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Must Judges Follow Children's Wishes Over Their Custody?

Giving children a voice in family law conflicts.

Post published by Benedetta F. Duramy J.S.D. on Jun 09, 2015 in The Cross Examination



The story of the Winternietz family is like many others. Tami and William married in 1985, separated in 2001, shortly after the birth of Jamison, their third daughter, and divorced in 2004. In 2003 Tami filed a first move-away request asking to relocate with her children to San Diego. The court granted the relocation based on a custody evaluation reporting that Tami was alienating the children from their father, that the children did not want to live with him and that they would have had "a less conflicted adjustment" by remaining with their mother. William, eventually, relocated to San Diego too and established his orthopedic surgery practice there.

Fast-forward several years and Tami is now asking to relocate again with Jamison, the only minor left among her children, to Chico in Northern California, where she has bought a house and her fiancée is currently living. William opposes the move and seeks primary custody of Jamison. The California 4th District Court of Appeal, Division I, on February 27, 2015, denied Tami's request and granted custody to William following a custody evaluation reporting that if placed with her father, Jamison may struggle "...adjust[ing]..." become "depressed, withdrawn, sullen, angry. There is a risk that she becomes angry with her father, blames her father for her not being able to go with her mother, and distances herself from her father and starts to pull back from that relationship." However, the custody evaluator concluded that Jamison's greatest risk is losing her relationship with her father if she follows her mother. In the end, the court found that opposing the move and changing custody to William was in Jamison's best interest in spite of her express wish to remain with her mother.

The Winternietz case is about how family life can become imperfect and complicated, how both parents and children often struggle to be consistent with their feelings and behaviors, and how these inevitably change over time. And, then, it is about how unrealistic and difficult is attempting to grasp and settle all this in a custody evaluation report or in a court decision and living with the consequences thereafter for both children and parents. But this case also raises the question whether and to what end judges must follow children's wishes over their custody.

Increasingly in the United States and beyond, children have been given the opportunity to express their opinions and preferences in family law conflicts. The United Nations Convention on the Rights of the Child protects, generally, the right of children capable of forming their own views to be able to express them freely in all matters affecting their lives. The California Family Code Section 3042 provides that courts should consider and give due weight to children's wishes when making an order granting or modifying custody or visitation. In practice, judges

have interpreted this statute in different ways: some allow children to testify in the proceedings, others prefer to meet with them privately, and finally others decline children's participation.

Across countries and jurisdictions, allowing children to voice their preferences in family disputes is beneficial for all parties involved. Judges find it useful to complement and corroborate facts and information of a case, parents learn how their children are coping with the current situation, and, finally, children end up being more satisfied with the process and adjusting better to the outcome. Giving children a say over their custody empowers them, fosters their sense of control, and contributes to their best interest. Those who are not invited to express their views, instead, become disappointed, frustrated and resentful.

But giving children a voice does not mean granting them a veto power. Children themselves don't wish to make the final decision, they only wish to be part of it. When courts seek children's views over their custody they fulfill their expectations as well as the goal of the law. Whether judges may then follow or not children's preferences, like in Jamison's situation, must differ with the circumstances of each case.

The Cross Examination

Family and children in the law.



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