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March 13, 2021

The Honorable Senator Dave Min
Member of the Senate, 37th Senate District
State Capitol, Room 2048
Sacramento, CA 95814

Re: SB 654 (Min)
Position: Oppose

Dear Senator Min,

On behalf of the California Association of Certified Family Law Specialists, a non-profit organization with 646 members who are certified family law specialists by the State Bar of California, Board of Legal Specialization, I write in opposition of Senate Bill 654 ("SB 654").

Pursuant to Family Code 3042, in its present form, in a custody proceeding the trial court must consider, and give due weight to, the wishes of the child in making an order granting or modifying custody or visitation if the child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody or visitation. Also, if the child is 14 years of age or older and wishes to address the court regarding custody or visitation, the court must permit the child to do so unless the court determines that doing so is not in the child's best interests.

The age 14 standard in Family Code 3042 was the result of an amendment to that code section by Assembly Bill No. 1050 (2009-2010 Reg. Sess.), and that age was arrived at after significant public and stakeholder input. That bill was shaped from the Elkins Family Law Task Force Final Report and Recommendations issued in April

2010. (The report is available online at www.courts.ca.gov/documents/elkins-finalreport.pdf.)

As some background, in *Elkins v. Superior Court* (2007) 41 Cal.4th 1337, the California Supreme Court recommended that the Judicial Council of California establish a task force to study and propose measures to assist trial courts in achieving efficiency and fairness in family law proceedings and to ensure access to justice for litigants. In response to this recommendation, the Elkins Family Law Task Force was appointed in 2008. According the Elkins Family Law Task Force, it held twelve in-person meetings. The meetings occurred in San Francisco (June, September, November 2008, May 2009, August 2009, and February 2010), Los Angeles (February 2009), and a Litigant and Advocate Input Group meeting on April 6, 2009 in San Francisco. Public Hearings on the Draft Recommendations were held in Los Angeles and San Francisco in October 2009. At the February 1 and 2, 2010 meetings in San Francisco, the Task Force reviewed and considered the public comments on the draft recommendations and discussed the proposed revisions of the draft recommendations. Pages 49-55 of the Elkins Family Law Task Force Final Report and Recommendations reflects this widespread input and recommendations as to children testifying.

Page 2 of the report by the Senate Committee on the Judiciary on Assembly Bill 1050 (2009-2010 Reg. Sess.) ("AB 1050") made the following observations about the impact of the Elkins Family Law Task Force Final Report and Recommendations as well as the involvement with stakeholders in the shaping of the bill into its current form:

> In its final recommendations, the Task Force concluded that determinations of whether and in what manner a child testifies should be decided on a case-by-case basis taking into account the need for the court to hear from the child in order to make an informed decision, the child's wishes, and the obligation of the court to protect children from any harm that may result from their participation. (Elkins Family Law Task Force, Final Report and Recommendations, February 2010, available at http://www.courtinfo.ca.gov/jc/tflists/documents/elkins-finalreport.pdf.
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> The author has since been working with a number of interested stakeholders in an effort to develop a proposal that would afford children a better opportunity to have their preferences heard while balancing the need for judicial discretion to protect the best interest of the child, and due process for all parties. This bill is the product of those discussions.

At pages 3 to 4 of that committee report, it was also noted as follows regarding the rationale and impact of the bill:

Studies have shown that children who are 14 years of age or older are generally mature enough to form intelligent preferences, and are close enough to the age of majority where the court should be considering their wishes with respect to custody and visitation decisions. (See Ellen G. Garrison, *Children's Competence to Participate in Divorce Custody Decisionmaking*, Journal of Clinical Child Psychology, Volume 20, Number 1, 1991.) However, there may be some instances where a child who is 14 or older is not mature enough, or is not capable of forming intelligent preferences. Or, for example, the court could determine that the child's interests would not be served by testifying because the case is particularly contentious and that testifying could be emotionally damaging to the child. In such cases, the court would still have discretion to preclude the child from testifying, but would have to articulate its reasons for doing so on the record.

Children who are younger than 14 would not be automatically precluded from testifying, however, the court would not have to make specific findings on the record should they preclude them from doing so. However, regardless of age, if the court determines that the child is of sufficient age and capacity so as to reason an intelligent preference, this bill would require that the court consider, and give due weight to, the child's wishes in making both custody or visitation orders. If the court precludes the child from testifying, then the court would be required to find alternative means of obtaining information regarding the child's preferences. For example, a court could utilize family court services, or appoint minor's counsel to obtain this pertinent information.

Thus, in its present form, Family Code section 3042 represents the result of significant discussion and thoughtful input from the Elkins Family Law Task Force, the public, and stakeholders. The result of that deliberative process is a balanced approach to handling the testimony of children about their preferences whereby the trial judge need not make findings as to why a child under age 14 is precluded from testifying but does need to make such findings for a child over the age of 14. Irrespective of the age of the child, the trial judge has numerous other means to ascertain the desires of the child without subjecting the child to the act of testifying, such as through court-appointed attorney, mediators, and investigators that can pass along the child's preferences.

SB 654 would significantly change the legal landscape that was carefully crafted in AB 1050. Not only would SB 654 reduce the age at which findings would be required to 12 years old, but it would also implement mandatory disclosure to children of a right to testify regarding their preferences in the proceeding between their parents. The age reduction

provision does not appear to be supported by independent analysis and conclusions within the legal or psychological communities. The mandatory disclosure requirements do not appear to be in any child's best interest.

As to the age of 14 that is currently stated in Family Code 3042, that age recognizes an approximate age where a child's mental and emotional development are such that they might be able to provide meaningful input on their preferences. SB 654's age reduction would cast family law proceedings down a slippery slope towards an ever-reducing age at which children are so developed. Children do not develop any faster now than in 2010 when AB 1050 was passed, so there is a significant question about why a reduction is needed. Moreover, this slippery-slope concern is not unfounded.

The slippery slope began with Assembly Bill 2098 (2015-2016 Reg. Sess.) ("AB 2098"), which sought to reduce the age to 7 years old, then was amended to 10 years old, and the bill also included mandatory disclosure provisions to inform a child of the right to testify. The author's Fact Sheet noted:

> Since Family Code section 3042 was amended six years ago, children age 14 or older who wish to address the court regarding custody or visitation are permitted to do so. The process has been successful, empowering children to state their wishes and in some cases to ensure their physical and sexual safety.

Page 2 of the report by the Assembly Committee on the Judiciary on AB 2098 observed that the bill was "strongly opposed" on grounds that children are significantly harmed by being dragged into the center of their parents' conflicts, that encouraging children to testify could subject them to retaliation by one parent and may cause guilt over hurting one parent to please the other parent, and that while children can report events from their environment, they cannot make well-informed decisions about their custodial arrangements. That committee report noted opposition by the Association of Certified Family Law Specialists, the Association of Family and Conciliation Courts and the California Psychological Association. AB 2098 was not passed into law.

Senate Bill 170 (2017-2018 Reg. Sess.) later sought to lower the age from 14 to 10. The bill was found objectionable by stakeholders, again for the reason of pushing the age limits downwards. The bill was apparently pulled from committee review by the author, and it was not passed into law.

These two recent, failed attempts to reduce the age of testifying in Family Code section 3042 reflect an ongoing push to allow children to testify who are not mentally and

emotional capable of forming informed, knowing preferences regarding their custodial arrangements. SB 654 continues this effort, which undoubtedly will open the door to the next push. After all, if age 12 is appropriate, why not 11? Why not 10? Why not 7?

The part custodial adjudication that seems to be overlooked is that a child of any age may testify if the trial judge finds it appropriate. For example, where there are issues of abuse of a child under age 14 the trial judge is not forbidden by Family Code section 3042 from allowing the child to testify. What the trial judge must do is weigh the personal impact on the child to go through the experience of testifying and determine if it is not in the child's best interest to do so. The trial judge does not make that decision in a vacuum, only looking at the age of the child, but also to the circumstances (e.g., allegations of abuse), and evaluating what alternative means are available to allow the child to express their preferences (e.g., through minor's counsel, through a court-appointed custody evaluator).

At pages 51-52 of the Elkins Family Law Task Force Final Report, the Task Force noted means other than testifying that allow the trial judge to consider the preferences of a child of any age:

> A child's participation in a family law proceeding may not be needed at all, as in the case where parents are able to agree on a parenting plan. In some cases, children may only want or need to speak with a mediator or evaluator to learn more about the process, and procedures should be in place to enable such participation. In disputed cases where their participation seems warranted, it may be appropriate to first provide children with the opportunity to give their input by meeting with a mediator or an evaluator working with the parents. Parents and the court could obtain information about the child's point of view from the mediator or evaluator, which may lead to a resolution without the necessity of further child involvement.

The Task Force noted the tools already available to the trial judge to avoid the necessity of further child involvement. However, a statutory mandate requiring children to be informed of their right to testify impliedly places testifying as the method of first resort – not last resort – to obtain input from a child.

SB 654 would create a mandate requiring a child to be informed of their right to testify. However, children should have little involvement in the procedural aspects of custodial litigation. Informing a child of the right to testify is a bell that cannot be un-rung. The child will forever be placed in the middle of the parent's dispute. Either the child testifies, thus creating the perception in one parent that the child is siding with the other, or the child does not exercise the "right" to testify, thus again creating the perception in one

parent that the child is siding with the other. Once the law requires mandatory disclosures, all children that are so informed will be forever placed in this horrible position.

"You have the right to tell the judge which parent you want to live with" is what a child will likely hear, which likewise places an enormous burden on a child. Even in cases where the parent do not have significant custodial conflict, SB 654 would require the child to be told they have the right to weigh in. A significant majority of children do not want such an invitation. They want stability and emotional security, and not to be drawn into conflict that is often only tangentially about them, and really an interpersonal struggle between the parents. For example, prior to a hearing on a dispute between parents about the visitation exchange time, where mom says it should be 5:00 p.m. because of her work schedule and dad says it should be 6:00 p.m. because of his work schedule, SB 654 would require the child to be informed they have the right to weigh in. SB 654 is overbroad and its mandatory disclosure requirements will have the likely effect of causing emotional harm to children in an overwhelming majority of cases.

For these reasons, ACFLS opposes SB 654.

Respectfully submitted,

AVI LEVY, CFLS
Legislative Director, ACFLS