

# What We Know

## ARTICLES & INSIGHTS

### ABOUT THE AUTHOR



Andrea is a Board Certified Family Law Specialist by the North Carolina State Bar Board of Legal Specialization, Certified Family Financial Settlement Mediator by the North Carolina Dispute Resolution Commission, and Parenting Coordinator. An experienced litigator, she represents individuals in matters involving high conflict and complex family law and domestic violence matters. Her practice areas include family law (equitable distribution, alimony, custody, child support, contested divorce), domestic violence, civil harassment, and child support enforcement.

## A Child's Wishes in Custody Modifications

December 19, 2018 | by

When it comes to modifications to child custody orders in North Carolina, parents often wonder if North Carolina law permits a child to determine where to live; either with one parent or the other. The short answer is no. Until a child turns 18, the presiding judge makes a custody determination based on "the best interests of the child." The long answer, of course, is more complicated. Read on to get a better understanding of how a child's wishes can influence a custody modification order.

### WHEN CAN [CHILD CUSTODY ORDERS](#) BE MODIFIED?

After a party makes motion to modify an existing custody order, the Court will make a modification if it determines that 1) there has been a *substantial change in circumstances* that affects the child's welfare since the entry of the last order, and 2) that a modification of the custody order is in the *best interest of the child*.

#### **Substantial Change in Circumstances**

The first prong can be relatively easy to satisfy, provided that enough time has passed between the entry of the first order and the modification request. The "substantial change" does not have to negatively impact the child's well-being; instead, it only has to be a change that affects the child, whether positive or negative. Substantial changes are often cumulative, consisting of several changes, not just one. Examples of life changes that can establish there has been a substantial change affecting the welfare of the child include: the child has started school, or is struggling with school; the remarriage of one or both parties; new half-siblings or step-siblings; diagnosis of medical or other issues that impact the child's health or learning; the inability of parties to co-parent; an impending move, etc. Certainly, one of those many factors can be the child's expressed wishes. However, the child's wishes alone should not be the factor that establishes the change of circumstances. In any case, the party seeking the change in custody must show a connection between the change in circumstances and the well-being of the child.

#### **Best Interest of the Child**

Once the court finds that there has been a substantial change of circumstances affecting the child, it moves to the next step of determining whether a custody modification is in

the best interest of the child. This “best interest of the child” analysis is considered the [“polar star which guides the courts in awarding custody.”](#) This requires the court to look at a wide range of relevant factors that can include, but by no means be limited to, the child’s wishes. But when and to what extent do the child’s desires factor into the court’s decision?

## **WHEN AND HOW DO A CHILD’S WISHES FACTOR INTO THE COURT’S DECISION?**

Ultimately, children will be treated as any other witness. They will be allowed to testify and express their wishes when they are old enough and mature enough to do so, and when they are deemed “competent” to do so. The competency test is the same for any other witness offered at trial. The judge alone can determine whether a child is “of suitable age and discretion” to testify. This question depends on the mental development and capacity of the child. Some courts have allowed children as young as six or eight to testify. In practice, the older the child is, the better.

Most judges do not enjoy having children testify, especially in bitterly contested custody actions. Knowing that parties ought to carefully consider whether the child’s testimony is necessary, especially knowing that the child’s expressed wishes alone will not carry the day in court. However, if a party decides to offer the child as a witness and the court finds that the child is competent and of suitable age and discretion, North Carolina law requires the court to hear the testimony.

Depending on the judge and the age of the child, the setting of the child’s testimony will vary. If the parties agree, the child can have a private meeting with the judge which would limit the child’s exposure to some of the negative consequences of testifying in a trial setting. However, if either party objects, the court must take the child’s testimony with both parties present, or with the counsel for both parties present.

Courts can give considerable weight to a child’s wishes as part of the “best interest of the child” determination when the child is able to give a well-reasoned explanation for his or her preference. However, if it seems that the child is being manipulated by his or her parents, or that the child is simply expressing a temporary dissatisfaction, the child’s testimony will carry little weight with the court. In any event, a court giving a child’s wishes considerable weight is not the same thing as a child “getting to decide” which parent he or she lives with, as there will be many factors that a court bases its decision on.

The guiding principle in every North Carolina child custody case is the child’s best interest. Within this analysis, the court may also consider the child’s wishes, but ultimately the court determines how much weight to give to the child’s wishes, and depending on the circumstances, other factors will be given equal or greater weight.

919.250.2000  
mail@smithdebnamlaw.com

The Landmark Center  
4601 Six Forks Road, Suite 400  
Raleigh, North Carolina 27609

Phone: 919.250.2000  
Fax: 919.250.2100

1720 Main St.,  
Suite 104  
Columbia, SC 29201

Phone: 864.751.5523  
Fax: 888.784.2250