

WHAT ABOUT CHILDREN'S WISHES?

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For separated parents, trying to sort out what time the children will spend with each parent is not easy. The Family Law Act says that the foremost consideration when making such a decision is what is in the child's 'best interests'. One of the most commonly considered aspects of 'best interests' are 'child's wishes'.

So, if parents can't agree and the court has to make an order, how much consideration is given to child's wishes?

A child's age – how young is too young?

When it comes to the area of shared parenting, the Family Law Act has a number of considerations it must take into account, on those being any views expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's views.

The Family Law Act does not stipulate a specific age a child must be in order for their wishes to be taken into consideration. According to previously decided cases, the court will take a child's wishes into account at about 12 years of age. The court may consider a child's views between the ages of about 10 and 12, depending on the individual child. The weight the court will give to the child's wishes or whether the court will consider the views of a child aged 10 and above will depend on the maturity of the child and how clearly their views are expressed. The wishes of a child under 10 years old is unlikely to be considered, as it will not be apparent to the court whether it is the child's views or a parent's view expressed through the child.

How can a child's wishes be heard?

Children cannot give evidence in the Family Court, so how is it that a child's true wishes in regard to who they want to live with or the amount of time they want to spend with each parent is provided to the court?

A child's wishes are captured in a Family Report, which is then given to the court and relied on as to what a child wants.

Getting a family report

There are a number of ways that a Family Report can be obtained. These include:

- On an informal basis, parents may go to a Family Relationship Centre (FRC) and participate in 'child-inclusive' mediation. This will involve the child speaking to a Child Psychologist and the child's wishes being relayed to the parents. No written report is prepared.
- Parents can mutually agree to get a Family Report prepared.

However, if the matter is going to court, a Family Report will need to be obtained for the children's views to be considered by the court. If there is a dispute and one of the parents is opposing a Family Report to be made, when the matter comes before the court, the court may order a Family Report be privately obtained (i.e. paid for by the parents privately) or prepared by one of

the Family Court's own counsellors, (at no cost to the parents), or through an Independent Children's Lawyer (ICL), (i.e. a lawyer who represents the child).

What weight is given?

There are many cases in which the court considers children's wishes, however it really depends on the different circumstances, the maturity of the child's views, the child's age and their ability to clearly express their views.

Recently, the court determined a case where (2) children (aged 12 and 10) had strong wishes about which parent they preferred to live with. The 12-year-old child wanted to live with his father, whereas the 10-year-old child wanted to live with her mother. The court recognised that the 10-year-old was less mature than her 12-year-old brother, however the court saw that she expressed a clear view not influenced by her mother. Both children's views were heard and the court made an order that the children live with the parent specified, even though the father lived in Brisbane and the mother lived in Adelaide. In circumstances involving older children, in their teen years, if their views are clear, the court will usually give significant weight to their wishes and make orders for parenting arrangements accordingly.

Examples:

1. The court recently had to determine in a case involving 2 daughters (aged 13 and 15) who did not want to spend time with their father, whether significant weight should be given to the daughter's views. Although the children's negative views were reinforced by their mother, the daughters were found to have a sophisticated understanding of the situation and were of an age and maturity where their views were given significant weight.
2. The older a child is does not necessarily mean the child has a higher level of maturity or a clear view of what they want. In another case involving children's wishes, a 13-year-old child with autism expressed views to spend more time with his father. The court however, recognised that due to the child's vulnerability and influence in the parent's conflict, the child's views were not ignored but were not given a determinant weight either.

At Michael Lynch Family Lawyers, we understand that children's matters can be complex. It is important to get the right advice early and focus on what is best for the children in any given situation. If you would like to discuss your personal circumstances, please contact us on (07) 3221 4300 or law@mlynch.com.au for a no obligation fixed-fee initial consultation.