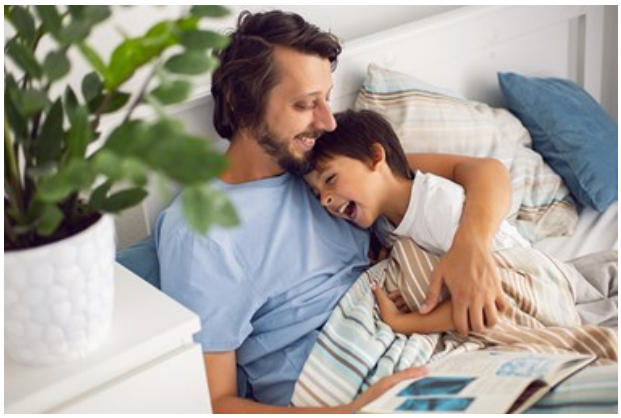


After separation, can my child decide which parent they wish to live with?

Author: Ben Smith
Email: ben@smithfamilylaw.com.au
Date: **Sunday March 2, 2025**

Where a child lives and which parent they live with is one of the most difficult issues for separating families. If family law proceedings have begun, the Court can make orders determining a child's living arrangements, including the overnight time they spend at each parent's house.

Although children cannot decide (on their own) which parent they live with, the Court can consider their views and wishes when making parenting orders for living arrangements. In this blog, we will look at the ways a Court can gather information about your child's views about where they wish to live and how this is balanced with other considerations.

What does the Court need to know to make decisions about where my child lives?

When making any parenting order, whether interim or final, the Court must place the best interests of the child as the paramount consideration. This means that what is in your child's best interests is the most important factor the Court considers when making decisions.

The *Family Law Act 1975* (Cth) sets out how the Court determines what are the 'best interests' of a child.

The general considerations in determining what is in a child's 'best interests' are:

- 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).

- Any views expressed by the child.
- The developmental, psychological, emotional and cultural needs of the child.
- 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.
- 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.
- Anything else that is relevant to the particular circumstances of the child.

Further considerations specific to Aboriginal or Torres Strait Islander children will also be taken into account by the court and are prescribed under the *Family Law Act 1975* (Cth).

Ways your child can share their views prior to Court proceedings

There are a number of ways that separated parents can be informed of and understand a child's views about where they wish to live.

Counselling

Children may find it difficult to talk to their parents about how they feel about their parents' separation or express their honest views about who they would like to live with.

Parents may consider arranging for their child to speak with an independent third party, such as a school counsellor or psychologist, to help them process the significant change in their lives. This process may also assist to empower the child to either be able to speak honestly and directly with their parents about their thoughts and feelings, or otherwise could be used as an avenue for the parents to speak directly to the practitioner to ascertain their child's views.

While the child cannot decide where they want to live during this process, it may assist families to understand and navigate separation where there are children of the relationship.

Child-inclusive family dispute resolution

Family Dispute Resolution ("FDR") (or mediation) is a process where parents attend a qualified mediator who will assist them in finding 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. You can read more about this and how it takes the child's view into consideration, in our earlier blog, "Child inclusive Family Dispute Resolution (FDR)".

Ways your child can share their views with the Court

As part of determining the child's best interests, the Court can consider 'any views expressed by the child' in determining living arrangements. There are a number of ways that the Court can be informed of and understand a child's wishes and needs in relation to where they live.

Family Reports

The Court can make an order for parents and children to see a 'family consultant', who is usually a psychologist or social worker with extensive experience and specialisation in working with separating families and children.

The family consultant may observe each parent with the child and/or speak to the child themselves, should it be appropriate to do so. This gives your child an opportunity to discuss the separation and the Court proceedings and how they are being impacted. Court documents and any other evidence provided to the Court may also be reviewed prior to the observation sessions.

The family consultant then prepares a 'Child Impact Report' or 'Family Report', outlining their observations, discussions and recommendations for living and other arrangements. The Court uses these reports to assist them in determining a child's views and if those views align with their best interests as defined by the *Family Law Act*.

Information sharing from authorised bodies

The Court can request information about the child's views, history and experiences from authorised bodies, including:

- The Department of Families Fairness and Housing (Child Protection).
- State and territory Courts, including Children's Courts; and
- State and federal police bodies.

Generally, authorised bodies that provide information about a child's experience or views to the Court are government institutions that deal with child safety, risk and protection. 'Information' can include reports and records of open or closed investigations within that institution.

The Court may request these bodies share information they have in relation to a child if there are relevant concerns about family violence or child abuse in determining living arrangements.

Parties can also obtain information about a child's experience or views by issuing a subpoena in relation to the child; for example to the child's school or counsellor.

Information provided by these third parties is only to be viewed by the Court and parties to the family law proceedings and cannot be shared. It is illegal to publish any information about a family law matter or the parties involved, including any information shared by these authorised bodies.

Independent Children's Lawyer

The Court may appoint an Independent Children's Lawyer ('ICL') to represent your child's best interests during the court proceedings. Amendments to the *Family Law Act* (which came into effect in May 2024) place an obligation on ICLs to meet with the child and give them a chance to share their views where appropriate.

However, this is not always appropriate, depending on the age and maturity of the child. For example, a toddler may not be able to communicate their views in a clear and understandable way. If your child is able to meet with the ICL, they do not have to express their views with the ICL if they do not want to, but they must be given an opportunity to do so if it is appropriate.

An ICL may also communicate with or review information from organisations that are involved in your child's care and wellbeing, including medical and education providers and the authorised bodies outlined above.

It is important to note that an ICL does not act for or represent your child as a party in the same way a family lawyer may represent a parent in the proceedings. They are there to independently represent the 'best interests' of your child, which means that their position on who your child should live with may be different to your child's wishes.

How a family lawyer can help

The Court may use one or a combination of the avenues referred to in this blog to ascertain your child's views about who they want to live with after separation. They will then take those views into consideration and place them in the context of risk factors and other matters that may impact your child's well-being.

If there are family law proceedings concerning your child, or you are unsure if your child's views about who they want to live with will be expressed to the Court, our experienced family lawyers may be able to assist.

Contacting Smith Family Law

03 8625 8957

info@smithfamilylaw.com.au

This blog is of a general nature and should not be relied upon as legal advice. If you require further information, advice or assistance for your specific circumstances, please contact us.