

# Children's Wishes under the Family Law Act

The Full Court of the Family Court of Australia recently refused a father's appeal against orders that two boys live with the mother. In doing so, Chief Justice Nicholson, Justice Finn and Justice Guest made observations about the information which should be gathered by family report writers and child representatives (lawyers representing children's interests in the Family Court).

## The Case

In *R and R: Children's Wishes* [2000] FamCA 43, a family report had been prepared by a counsellor for the trial Judge. It indicated that both children wished to live with the father but also raised concerns about the father's interactions with the children, his lack of respect for the mother's viewpoint, and his commitment to facilitating contact between the children and their mother in the future.

Having regard to all of the evidence, the trial Judge decided that the children should reside with the mother notwithstanding the children's wishes. Her Honour concluded as follows (at para 31):

*"The expressed wishes of the children is accepted and it is acknowledged that this is coming from boys who are aged 12 and 10 years, though [the younger boy] may not have the maturity at this stage to appreciate the full implications. Nonetheless, their preferences are of considerable weight in this case. Even so, that has to be placed in the overall context of this family. They have had irregular contact with their father for 2.5 years until his return to Australia relatively recently and it is entirely understandable that they should be wishing to spend more time with him. No doubt they felt a loss of his company and missed the sort of relationship which he offered them when he was around. As I see it, the strength of the children's expressed preferences has to be tempered by these considerations. It also has to be tempered by the fact that he is now more available to them than he was before and by the counsellor's view, implicitly expressed, that the children's desire to spend more time with him can be met by frequent and regular contact arrangements. Moreover, while the issue is a weighty consideration, it is tempered also by the children's mother having given them good quality care to this point and by the added factor, discussed in detail above, of the husband's limited insight into the effect of his conduct on the children's future balanced development.*

*In the end result, I am of the view that the balance of the children's best interests favours their remaining in their mother's primary care, but having regular and frequent contact with their father."*

In upholding the trial Judge's decision, the Full Court considered earlier cases concerning the treatment of children's wishes, and said:

*"44. It is quite clear that their Honours were not saying that if the child's wishes are valid then they are to be acted on by the Court and indeed this is not the law. What is required is that they be given appropriate and careful consideration and not simply treated as a factor in the determination of the child's best interests without giving them further significance. When validly held reasons are departed from by the trial Judge, it is apparent that good reason should be shown for doing so."*

The Full Court found that the trial Judge had undertaken the correct process on the evidence before her. It then made the following remarks about the information obtained through the family report process:

*"59. Before leaving this matter we would make an observation about the Counsellor's evidence in response to her Honour's question about the impact on the boys and their likely response if effect was not given to their expressed wish to live with their father. It would appear that the Counsellor's response was an opinion formed on the basis of her professional expertise rather than specific statements made by [the boys] during [the Counsellor's] interview with them.*

*60. Most properly, the Counsellor's report makes it clear that in asking each boy whether he had a preference as to where he would like to live, she informed him that he did not have to answer the question if he found it uncomfortable to do so. It does not appear, however, that a question in similar terms was asked along the lines of how each boy would feel if the Court did not come to the same conclusion.*

*61. In our view, it would seem generally desirable that authors of family reports ask such a supplementary question where children do feel comfortable to express a preference on a matter*

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*before the Court. The inclusion of such information as well as the Counsellor's assessment of it in family reports is an aid to better understanding the wishes of children and the process of giving weight to them.*

*62. Our remarks are also applicable to child representatives. Their role requires them to "inform the Court by proper means of the children's wishes in relation to any matter in the proceedings" - see P and P (1995) FLC 92-615; A v J (1995) FLC 92-619. We consider that it would also be desirable for the child representative to arrange for evidence to be before the Court as to how the child would feel if the Court did not reach a conclusion which accorded with the child's wishes, provided of course that the child is comfortable to express a view."*

## Comment

The Full Court's decision reiterates that children's wishes are not determinative under the *Family Law Act 1975*. They are one factor, albeit a weighty factor, to be considered in the task of deciding what outcome will best serve their interests (see section 68F of the Act). Within this framework, the Full Court's suggestions to family report writers and child representatives are a specific but welcome extension of attention to the right of children to participate and have their say in disputes about where they will live and other parenting matters.

The expectations laid down by the Full Court are also a small enhancement of Australia's conformity with Article 12 of CROC which provides as follows:

"1. States Parties shall assure to the child who is capable of forming his or her own views the right to

express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

In family law proceedings, a professional assessment of how children may feel about an outcome different to their wishes is now generally undesirable without information about what children themselves have said about such a result. The Court expects the issue canvassed with children and to hear any views they have expressed, not just a professional prediction.

By spelling out this requirement, the Court is doing more than improving the material on which it makes decisions. It is also helping to ensure that the practice of counsellors and child representatives informs children of the legal status of their wishes. One would expect that there will be less risk that the process of asking about wishes leaves a false impression with children that their wishes will decide the outcome of a family dispute.

The full text of *R and R: Children's Wishes* [2000] FamCA 43 (judgment delivered 4 February 2000) can be viewed at the Family Court's website: [www.familycourt.gov.au/html/2000.html](http://www.familycourt.gov.au/html/2000.html)

- Danny Sandor

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## DCI President to advise Victorian Government on Rights of Same-Sex Partners

With the support of the National Committee, DCI – Australia President Danny Sandor has accepted an invitation from the Victorian Attorney-General, Mr. Rob Hulls MP, to join a new advisory body.

Prior to the State election, the Government made a commitment to extend the rights of same-sex partners in various areas of public life, including the implementation of the 1998 Report of the Equal Opportunity Commission of Victoria entitled *Same Sex Relationships and the Law* which identified over 30 pieces of legislation that discriminate against same sex partners.

The Attorney-General has established an Advisory Committee on Gay, Lesbian and Transgender Issues to be chaired by the Parliamentary Secretary, Justice, Mr Richard Wynne MP. The Committee is to advise on law reform initiatives to address discrimination matters and legislative options for extending rights to same sex partners. The first meeting of the Committee took place on 2 June 2000.

Interested DCI members and affiliates are invited to contact Danny if they wish to receive updates and provide input into the Committee's deliberations. Please e-mail him on [dannysan@ozemail.com.au](mailto:dannysan@ozemail.com.au). If you don't have e-mail, please phone 0409 311 510.