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When Are Children's Views Determinative in Relation to Matters of Custody?

Questions quite often arise as to what age a child's views should or would be taken into account by the court in determining questions of custody, access, and primary residence. There is no specific rule as to the age a child should be when a child's views are solicited or even considered, but the court uses some general guidelines from time to time when litigants try to encourage the court to give consideration to the child/children's views or wishes.

Section 24(1) of the *Family Relations Act* imposes a duty on a court involved in a custody enquiry to give paramount consideration to the best interests of the child; it also requires the court to consider the following factors, and "give emphasis to each factor according to the child's needs and circumstances":

1. the health and emotional well-being of the child, including any special needs for care and treatment;
2. **if appropriate, the views of the child;**
3. the love, affection, and similar ties that exist between the child and other persons;
4. education and training for the child; and
5. the capacity of each person to whom guardianship, custody, or

access rights and duties may be granted to exercise those rights and duties adequately.
(bold emphasis added)

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Stangle v. Stangle

A recent decision of Mr. Justice McEwan in the case of *Stangle v. Stangle* 2002 B.C.S.C. 328, dated March 5, 2002, is of interest. This case concerned the weight to be given to the wishes of a 13-year-old boy in a dispute between his parents over his future, centred particularly around his education.

The parties were married on October 11, 1980, separated on December 1, 1994, and were divorced in March 1997.

The Separation Agreement, dated December 1, 1994, prepared in New York where the parties then resided, provided that joint custody was agreed, with "primary physical placement" to the child's mother. After separation, the

mother and the child moved to Balfour, BC, where her parents live. She has lived in the West Kootenays since separation, in or near Nelson, BC.

In November 1996, Mr. Stangle moved to Spokane from New York—where he had grown up—primarily to be closer to his son. He was self-employed as an academic writer. In November 1997, he met Sharon and married her in 2001. She has a PhD in psychology; he has a doctorate in engineering.

The child's mother has a master's degree in special education and teaches in the Human Sciences Department at Selkirk College. She remarried to Andrew in 1997. Andrew attends the University of Victoria; they have been entertaining thoughts of moving to Victoria.

An application was brought by Dr. Stangle seeking to "change" his son's primary residence to his home in Spokane, principally to enroll his son in a private school there. The mother responded with an application for a custody report and for disclosure of documents relating to the respondent's medical condition.

Before the hearing, the parties cooperated in having their son see Dr. Todd Kettner, a registered psychologist, on January 21, 2002. Dr. Kettner provided the court with a letter based on

a 1-hour interview and a 20-minute telephone call with the parties' son "Charlie," and on 45-minute interviews with each of the parties. Dr. Kettner's letter concludes as follows:

...It is my firm opinion that Charlie desires to live with his father while attending St. George's School next year. In my opinion, he has carefully considered his options and understands the potential drawbacks of his decision. He does not appear to be unduly influenced by either parent in his decision making process.

As was initially stated, the current assessment does not address the multitude of other issues that are likely impacting whether or not Charlie's expressed intentions are fully in his best interest. Thus, this report should not be interpreted as a recommendation as to where Charlie should live or attend school.

Dr. Stangle's application was made pursuant to both the *Family Relations Act* and the *Divorce Act*. McEwan J. cited the decision of *A.H.P. v. C.A.P.*, 1999 B.C.C.A. 203, where Madam Justice Proudfoot considered section 16(8) of the *Divorce Act* and section 24 of the *Family Relations Act* and made the following observations:

As Madam Justice Stromberg-Stein said in *Mitchell v. Mitchell* [1998] B.C.J. No. 1684 (B.C.S.C.), in the past, certain facts have been singled out by courts as critically important to a determination of the child's best interests and, in fact, have been elevated to the status of rules of law, or more recently, presumptions. These include the "tender years" doctrine that young children should be placed in the custody of their mother, that courts should avoid splitting siblings, and that the *status quo* should be maintained wherever possible. In light of the broad "best interests" test, it is inappropriate to view the above factors as presumptions or as necessarily determinative.

The evidence is that Charlie is remarkably gifted intellectually. It was obvious that Dr. Stangle held a low opinion of the public school system in which Charlie was enrolled in Nelson, and was of the opinion that Charlie's interests would be best served by his attendance at St. George's School, where he would be exposed to intellectual peers in a program designed to accommodate exceptionally gifted children. He also felt that Charlie's clearly expressed preference to go to St. George's School ought to be respected. On the other hand, Charlie's mother felt that while he was intellectually precocious, he was still a young adolescent and that his preference was not necessarily the result of a mature appreciation of what was best for him.

The court found that Charlie was 13 and able to clearly articulate a preference. The question was whether he had the necessary degree of maturity or perspective... .

The court also found Dr. Stangle had filed an application for Charlie at the school and as well, had actually enrolled him in the school and shown him the school without discussions with Charlie's mother. Charlie also wrote an entrance exam. When Charlie was accepted, Dr. Stangle commenced the current proceedings. He did not discuss any of this with Charlie's mother prior to bringing on the application. He even took considerable pains to keep his plans from her, even omitting her name as guardian on the school application. The court found that having embarked on this course of action, Dr. Stangle left Charlie in a position where he had to decide to keep a secret from his mother for several months.

The court took pains to indicate that the case was not about the court deciding

which of the proposed alternatives was better for Charlie in that there should be a choice between public and private schools. The court said that the primary question for determination was which of the parents should make the decision as to the school Charlie should attend.

The court then went on to determine the degree to which Charlie's wishes should weigh in the court's determination. The court found that Charlie was 13 and able to clearly articulate a preference. The question was whether he had the necessary degree of maturity or perspective for his wishes to have determinative weight.

The court felt there was nothing to suggest that Charlie was anything other than a 13-year-old in terms of his emotional or social maturity. He was, however, described by a teacher as having a "high degree of emotional immaturity" in the preceding school year of 1999/2000. The court said, "the fact that Charlie is able to articulate his preference in adult terms does not mean that his preference is in itself an adult choice."

Mr. Justice McEwan stated, "where our courts have refused to give determinative weight to the wishes of children over 12, contextual consideration has been significant," citing *Grove-White v. Grove-White* [1991] B.C.J. No. 3733 (B.C.S.C.), a decision of Mr. Justice Meredith as he then was, where Meredith J. refused to allow a 12-year-old to go with his father. Meredith J. made the point that to suggest at some point that children ought to have their own way "might well invite irresponsible or destructive inducements." In that case, the father was insolvent and proposed to move from Nanaimo to Toronto to a very uncertain future.

In the *Stangle* case, Mr. Justice McEwan was somewhat disdainful of Dr. Stangle's activities in saying:

To get what he wants, he has shown himself quite willing to undermine, if not subvert, the relationship Charlie has with his mother. That could never

be in Charlie's best interests, and has placed Charlie in a nearly impossible position. The degree to which Dr. Strangle talks about Charlie's "choice" in such matters is further illustrative of his lack of insight.

The result was that the court chose not to take into account Charlie's wishes to live with his father and attend school in Spokane. The court said:

Given the context in which Charlie's choice was made, and bearing in mind his age and maturity, I am not satisfied that it ought to be accorded weight sufficient to displace what is otherwise a case in which Charlie's best interests lie in staying with his mother.

Gullett v. Gullett

In a decision dated August 23, 2001, entitled *Gullett v. Gullett*, 2001 B.C.S.C. 1207, Mr. Justice Shabitts had to consider an application of a mother of three children to move her residence and her children from Port McNeill where

the children had always resided, close to their paternal and maternal grandparents, to Peace River, Alberta.

The court commented that the concerns of the children about reduced access to the parent with whom they will not be living, and to their extended families, is legitimate.

The plaintiff Rhonda Gullett and the defendant James Gullett were married on March 21, 1992, separated June 1997, and divorced August of 1998. They had three children: Christopher, born October 26, 1989; Steven, born December 27, 1992; and Jaymie-Lynne, born June 3, 1994. The application was brought by the defendant seeking an order that the primary residence of his children be with him.

While four Orders were made in respect of the marriage, the most important Order, other than a Divorce Order of August 13, 1998, was made on September 10, 1997, by consent that the parties have interim joint custody and joint guardianship of the children, and the plaintiff have the day-to-day care of her children. The defendant's application to vary the "day-to-day care" in the September 10, 1997, interim Consent Order was prompted by the plaintiff's advice to him that she and her current husband had decided to move to Peace River, Alberta, where they had since moved. As a result of the move, the children remained behind with their father in Port McNeill for the summer, awaiting the outcome of the court's decision.

The plaintiff submitted that the children were of such an age where their views ought not to be accorded much weight. She submitted that in any event, the children wished to live with her.

The court cited at length the decision of Madam Justice McLaughlin in *Gordon v. Goertz* [1996] 2 S.C.R. 27, where McLaughlin J. set out certain considerations a trial judge should make in determining whether, after having found a change in circumstances, custody and access should be considered afresh based upon one parent's application to move or remove a child from close contact and access with the other parent, due mainly to employment considerations. McLaughlin J. said that the judge should consider *inter alia*:

1. the existing custody arrangement and relationship between the child and the custodial parent;
2. the existing access arrangement and the relationship between the child and the access parent;
3. the desirability of maximizing contact between the child and both parents;
4. the views of the child;
5. the custodial parent's reason for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child;
6. disruption to the child of a change in custody; and
7. disruption to the child consequent on removal from family, schools, and the community he or she has come to know.

Not only are the wishes of the children to be considered as noted by Chief Justice McLaughlin in *Gordon v. Goertz*, it is also a factor referred to in section 24(1)(b) of the *Family Relations Act*.

In *Gullett*, the wishes of the children were placed before the court in that each of the parties in affidavit material expressed their respective opinions that the children wished to live with each of them.

The children were interviewed by a registered clinical counsellor who filed an independent report by way of a letter dated August 13, 2001. Mr. Frank had short, separate interviews with each of the plaintiff and the defendant, and an hour-long interview with the three

children together. He said the children were capable of verbalizing their respective thoughts and that they had arrived at a consensus about their wishes. He said the children expressed a closeness to each of their parents and that they liked the ability to spend time at both parents' houses. He said the two older children were adamant they did not want to have to leave Port McNeill. They were concerned about losing their friends and about not seeing their grandparents. All three children said they wanted to remain together. The clinical counsellor's letter to the court concluded as follows:

In summary, the issue is not which parent they wish to live with but rather in which community they wanted to live... They would all like to keep the arrangements as they were prior to June when their mom lived in Port McNeill and they could spend time with both parents. Although expressed in some different ways, they all felt they did not want to have to move to Peace River, Alberta, which seems very far away to them. They also don't want to be separated from each other. Jaymie and Steven both hoped their mom would move back to Port McNeill. Christopher nodded in agreement.

As a result, the court was of the opinion that the wishes and preferences of the three children were of little assistance.

The court commented that the concerns of the children about reduced access to the parent with whom they will not be living, and to their extended families, is legitimate. The court then went on to consider the case of *Currie v. Currie* (1975) 18 RFL 47 (Alta), where the court upheld the wishes of an 11-and-a-half-year-old girl to live with her mother, and *O'Neill v. O'Neill* (1971) 5 RFL 98

(N.S.), where the court refused to give effect to the wishes of a 14-year-old who wished to live with an aunt and uncle, rather than with his mother and stepfather. The court then went on to say, "in my opinion, the weight to be given to the wishes of a child, in respect of his or her care and control, depends on the age of the child, the reasons why the child wishes to live with a particular custodian, and the firmness with which the child prefers one place over another."

Mr. Justice Shabitts thought that Christopher was of an age where his views should be considered but that the other two were so young, their views were of little consequence. He did not think the oldest of the three should be permitted to determine the future of his two younger siblings, however.

As a result, the court was of the opinion that the wishes and preferences of the three children were of little assistance. Christopher had expressed no strong preference to live with either parent.

In the end result, the court decided that the children's best interests would be served by moving with their mother and stepfather to Peace River, Alberta.

Dove v. Dove

In *Dove v. Dove*, 2002 B.C.S.C. 373, a decision of Mr. Justice Edwards dated March 14, 2002, the plaintiff mother applied for the court's permission under a Separation Agreement to remove the parties' child Vanessa, aged 9, to Greentown, Indiana, from Langley, BC, and for consequential amendments to the access of the defendant father specified in the agreement.

The father opposed the relief sought by the mother, and applied for an order that the access provisions of the agreement "be enforced," and a direction that a custody and access report be prepared pursuant to the *Family Relations Act*.

The Agreement provided that the parties share joint custody and joint guardianship of Vanessa, and that she reside primarily with her mother who agreed not to move her residence from

Greater Vancouver without the father's approval or an Order of the court.

Voluminous affidavits were filed; Vanessa's views on the proposed move were not disclosed in the affidavit material, however. Mr. Justice Edwards said, following the decisions of *Gullet v. Gullet*, 2001 BCSC 1207; *Sam v. August*, [1998] B.C.J. 2879; *Alexander v. Alexander*, (1986), 3 R.F.L. (3d) 408 (B.C.C.A.), and *Jespersion v. Jespersen* (1985), 48 R.F.L. (2d) 193 (B.C.C.A.), that the preference of a child of 9 years may be given some weight, but it is not determinative, that it is a matter of discretion as to whether or not the court takes the views of any child into account, and that the court was not bound by the preference of a child where it appears the best interest of the child lies in granting custody elsewhere.

The court went on to say that even if Vanessa had expressed a view that she would prefer to reside with her father, that view would not be determinative in light of the fact that she had not resided

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with him continuously for any extended periods since the parties separated, but only during holidays and weekends. Therefore Vanessa has no appreciation of what the home routine with her father would be if her primary residence were with him. In the end, the court decided it would be in Vanessa's best interest to reside with her mother and therefore allowed the mother permission to move to Greentown with Vanessa. One of the reasons for making this decision and not following Vanessa's stated desire to remain with her father was that Vanessa was severely asthmatic, and her mother would be alert to the problems of asthma.

Alexander v. Alexander

In *Alexander v. Alexander*, (1998) 15 R.F.L. (3d) 363 (B.C.C.A.), the custody of an 11-and-a-half-year-old boy was awarded to his father after 10 days of trial in spite of the fact that he had lived with his mother for 11 years and the boy expressed the wish to continue living with his mother. The trial judge's decision was upheld on appeal to the British Columbia court of Appeal. The mother then made an application to vary the award, which resulted in a decision upholding the original award.

An appeal of the latter decision to the Court of Appeal resulted in the court allowing the appeal and giving effect to the boy's wishes, on the basis that he was then 14 years of age, and old enough to make and be responsible for his own decision. In speaking for the court, Mr. Justice Locke said:

This court is now faced with the decision as to what is best for this boy who has been in the middle of a protracted custody battle between

two parents who are both equally well qualified to parent and who would each offer him a good home. What the child wishes is not necessarily best for the child, but there does come a point when at near adult years, a child capable of responsible thought must now be deemed to be able to settle his own future in this important matter.

As must now be evident, there is no specific age at which a child's wishes are given greater credence or weight. Rather, the court must take into account what is in the best interests of the child, and in doing so, must also consider certain contextual matters including the age and maturity of the child, the child's familiarity with the issue and his or her ability to articulate the issue as well as his or her wishes, and the child's interaction with one or both of the parents, to name but a few.

Once the court has made a determination with regard to these factors, it will then have to decide what weight to give to the overall preferences of the child when considering the child's best interests. In each and every case, the weight to be given is completely discretionary. In many cases, the court gives little or no weight to the child's views. In other cases, the court will give much weight to the wishes of the child when determining what is in the child's best interests. ▲

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