

Different Ages, Different Wishes

The age at which a child's wishes hold weight with a Court is a topic constantly debated, and continues to be a difficult subject for the Court. It is worth re-stating that Orders made under the Family Law Act in relation to children remain in place until a child is 18 years of age. Despite this being the legislative position, there is a misunderstanding in the wider community that a child can "make up their own mind" from a much younger age.

The case law shows that often the Court will give serious weight to a child's wishes from approximately 12 years of age. However a child's age (and wishes) is not the only consideration of the Court. The Court has a myriad of considerations they must have regard to in making a decision, with a child's 'best interests' being the paramount consideration.

A recent decision of the Federal Circuit Court discussed the weight to be given to the wishes of a 15 year old in circumstances when the child's two younger siblings (13 and 11) were expressing different wishes.

Facts:

- The mother and father made competing applications to the Court for the children to live with them.
- At the time of the hearing all 3 children were in the care of the mother and had been since separation;
- There were times when the children had refused to spend time with the father;
- The 15 year old's relationship with her father was fractured/estranged and she had expressed a strong wish not to have time with her father;
- The two younger children expressed a wish to continue to live with the father, although they had at times also expressed concerns about spending time with him;
- The mother's parenting style was more relaxed and was seen as a "do as you wish" environment;
- The father's parenting style was more rigid and authoritarian with a preference for structure and recognition of his authority;

- It was contended that the mother had developed a more “enmeshed” relationship with the children than might be healthy for them;

Findings:

- The court had the benefit of evidence from an Independent Children’s Lawyer and a Family Report.
- That despite the ages of the children the court was cautious in accepting the words/wishes of the children as a genuine expression of their feelings. The reason for this being the history of the children being exposed to the parental conflict;
- That although the younger two children had expressed differing versions of opposition to spending time with their father, the Court did not accept that there was strong foundation for any concerns.
- That the children were of an age where they should be capable of discerning the unique qualities that time with their father enabled them to enjoy and that the mother should be more positive about those opportunities;
- It is a distinct possibility that the children will see the mother’s parenting as less appropriate as they get older.

Decision:

- The court found that the mother had capacity to influence the children’s behaviour positively to continue to engage with the father.
- That although the court did not make an order for the 15 year old to spend specific time with her father, the court was anxious to ensure that the relationship between them have strong yet supportive therapeutic intervention (and made orders for therapy and counselling for the father and the child);
- The court found that the younger two children still had an intact and meaningful relationship with their father and ordered that they spend time with him for at least 4 nights per fortnight as well as half holidays and to share special occasions with him.