



DIVORCE:

can my children testify in court about who they want to live with?

By Joel H. Feldman

Child custody issues are the most agonizing and difficult areas in family law – for the litigants, the children, the attorneys and the court. Parents who cannot agree on the type of custody they should have over their children and who cannot agree on schedules of timesharing set themselves up for longer and more expensive litigation and, generally, results not entirely to their liking.

Often parents want their children to be able to “tell the Judge” why they should live with one parent over the other or, just as often, why they should not have to live with one parent over the other. Because of the likelihood that children testifying for one parent and against another may be victims of coercion, promises of rewards and parental alienation, it is uncommon for Florida divorce courts to allow children to state their preferences in court.

In arriving at custody decisions, Fla. Stat. §61.13 provides that the court is to determine the “best interests of the child” by applying a series of factors. One of these factors permits a Judge to consider “the reasonable preference of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference.” However, that statute does not require the court to consider the child’s preference; it only allows the court to consider it, if the court is so

inclined. Not all courts are so inclined. Many courts do not give much weight at all to a child’s preferences.

A minor child may testify only if the court approves, in advance, a parent’s request to allow a child to testify. Florida law provides no specific age at which a minor child may testify in family law proceedings. One judge may allow 14-year olds to testify; another may not. One 14-year old may have sufficient intelligence and maturity to offer relevant and credible testimony; another may not. Therefore, if there are any rules of thumb, they are that requests to allow children to testify in divorce proceedings are routinely discouraged and that children who are not even teenagers rarely will be allowed to testify.

If you think your child wants to state a preference to live primarily or exclusively with you, you need to discuss with your attorney other options that will accomplish the same result, such as the appointment of a custody evaluator or guardian *ad litem* who can meet with the child, discuss his or her preferences, investigate any motivations or hidden agendas, and make recommendations to the court. You should evaluate the psychological damage that can be inflicted on the child and the child’s relationship with the other parent and try to find alternatives. If, however, you are

convinced that your child needs to testify in court, be prepared to explain in detail why the child’s preferences cannot come before the court in another way and why the child’s testimony is crucial.^{stb}

JOEL H. FELDMAN is a partner in the law firm of Feldman & Schneiderman at 401 Camino Gardens Blvd., Boca Raton, Florida (561-392-4400). He has been practicing in Boca Raton for 28 years and is considered “Preeminent” in the field of divorce and family law. Joel Feldman is an honor graduate of Georgetown University and Duke University School of Law, twice has been honored by the Legal Aid Society of Palm Beach County, is involved in multiple charities in the south Florida area and is rated “AV” by the Martindale-Hubbell rating service for attorneys.



JOEL H. FELDMAN