My 12 Year Old Says She's Moving to Her Dad's House! Can She Do That?

A look at parental rights.

BY STEPHEN C. FARRAR

Based on an increasing number of telephone calls I have received, there appears to be a public misconception when it comes to the primary residence of and/or visitation with a child who has reached the age of 12. The purpose of this article is to dispel two general myths that parents have about the rights of their 12-year-old children.

First, it is important to know what the public policy of the state of Texas is when it comes to children and what "guidance" the court is charged with in deciding issues relating to children.

The Texas Family Code sets out the public policy of the state of Texas and states in part that "the public policy of this state is to: (1) assure that children have frequent and continuing contact with parents who have shown the ability to act in the best interest of the child; and (2) provide a safe, stable, and nonviolent environment for the child . . ."[1]

The Texas Family Code also provides that "the best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child."[2]

The trial courts are given latitude in determining the best interests of a child[3] and the Texas Supreme Court has articulated a non-exhaustive list of factors that help guide the trial court's determination of the best interest of the child.[4]

Let's take a look at the two common myths regarding 12 year olds.

Myth 1: When my child turns 12, he or she can decide which parent to live with.

The Family Code provides that the court shall interview in chambers a child 12 years of age or older to determine the child's wishes as to conservatorship or as to the person who shall have the exclusive right to determine the child's primary residence.[5] The code also states that interviewing the child does not diminish the discretion of the court in determining the best interests of the child.[6]

A plain reading of the statute dispels the myth that the Legislature has granted the absolute authority to the child to make the determination where the child will reside and that the child's "determination" is binding on the court. The Legislature has instead chosen to give a child that has reached the age of 12 a voice in the matter and an avenue to inform the court of the child's wishes. However, it is still up to the court to determine what is in the child's best interest, and the child's wishes are only a factor for the court to consider in making that determination. For example, it's not hard to imagine that a child may want to live with the parent who has lax rules concerning homework, chores, video games, discipline, bed time, etc., instead of the parent who makes and enforces rules.

Therefore, while a 12-year-old child has the right to make his or her wishes regarding where to live known to the court, the child does not have the ultimate decision.

Myth 2: When my child turns 12, he or she can decide whether they want to visit with the non-primary parent.

In addition to the authority of the court to interview the child as to where he or she wants to reside, the Family Code also provides that a court may interview the child in chambers to determine the child's wishes as to possession, access, or any other issue in the suit affecting the parent-child relationship.[7]

As previously stated, this authority does not diminish the discretion of the court in determining the best interests of the child and is not binding on the court.[8]

Again, the statute makes it clear that the child's wishes as to access (visitation) by the parents is only a factor for the court to consider in determining the best interest of the child.

Therefore, while a court may listen to the wishes of the child who is 12 years of age regarding visitation with a parent, the decision whether the child must visit with that parent is up to the court, not the child.

While all of the above applies in original suits, i.e., a divorce case or suit affecting the parent-child relationship, it equally applies to, and the issue most frequently comes up in, a suit for modification of a prior order. Some parents apparently believe that when their child turns 12, that he or she is automatically entitled to a modification of the prior orders concerning his or her primary residence or modification of the visitation schedule by the non-primary parent.

When a child turns 12 and desires to live with the visiting parent and it has been more than one year since the date of the prior order establishing conservatorship and possession, the visiting parent may file for modification of the prior order with a request that the court interview the child. The Family Code provides grounds for a court to modify the prior order based on the child's preference expressed in chambers as to the person to have the exclusive right to designate the primary residence of the child and that it is in the best interest of the child.[9] Again, the child's preference is only a factor, which does not bind the court. The statute provides that if the court finds the child's preference is in his or her best interest, those grounds will support a modification of the prior order.[10]

Though beyond the scope of this article, there may be legitimate, serious reasons that the child does not want to visit with or reside with the other parent. Some indicators that there is something wrong with a parent's home environment may be that the child's mood changes, the child becomes fearful and/or anxious when it is time to visit with the other parent or return home to the primary parent, or there is a significant change in the child's demeanor. If that is the case with the child, it is important to try to find out the root cause(s) of these issues and determine the nature of the home environment of the other parent. In such cases, consulting with a qualified family law attorney will help you to understand your rights, provide valuable resources and help you reach your goal of protecting your child and his or her best interests. **TBJ**

Notes

1. Tex. Fam. Code § 153.001(a)(1-2).
2. Tex. Fam. Code § 153.002.
3. *Gillespie v. Gillespie*, 644 S.W.2d 449, 451 (Tex. 1982).
4. *Holley v. Adams*, 544 S.W.2d 367, 371-72 (Tex. 1976) (non-exhaustive listing of factors indicating a number of considerations which either have been or would appear to be pertinent (A) the desires of the child; (B) the emotional and physical needs of the child now and in the future; (C) the emotional and physical danger to the child now and in the future; (D) the parental abilities of the individuals seeking custody; (E) the programs available to assist these individuals to promote the best interest of the child; (F) the plans for the child by these individuals ... seeking custody; (G) the stability of the home …; (H) the acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one; and (I) any excuse for the acts or omissions of the parent).
5. Tex. Fam. Code § 153.009(a) (emphasis added).
6. Tex. Fam. Code § 153.009(c).
7. Tex. Fam. Code § 153.009(b).
8. Tex. Fam. Code § 153.009(c).
9. Tex. Fam. Code § 156.101(a)(2).
10. *Id.*

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