

Custody & Access

Haberman v Haberman, 2011 SKQB 415 (CanLII) <http://canlii.ca/t/fnr3l>

1. Should a child be consulted on custody and access decisions?

One position is that it is best to keep children completely out of the judicial process. Telling them about the process or consulting with them about their wishes may cause undue anxiety and concern. It may be traumatizing for a child to feel that they are responsible to make their own decision about access and custody. The child may experience guilt or pressure from a parent before a decision is made or after a decision is made and the parents are told. Family law is complex and their opinion on one matter may affect a number of things that they could not anticipate or appreciate at the time.

On the other hand, the child's life will be deeply affected by the separation and divorce and the child's opinion should be considered if the child is mature enough and wishes to offer an opinion. There are mechanisms in place that allow a child to state what their concerns are and what suitable living arrangements would be without having a child testify in court or review sworn affidavit evidence. Family counselors are skilled at interviewing children to find out their concerns and wishes and examine the source of emotions and behaviour. It may be empowering for children to have a role in the family court process despite the fact that their wishes are not determinative. The court still decides what is in the best interests of the children but the child has a chance to be heard. See also the UN Convention on the Rights of the Child:

Convention on the Rights of the Child

Article 12

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.

2. Should a separate decision be provided specifically for the child by the judge?

If there has been a decision made to involve the child by consulting with the child or reporting on the child's condition, then there may be some benefit to advise the child about the outcome. However, it is not often appropriate for the child to see the judge's reasons for decision. Their life issues are summarized and analyzed according to the law. They are not necessarily addressed in a way that is sensitive to the personal nature of the information. A separate decision for the child may provide the opportunity to address the child and confirm that their wishes were taken into account without exposing them to the entire reasons for judgment. The other position would be that it is best to completely isolate the child from the court process for their emotional wellbeing.