



Do Children Get to Decide Where They Live? By Jodi Wyman

Yet another myth in family law cases is that the Judge will sometimes talk to the children in custody cases. Many people have heard that after children turn twelve they get to decide which parent they will live with. This is not in fact how it works, but there is some foundation to the idea.

Judges have to consider a lot of factors when making decisions about custody and access. Only if the child at the centre of the custody fight is mature enough to make thoughtful and rational decisions, will the Judge agree to hear the child's views. Judges will not take the views of young children into account. In the first place, it is emotionally detrimental to little kids to believe they can make such important adult decisions. Secondly, they should never be put in the position of having to choose between parents. In addition, their choices could be based on which parent lets them stay up later or have ice cream for breakfast.

Typically, it is around age twelve when children are seen as able to participate. They are becoming independent, have strong views and are better able to make decisions for themselves. This does not always mean the children will make good decisions. Teens are also susceptible to feeling conflict loyalty between parents or to choosing the parent who may have fewer rules. Judges are cautious when hearing a child's views for those reasons. The Judge does not automatically make the decision the child wants.

One of major practical problem is how to have the Judge hear the child's wishes. Judges will almost never actually meet the child. Instead, the information is conveyed to the Court indirectly. In some cases, if the Judge has ordered that a home assessment be completed, the social worker will interview the child. If there are serious behaviour problems or in high conflict cases, sometimes a psychologist is hired to assess the child's feelings. Other

times, the Judge can appoint a "friend of the Court" called an *amicus curae*. This can be a social worker, counsellor or even an independent lawyer who will speak with the child and prepare a report about their discussion. Judges can also appoint a lawyer to represent the child but this is usually only in cases involving child welfare agencies, not custody cases.

Practically, it is very difficult in Brandon to find the proper format for the child. Assessments can be costly or take months to complete. Finding an experienced, qualified *amicus curae* is not easy, and can also be expensive. Parents sometimes cannot agree on the right format, leading to an extra Court case.

A pilot project in Kelowna is trying to help with the problem. Called "hear the child", it provides training to lawyers and counselors about how to talk to children about their wishes. A standard interview structure was established to explain to the child what the interview is

about. Children are told that the Judge wants to hear their thoughts on various custody and access scenerios before he or she makes the decision. The child is not asked to choose between their parents. A transcript of the entire interview is given to the parents and the Judge.

The project has proven very popular with parents and the Courts. The interview process can be completed in a week, the cost is minimal and the results are very helpful to the Court. Hopefully, this project may set an example for other Canadian jurisdictions.