

Voice of the child: How do courts assess the weight to give a child's preferences?

By **Lorne J. Fine**

Law360 Canada (August 19, 2026, 2:50 PM EDT) -- Every family lawyer has heard some version of the same instruction from a client: "Just ask the kids who they want to live with."

While it may sound like a simple and practical solution, the legal reality is far more complex. Family courts in Ontario have spent the last several years refining — and in a few notable cases, sharply curtailing — how much a child's stated preference should actually "move the needle" in a parenting dispute.

The key takeaway is that a child's opinions (or "voice") is never the whole conversation, nor are they always the deciding factor. There are fixed legal principles around how that voice gets introduced as evidence in the first place, and how readily courts will discount it once it's there.



Lorne J. Fine

Some background on the VOCR

Not surprisingly, the Ontario family justice system puts some structure on how the voice of the child is introduced into divorce litigation and related proceedings.



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The primary method is known as a "Voice of the Child Report" (VOCR), which reflects a basic principle: that a child's access to justice is a fundamental right and includes the right to be heard in a judicial or administrative proceeding that affects them. These protected rights are derived from the *UN Convention on the Rights of the Child* (UNCRC), which was ratified by Canada in 1991. There is now a legal presumption that Canadian law conforms to the UNCRC (*S.K. v. D.G.*, 2022 ABQB 425, at paras. 158, 161).

When a VOCR is part of a legal proceeding, it amounts to a report of what the child has said, as recorded by a mental health professional, lawyer or other trained person — but contains no evaluation, recommended outcome or conclusion. (In this way, the VOCR differs from what is known

as a "Section 30 Assessment" under the Ontario's *Children's Law Reform Act*, R.S.O. 1990, c. C.12, which empowers a court to appoint a qualified person to assess and report on the needs of a child, and on the ability and willingness of each parent to satisfy them.)

VOCRs are not automatic

The option for a VOCR does not arise under family legislation, nor is it necessary for parents to agree to have one. In *Canepa v. Canepa*, 2018 ONSC 5154, the judge confirmed that a family court can order a VOCR even without both parents' consent, since the authority comes from Rule 20.1(3) of the *Family Law Rules*, which lets a court appoint an expert to report on any question of fact relevant to the case. This means VOCRs are not ordered as a matter of course.

In fact, as with many issues affecting a child, the family courts must consider the propriety of making an order at all, based on the unique circumstances. In *Zychla v. Chuhaniuk*, 2025 ONSC 3594, the judge laid out a lengthy, non-exhaustive list of factors to weigh, including the child's age and maturity, whether the VOCR process might itself cause harm, the impact of the decision on the child, and whether the child can express views without undue influence, among others.

Not every request for a VOCR succeeds, either. In *McDonald v. McMullen*, 2021 ONSC 1001, the court dismissed a father's motion for an updated assessment or VOCR outright; it found that in light of his conduct throughout the litigation, together with the history of conflict and concerns regarding influence, there was a real risk the children's views could not be independently ascertained at all. This would tend to compromise the process before it even started.

Finally, while the age of the child is a factor in determining whether to order a VOCR, there is no hard cutoff. Currently in Ontario, VOCRs are generally aimed at children 8 years or older, in keeping with the recommendations in a pilot project championed by professor Nicholas Bala and Dr. Rachel Birnbaum a decade ago. However, in *Byers v. Byers*, 2023 ONSC 297, the judge ordered a voice of the child interview for a 6-year-old; likewise in *Canepa v. Canepa*, the report was ordered for a child aged 6.5 years. In the latter ruling, the judge dismissed concerns about the child's young age partly on the basis that the report was not evaluative but was merely an "exploration" of the child's wishes.

The test for evidentiary weight

All of this comes with an important caveat. As the court put it in *S.K. v. D.G.*: "It is often said a child has a voice, but not a choice. The views and perspectives of a child are significant for a judicial decision about the child's best interests, but they are not determinative" (at para. 164).

This means that VOCR informs the analysis; it does not replace it. A child's true wishes — without more — are not legally conclusive of their own best interests. However, when warranted on the evidence, Canadian judges may give them significant weight when assessing parenting time, access and related issues. This kind of determination is well within a judge's discretion and will attract considerable deference on appeal (*Kniaz v. Pawliw*, 2025 SKCA 32).

Ontario family courts commonly assess the weight to be given to a child's wishes by considering the factors summarized by the Court of Appeal in *Decaen v. Decaen*, 2013 ONCA 218. These include:

- How clear and unambivalent the child's wishes are;
- How informed the child's expression is;
- The child's age and maturity;
- The strength and duration of the child's preference; and
- The practicalities of giving effect to those wishes.

Those factors were front and centre in a COVID-19-era case called *J.N. v. C.G.*, 2023 ONCA 77, where the Ontario Court of Appeal reversed a lower court ruling in which the trial judge had given significant weight to the child's views as expressed in the VOCR. The judge had accepted that the child's stated opposition to being vaccinated was "strongly held and independently formulated," but in fact, there were clear signs the child was simply parroting specific talking points heard from the mother, as the Appeal Court later found. The so-called "wishes" of the child were not independently

held at all.

Rejecting parental influence

That ruling in *J.N. v. C.G.* illustrates another important point: the moment a court finds that a child is being coached or influenced by a parent, in the right circumstances the child's preferences can be discounted entirely.

Courts are alert to even the subtleties around this. In *K.K. v. M.M.*, 2021 ONSC 3975, the clinician who assisted with the VOCR stated that the child thought carefully about his given responses, to ensure that his messages were consistent. She added, "His views and preferences do not appear coached but also do not appear to be independently formed."

When asked by the court to elaborate, the clinician stated that "it was as if [the child] had heard certain things repeated so many times that he picked up information and then regurgitated it" (at paras. 628 and 629). The court ultimately gave the VOCR essentially no weight, having concluded that the child was repeating things he had heard others say, instead of speaking from his own independent perspective.

With that said, not every court frames influence as being fatal to admissibility and weight. Returning to *Byers*, the court was careful to note that a *potential* concern about parental influence should never stop a court from hearing from a child in the first place. Rather, these kinds of concerns are among the factors going to the weight given to the views expressed in the VOCR; they are not an absolute bar to their admissibility.

The practical takeaway

For family lawyers, a few threads run through this body of case law. First, getting a child's voice into the evidence before the court is one task, but getting it weighted heavily in the court's ruling is another. Success in the first task does not guarantee success in the second. Secondly, the *DeCaen* factors — and in particular, how informed and independent the expressed views really are — remain the operative test when seeking to have a VOCR considered.

Lorne J. Fine is the principal of Fine & Associates Professional Corporation in Toronto, where his practice is dedicated exclusively to family and divorce law. He has over 30 years of experience representing clients in complex family law matters. Lorne is a qualified arbitrator (Q.Arb) with additional training in negotiation, collaborative law and mediation. He has been regularly featured in media on family law issues, including appearances on Global Television, CHCH and as a recurring legal contributor on AM740's Goldhawk Fights Back.

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