As a Family lawyer in California I am often asked 'when can the child decide which parent to live with'. This is a summary of the current law and the new changes that became law January 1, 2011 with specific mandated changes to take effect in our courts beginning January 1, 2012.

Under California law there is no specific age and the child does not decide custody.

California Family Code § 3042

(a) If a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody, the court shall consider and give due weight to the wishes of the child in making an order granting or modifying custody.

(b) In addition to the requirements of subdivision (b) of Section 765 of the Evidence Code, the court shall control the examination of the child witness so as to protect the best interests of the child. The court may preclude the calling of the child as a witness where the best interests of the child so dictate and may provide alternative means of obtaining information regarding the child's preferences.

As a practitioner I observed a lack of consistency in how judges approached the matter of the child's preferences. I can give the example from the past of two commissioners who served at the same time in the same courthouse.

One commissioner believed no child is ever be in a court room and would assign minor's counsel to speak for the child. However, minor's counsel would not always choose to state the child's preference to the Judge.

The other commissioner frankly admitted s/he was awful at speaking to children but when s/he would allow a child to express their preferences, the meeting would take place in judge's chambers to shelter the child from the harshness of the court room. No other parties or attorneys were allowed in chambers for the meeting.

Minor's counsel handling of the child's preference has also been inconsistent. Typically, minor's counsel is to include in their report to the court their own recommendation and the child's preference which may or may not be the same as that of the minor's counsel. However, as Ii observed through the years, minor's counsel does not state the child's preference to the court whenever the child's preference is different than the minor's counsel. Usually the reason given for excluding the child's wishes from their report goes something like this: the child is, in opinion of the child's attorney, not of sufficient discretion to intelligently formulate a preference. So the minor's counsel summarily excluded the child's preference from their report to the court. One wonders if some minor's attorneys feel that whenever their client (the child) has a different preference than the minor's attorney, then the child obviously is not "intelligent" enough to have their wishes made known to the court. Further, the court is mandated with the duty to decide if the child is of suitable discretion to formulate a preference for custody and the judge is not supposed to delegate their judicial duties to another person in sush a wholesale manner. For whatever reason, the child's wishes often are not made known to the court even when a child

was appointed an attorney. My practice was to openly ask minor's counsel if the child has a preference and to please state it to the court. If the minor's counsel said yes but refused to state the minor's wishes claiming the child was not of suitable age and discretion, I'd argue that this was for the court not the minor's attorney to decide. While this was an uphill battle, the tactic often resulted in getting the child's preference on the record. With the new law effective in 2011, this process is made easier.

Effective January 1, 2011 this section of the law is amended. The change is as follows.

If the child is age fourteen (14) or above, the child shall be allowed to express their preferences for custody and visitation to the court. If the Judge decides that it is not in the best interests of the child to be allowed to testify in court, effective January 1, 2011 the Judge will now have need to state "on the record" the the reasons for precluding the child's testimony.

Nothing in the new 2011 amendment precludes a child under age fourteen (14) from being permitted to state their preferences to the court if they are of suitable age and discretion to intelligently reason (same as under the old law).

Evaluators, mediators and child attorneys shall assist the court in determining whether the child wishes to express his or her preference , if a party does not inform the court whether the child wishes to express their wishes the judge may inquire of the expert as to whether the child wishes to express his or her preference. Any party or attorney may make this inquiry or request, too.

The new California law effective January 1, 2011 is stated below:

§ 3042. [Effective 1/1/2011]

(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.

(b) In addition to the requirements of subdivision (b) of Section 765 of the Evidence Code, the court shall control the examination of a child witness so as to protect the best interests of the child.

(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.

(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.

(e) 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.

(f) To assist the court in determining whether the child wishes to express his or her preference or to provide other input regarding custody or visitation to the court, a minor's counsel, an evaluator, an investigator, or a mediator who provides recommendations to the judge pursuant to Section 3183 shall indicate to the judge that the child wishes to address the court, or the judge may make that inquiry in the absence of that request. A party or a party's attorney may also indicate to the judge that the child wishes to address the court or judge.

(g) Nothing in this section shall be construed to require the child to express to the court his or her preference or to provide other input regarding custody or visitation.

(h) The Judicial Council shall, no later than January 1, 2012, promulgate a rule of court establishing procedures for the examination of a child witness, and include guidelines on methods other than direct testimony for obtaining information or other input from the child regarding custody or visitation.

(i) The changes made to subdivisions (a) to (g), inclusive, by the act adding this subdivision shall become operative on January 1, 2012.

History. Amended by Stats 2010 ch 187 (AB 1050), s 1, eff. 1/1/2011