

Canada has signed the *United Nations Convention on the Rights of the Child*. It says that all member countries must give children the chance to participate in legal proceedings that affect them. The child can state her views directly on her own, or indirectly through another person. In a custody case, the judge could hear about the child's views in several ways. If the child is older and mature enough, she might speak in open court. Or, an independent lawyer could go to court for her to present her views. Sometimes, children write letters about what they want and the parents produce those letters during the trial. Yet another way is through a custody or access assessment. The assessor's job is to make a recommendation to the court setting out the parenting arrangements he thinks would be best for the children. In preparing the assessment, the assessor (usually a social worker, psychologist, or psychiatrist) observes and questions the children. For very young children, he will report what he saw and heard, but for older children he will also report what they said to him.

Judges prefer to get this information through trained and experienced third parties. But assessors are expensive and assessments take a long time. Lawyers are expensive too, and parents may not be able to afford lawyers for themselves, let alone for their children. Sometimes one or both parents will ask the judge to interview a child directly. Should the judge meet with the child? If one parent objects, can the judge go ahead anyway? In Newfoundland, PEI, Ontario, the Northwest Territories, and Nunavut there are specific laws that allow judges to interview children without their parents' consent. The rest of the provinces and the Yukon Territory have no specific laws. There, judges rely on their *parens patriae* power to do it. (*Parens patriae* is the power of the court to act in the best interests of children even if there is no law authorizing them to do a particular thing). If the judge thinks it is in the child's best interests, he can interview the child whether or not her parents object.

What information does the judge look for? Generally, judges want to accomplish three things:

- find out what the child wants, on a variety of issues. For younger children, it may be on simple things such as the type of activities they prefer or how they want to handle special occasions and holidays. An older, mature child might say where she'd like to live and how much time she'd like to spend with each parent.
- make sure the child knows she has a say. Talking directly to the decision-maker can help the child avoid feelings of isolation, anger, and frustration at being left out of a process that profoundly affects her.
- find out more about the child's character and personality. Is he easygoing and

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flexible? Anxious and afraid? Gregarious or a loner? This information may help the judge tailor a solution for that individual child.

Procedurally, there are many things to sort out. Should the interview take place in the judge's private office, or somewhere else? Will anyone else be present, such as the judge's secretary? Should it be tape recorded or does the judge just take notes? How much (if any) of the information should the judge pass on to the parents? Do the parents get to challenge that information? At what point in the trial does the judge interview the child — the beginning, the middle, or the end? To make the process as smooth as possible, the judge should hear from both parents on all these issues, then lay out the ground rules as early as possible in the trial.

After the interview, the judge can rely on what she heard from the child, or ignore it. If she ignores it, there is no problem. Her judgment will say that she interviewed the child in private but none of the information she heard influenced her decision. The more tricky question is what the judge should do if she does rely on the interview. These interviews are intended to let children speak freely without choosing sides and without worrying about disappointing or embarrassing their parents. So, if the judge does rely on the interview in reaching her decision, what should her judgment say about it? The judge knows that by the time parents get a custody case to trial, parent-child relationships are usually very fragile. She will not want to do more damage by revealing information that a parent may find hurtful. On the other hand, both parents have the right to know why the judge decided the way she did. The judge must balance these competing interests and decide what to say and what not to say on a case-by-case basis.

The whole procedure is not without risk. The judge may not have the necessary training to evaluate the child's true wishes. Some children might find the interview extremely stressful, intimidating, and worrisome. Judges must be particularly careful when conducting an interview over one parent's objections, as an unhappy parent may appeal a disagreeable judgement and keep the family embroiled in litigation even longer.

Children deserve individual, not cookie-cutter justice. Having a judge interview a child may not be the preferred way to get the child's opinion before the court, but it is better than not hearing her at all.

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