

Are the views of the child considered in family law?

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Where family law matters involve children (for example, parenting disputes), it's common for parents to ask if the views or wishes of their child will be taken into consideration. In short, the views of the child are sometimes considered in family law matters. This blog explores in what circumstances this can happen.

Best interests of the child

The Court can take the views of the child into account when making Parenting Orders. However, the paramount consideration will always be what is in the "best interests of the child?"

The general considerations in determining what is in the are:

1. The need to promote the safety of the child and each person who has care of the child, whether or not this person has parental responsibility of the child (including safety from family violence abuse, neglect or other harm).
2. Any views expressed by the child.
3. The developmental, psychological, emotional and cultural needs of the child.
4. The capacity of each person who has or is proposed to have parental responsibility for the child to provide for the child's developmental, psychological, emotional and cultural needs.
5. The benefit to the child of being able to have a relationship with the child's parents, and other people who are significant to the child, where it is safe to do so.

6. Anything else that is relevant to the particular circumstances of the child.

There are also a number of ‘further’ considerations that the Court must consider when determining the best interests of Aboriginal and Torres Strait Islander children.

The general and further considerations are non-hierarchal and focus on a core list of considerations to best promote the child’s welfare and development. The Court is not required to give more weight to any one factor over the others (although the Court still has the discretion to place whatever weight as they deem appropriate to a certain consideration).

However, when determining what is best for the child/children, the Court will give greater weight to the need to protect a child from physical or psychological harm or from being subjected to, or exposed to, abuse, neglect or family violence over the benefit to a child of having a meaningful relationship with both parents.

Does the Court have to follow what the child wants?

While the Court may take the child’s view and wishes into consideration, they are not bound to follow any request.

The Court has discretion to decide what weight (if any) they give the child’s views. That is, how much the child’s views will influence the Court’s decision when making Parenting Orders. As the Court must make Parenting Orders in the best interests of the child, if they decide that the views expressed by the child are not in their best interests, the Court would be unable to make such an Order.

It is important to note that it is not appropriate for children to have, or feel as though they have, decision-making powers relating to their parent’s separation. Ultimately, while the Court can consider the views of the child, it is not up to the child to decide what arrangements will be put in place for their care.

When is it not appropriate for the Court to consider the views of the child?

There are a number of circumstances where it may be inappropriate for the Court to consider the views of the child. Some of the most common circumstances are where the child is too young, too immature, or cannot/does not understand the matter sufficiently to make an informed decision.
For example, it would be inappropriate for the court to consider the views (or, the inferred views) of an infant or toddler, as they are too young to be able to voice their opinion.
There is no set age where it becomes appropriate for the child’s views to be heard. A common myth in family law is that once a child turns 12 years old, the Court will only make orders in line with the child’s views – this is not the case.

It will depend entirely on the maturity of the child and the history of the matter, to determine what weight, if any, is given to them.

How does the Court hear the child’s views?

The Court does not hear directly from children in family law matters (although it can in some very rare circumstances). Children do not usually go into Court or present evidence to the Court. The aim is to keep children as removed from litigation and the court process as possible.

The views of the child can be made known to the Court through the preparation of a family report or through an Independent Children's Lawyer.

Family Reports

Family consultants conduct 'child and family assessments' for the purpose of preparing independent reports to be provided to the Court. These reports are to assist the parties and the Court to determine arrangements that will bring about the best outcomes for children.

The two main types of reports are:

1. Child Impact Reports are shorter reports generally ordered early in proceedings, and
2. Family Reports are more in-depth reports generally ordered for matters at the final hearing stage of proceedings.

Family consultants will usually conduct a series of interviews in one day or over a few days. They will have individual interviews with each parent and can also interview other significant people (such as adult siblings, step or half-siblings, partners or grandparents).

Children are usually seen separately from the adults if they are old and mature enough to do so. The children will be given an opportunity to express their views and wishes, but are not expected to do so if they don't want to.

The family consultant can also observe interactions between the children and each parent (and/or other significant people) in separate observation sessions. These interactive sessions are common when the children are still quite young, but can also be done with older children depending on the circumstances of the matter.

Independent Children's Lawyers

An Independent Children's Lawyer, or ICL, is an independent, impartial party to family law proceedings.

As children are not usually allowed to attend court, sometimes an ICL will be appointed to represent the child's best interest in a family law matter. A Court will appoint an ICL when it needs to hear an independent assessment about the child's best interests.

An ICL will carefully consider the evidence of all parties and will make a recommendation to the Court about what they believe to be in the best interests of the child.

Other options for child's views to be considered in parenting disputes

Child-inclusive counselling &family therapy

Child inclusive counselling and family therapy can help parents and children address family conflict, loss and trauma and may even be used to holistically rebuild a child's relationship with a parent.

With help from professionals, children are encouraged to express their views in a supportive environment and develop tools to assist them to cope with the significant changes relating to separation.

You can contact your general practitioner for referrals to local professionals or contact Family Relationships Online to find publicly-funded providers.

Child-inclusive family dispute resolution/mediation

Family Dispute Resolution ("**FDR**") (or mediation) is a process where parents attend a qualified mediator who will assist them to find arrangements that work best for their children and the family. Child inclusive FDR is exactly what it sounds like – dispute resolution between parents that takes into consideration the child's point of view.

More and more organisations are offering child inclusive FDR.

You can contact private family dispute resolution practitioners through the Family Dispute Resolution Register. You can also contact publicly funded providers through Family Relationships Online.

For more detailed information, you can read our blog on Child-inclusive Family Dispute Resolution (FDR) here.

How a family lawyer can help

If you're working through parenting arrangements after separation and you need assistance to ensure the best interests of the children are paramount, our family lawyers have significant expertise and experience in all aspects of parenting disputes.

Contacting Smith Family Law

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