

Children's Views in Family Law



This fact sheet summarises the Ask LOIS webinar on this topic, presented by Mari Vagg, Solicitor, Women's Legal Services NSW on 4 December 2012. This webinar can be downloaded for free at www.asklois.org.au/webinars/past-webinars.

This fact sheet covers:

- How and when children's views can be taken into account in family law matters.
- Can a child decide who they live with or spend time with?
- How does evidence of children's views get before the court?
- What are Family Reports?
- What does the Independent Children's Lawyer do?
- What if children refuse to spend time as ordered?

Children's views matter!

- Generally, children can't decide who they live with or spend time with, as it's not appropriate to pressure children to choose between their parents
- This decision is made by either the child's parents or by the court. However, a child's view does matter

Relevant law: *Family Law Act 1975 (Cth)*

- A court **must** consider a child's view if they express where or with whom they wish to live with (**s 60CD**)
- Courts also must consider any factors (such as the child's maturity or level of understanding) that it thinks are relevant to the weight it should give to the child's views (**s 60CC(3)(a)**)
- However, the court is not bound by the child's wishes

Age:

- There is no arbitrary age for a child's views to be followed (unless they are an adult as at 18 years old)
- Importance given to the child's views will depend on the child's age and maturity, and the facts of the case.

Children's evidence at court

- No one under 18 years old can give evidence, in court or on affidavit (**s 60CE**). This is to protect children, so they cannot be required to express a view
- Children can only give evidence relating to affidavits if they are seeking to become a party to proceedings or if the court makes an order for the child to do so (**s 100B**)
- Children can only give evidence in court if the court makes an order for the child to do so (**s 100B**)

How to give evidence of a child's views to court

a) Parents affidavits

- Affidavits containing statements about the child's views that the child has made to someone else will be considered (and thus, the hearsay rule is ignored)

b) Subpoenaed evidence

- Includes records from school, the child's counsellor and DOCS

c) Family Consultant's Report

d) Independent Children's Lawyer

e) Exceptional Circumstances (although highly unlikely)

- Where the child has directly spoken independently with a judicial officer
- Where a child over ten is a witness following the grant of special leave by a judge
- Where there has been direct communication between the child and a judicial officer that is not initiated by a parent, for example - a letter from child to judge
 - However, this must be dealt with cautiously as there is a risk of an adverse finding against the parent if they have involved the child in the court process



Family Consultants

- Family consultants are counselling professionals appointed by and employed by the Family Law Courts to assist judicial officers in children's cases
 - They can include psychologists and/or social workers
- Information provided to a family consultant is not confidential or privileged
- Parties usually attend an initial conference early in the court process to try to resolve the matter

Family report:

- Reports by family consultants can be ordered by the court to assist it in making any decision about children
- The report can cover any matter that relates to the care, welfare or development of the child, and must include the child's views unless this is inappropriate because of age or other special reason
- Family Consultants will meet with both parents and with the children separately

Process in court:

- The family consultant can be called to court by either parent's lawyer and asked to explain the report, like any other witness
- After listening to all the evidence and each parent in the witness box, the judge may reach a view opposite to that of the family consultant

Effect of a family report:

- Family reports are very influential but are not binding on the court
 - Eg, if the report favours one parent, it can be very difficult for the other parent to persuade the court to come to a different conclusion

Reports from other experts

- A court may order a report from an outside expert including psychologists, psychiatrists or social workers
- Reports are only accepted by the court if:
 - It has ordered the report, or
 - It has given special leave for a parent to submit a report that requires the child to see another specialist (s 102A)

Independent Children's Lawyers (ICL)

- The court may order that a child's interests be separately represented by an ICL
- Examples of when an ICL would be appointed:
 - High conflict or hostility between the parents and affects the presentation of child's interests
 - Serious allegations of child abuse or neglect
 - There are complicating factors such as a difference in religion or culture between the parents

Role of an ICL:

- The lawyer's role is not to act as the child's legal representative, unlike the relationship between an adult and their lawyer, the child **cannot** instruct the lawyer how to run the case
- The lawyer should:
 - Form an independent view of what is in the child's best interests; put the child's views before the court and act in what they believe to be the child's best interests (but they do not have to agree with the child's views)
 - Minimise as far as possible the trauma of the proceedings for the child

Appointment of an ICL:

- a) The court makes an order for the appointment of an ICL on its own initiative, or
 - b) On the application of the child or a parent. Legal Aid NSW is then requested to provide the lawyer
- Because of funding constraints, Legal Aid NSW has policies that limit both the circumstances where it will act as an ICL and the funds available for each case.



- The parties may be required to pay the cost of the ICL

Children's Lawyers in other jurisdictions

- Children's Care and Protection Law:
 - 'Best interests model' if under 12 years – Not instructed by the child
 - 'Direct legal representation model' if 12 and over – Instructed by child directly
- Criminal Law:
 - Direct representation model - (note: the age of criminal responsibility is 10. Between the ages of 10-14 the child is presumed *doli incapax* (incapable of crime), however, this is rebuttable)
- Civil Law:
 - Direct representation model, or
 - Where person is deemed incapable of giving instructions or has limited capacity due to age or another reason, a *guardian ad litem* (a special representative) is appointed

Application by child themselves

- Under the *Family Law Act* a child can make an application to the court on their own behalf
 - A child can sign an affidavit if they are the applicant, but wouldn't be able to give evidence without leave (permission) from the court (**s 65C(b)**)

Relevant Case Law

- In *Madley & Madley and Anor* [2011] FMCAfam 1007 (1 April 2011), a 16 year old girl made an application to the court for a restraining order that prevented her from leaving the country to avoid a forced marriage, and the order was granted

Children's refusal to spend time with a parent

Duties of parents

- Parents must comply with court orders or risk penalties
- It is well established that parents cannot simply allow a child to choose not to go

Duties of children

- Children are not bound by the orders as parties, however, if they do not comply with the orders their parents are at risk of being in breach
- In practice,
 - For a younger child – the court would expect a parent to exercise their parental responsibility and be able make the child go
 - If a child (usually an older child) acts very stubbornly despite the best efforts of the parent, the parent will not be in breach

Further resources

- **Family law courts**
 - www.familylawcourts.gov.au
- **Legal Aid - ICL**
 - www.legalaid.nsw.gov.au/publications/factsheets-and-resources/independent-childrens-lawyer-for-parents