

CONSIDERING CHILDREN'S WISHES IN A DIVORCE

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In situations where parents separate, children will often have opinions on what they want to do, who they want to live with and when they want to spend time with each parent.

When should a child's wishes be acted upon by the Court?

The *Family Law Act* is silent as to what age a child must be before their wishes are considered carefully by the Court. Cases tell us that the age is about 12 years – but what happens when a child is younger than 12 years?

In determining whether the Court will place any weight on a child's view, the child's age is taken into account, as well as the child's maturity and degree of insight and any other factors impacting on the child's wishes.

This Article highlights 2 cases where the Court had to consider the wishes of a younger child.

Case 1: Child aged 6 years

The Facts:

- The mother, aged 25 and father, aged 27 were together for 6 years and had 1 child, aged 6.
- Both the mother's and father's parents significantly assisted with the daily care of the child.
- The Interim Court Order stipulated that the child live with the father from Thursday to Sunday one week and Thursday overnight in the alternate week. For the remainder of the time, the child was to live with the mother.



it that way, but her father and grandmother really wanted it changed.

- The child appeared to be confused about the amount of time she wanted to spend with each parent and was being subjected to pressure by the parents and extended family members. The child told the psychologist, "I told you I wanted 7/7 but I didn't really want to, but my Dad said to."

Court Found:

- When the Court considered whether weight should be given to the child's views, the following factors were taken into account:
 - The child's young age
 - The child's close relationship with each of her parents and her extended family
 - The pressure the parents placed on the child and that each parent told the child to voice her opinion to the psychologist according to what they told the child on separate occasions.
- The Court should not place significant weight on the child's views when determining the child's care arrangements. The child was not "equipped in terms of age or circumstance" to have the responsibility for making decisions about her daily living arrangements.

Court Order:

- Although a 'week-about' arrangement for the child would be beneficial, it would involve communication difficulties between the parents.
- The child live primarily with the mother and spend time with the father from Thursday to Sunday one week and Thursday overnight on alternate weeks.

- The mother argued that the child had seen the father behave violently in the past and was fearful of him and therefore did not wish to see him. She also said that the child had voiced her wishes to many psychologists and counsellors.
- When the parents separated, an incident occurred which resulted in the father being charged with assaulting the mother. The father was later acquitted of the charges.
- The father stated that the reason the child did not want to see him was a result of the mother manipulating and influencing the child. The father sought Orders for the child to attend counselling and “re-introduce” a relationship with him.
- The mother arranged for the child to see a psychologist. The psychologist found that the child experienced genuine fear and distress as a result of interactions with the father. The father disagreed with these findings, arguing they were based on the false basis that he was violent.
- The Court Ordered that the child attend upon another psychologist. It was found that the child was confident in her expressed views and showed no desire to see her father and that she should not be forced to spend time with him.

Court Found:

- Regardless of whether the child has been led by her mother’s views or not, the Court found the child to be vulnerable.
- At the age of 11, the child is not in a position to realise the long term detriment of not having a father role model in her life.
- Taking into account the complexity of the view, the Court was concerned of the consequences of disregarding the child’s wishes and forcing her to undertake counselling with her father.

these 2 cases the Court did not place weight on the child's wishes, however each case involved the child being influenced and confused by the input of one or both parent's wishes. In the situation of the 11 year old child, it was clear that, despite the Court not upholding the child's wishes, it found that it was important not to disregard those wishes altogether.

It is more likely that a child aged 12 years and older will have their wishes considered, but for younger children, depending on their age and maturity, the Court may still look at their views. Whether these views then reflect in the child's arrangements will depend upon the facts of each case.

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