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## **Best Interests of the Child: The Key Standard for Custody Determinations**

**In making its decision as to what is in the child's best interest, a court may consider an array of facts and circumstances.**

*By Renee Campion*

To determine who should have custody of a child, the court must base its decision on what is in the child's best interest. While almost any fact, circumstance, or consideration can affect a child's best interest, there are several scenarios common in many custody cases.

The preference of the child can be a crucial part of a custody decision. Courts cannot defer their authority to the child--the subject of the proceeding, but the youngster's preference can influence the court and affect how it decides the case. But it depends upon the state. Some states grant the court discretion, allowing it to consider the child's preference, and if so, how much weight or relevance to give it. Other states, under certain circumstances, allow a child to have a "voice" in the proceedings.

**TransActive Note:** Having a Court Appointed Special Advocate (CASA) or Guardian Ad Litem (GAL) represent the child's preference for being with the parent that supports their gender identity expression may be helpful in some cases.

### **The Child Must Be Competent to Testify**

First and foremost, to testify in court, a witness--in this case the child--must be legally competent. The child must understand the nature of the proceedings and know the difference between truth and fiction. Then, any consideration of preference may still be discretionary and an individual judge may elect not speak to the child, though the child may be of sufficient age to be heard.

Courts often will appoint an attorney [CASA or GAL] to be the child's voice, thus giving the child a part in the proceeding without unnecessarily subjecting the child to the direct stress and reality of the courtroom.

Contrary to what has been portrayed in the media, judges do not generally ask a child with which parent they wish to reside. The exchange is typically more conversational, the judge listening to the child talk about his or her home life, school, friends, pets, etc. The court may be required on the request of a party to have the court reporter record the conversation between the judge and the child, which will then be read to the parties in the courtroom. Many judges do not want to talk to the child, and some admit that doing so has never changed their perception of the case.

In some states, children actually have the right at a specific age to petition to the court directly for a change of custody. Recently, a child showed up in a court on her own, without telling either parent, and said that she wanted to live with her father. The child was fifteen and had been residing and doing well with her mother since the separation. She revealed that Dad was willing to allow her to obtain birth control pills and travel to the Caribbean with friends.

**TransActive Note:** It's possible that some courts (without the proper information and education about gender identity) will see a child's gender expression as simply a "preference" for a certain kind of playtime or childhood indulgence rather than as an aspect of the child's core identity. It is important to provide education to the court in the form of supportive psychological testimony and/or substantial peer reviewed documentation.

### **The Basis for the Preference Must Be Examined**

Key to remember in all of this is that the court must examine the basis for the child's preference and that if any part of a decision is based on a child's preference, the court must find that the preference is in the child's best interest.

Material opportunities each prospective custodian can provide to the child are another factor courts often consider when determining what is in the child's best interest. There is a common misconception that custody will go to the individual with the bigger house, higher income, more education, etc. This is not necessarily true. A higher standard of living can bring certain benefits, but it is not a replacement for a dedicated loving parent. A parent struggling with what shortcomings life may have dealt may be the better choice to meet the child's basic needs and to act in the child's best interest. Courts can balance material inequities through both the amount of child support awarded and/or access by the non-custodian.

### **Maternal Preference No Longer Automatic**

Courts used to recognize-and often made their custody decisions based almost solely upon--what was called "maternal preference." That is, if a child was of tender years or less in school age, the mother was usually awarded custody. In some states, this is specifically prohibited. Still, it is not uncommon in a case involving an infant for breastfeeding to be a factor. However, when a child is older, a court may not be as inclined to grant custody to a breastfeeding mother.

In short, courts are not restricted to specific considerations when determining child custody, but look to a variety of facts and circumstances that affect a child's best interest. Courts have much discretion and can generally consider any evidence that affects a child's well being, whether physical or psychological.

**TransActive Note:** It is not uncommon for gender supportive mothers to be disproportionately accused of being “over-indulgent”, “smothering”, “preferring a girl child”, “emasculating” and other antiquated psychological stereotypes by attorney’s representing the other side. Be prepared to have both written and oral testimony from professionals that will debunk or contradict such accusations.