The rationale behind this is that the court system in Florida doesn't want to place a child in the middle of a custody battle."
- "Our **North Carolina** cases provide that the wishes of a child of 'sufficient age to exercise discretion' are 'entitled to considerable weight' in a custody case but the child's wishes are not controlling," says the [Rosen Law Firm](#) in an [article](#). "Although other states hold to various ages at which the child's testimony on this issue becomes relevant, the test in this state is whether the child has sufficient mental capacity and comprehension to offer a reasoned opinion about where he or she wants to live."
- "Children can testify at custody hearings, but it does not happen very often. A child must be 'competent' to testify. This means that the child must understand the difference between the truth and a lie, and must promise to tell the truth in court," according to the [Indiana Justice Center](#). "Even if a child is competent to testify, children do not testify at custody hearings very often because most parents and attorneys think it would be too difficult for a child to testify in court in a custody case. However, sometimes the child can speak privately to the judge."

Depending on how the new California law plays out, it could become a bellwether for similar reforms. "I imagine other states will be looking at what California is doing, and perhaps implementing some of these changes," Walzer says.

Tagged as: [American Academy of Pediatrics](#), [California](#), [Child custody](#), [family law](#), [Peter Walzer](#)

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