



# Family Court

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## Can a child be called as a witness in a Family Court Case?

In one custody case in 1983, the mother alleged that the father breached an undertaking given by him that he would not consume alcohol while the children were in his care. The mother applied to the Court for permission for the eight year old child to give evidence relating to the alleged breach (*In the marriage of Barnett and Hocking (1983) FLC 91-331*).

It may seem logical in such a case to ask the child if he or she saw the father drink alcohol; however, it is not that simple. The Court must consider a number of factors, such as the Rules of Evidence, the maturity of the child and whether the evidence may be obtained in another way. The Court must also weigh the value of the evidence to the case against the possible detriment to the child. After considering all such factors, the Court may allow the child to give evidence. The child may then swear an Affidavit, or give evidence by electronic means.

In the case mentioned at the outset, the Judge refused the mother's application and did not allow the child to give evidence in Court. In this case, the Judge stated that the child's evidence may be given in a different way, for example, by

the mother stating what the child has said to her about the father drinking alcohol.

There are other ways in which a child's evidence may be presented to the Court. In the Family and Federal Magistrates Courts, children's evidence, for example, about which parent they would prefer to live, may be put to the Court through a Family Report. Such a report is written by a court appointed expert, who is often a social worker or psychologist. After considering all relevant factors, the report writer presents the child's wishes, if the child is old enough to voice them, to the Court and recommends what type of living arrangements should be put in place.

The answer to the question whether a child could give evidence is therefore yes, if the Court permits it. However, in addition to the questions about the child's competence as a witness, and whether the child even understands what it means to tell the truth, we must also consider the emotional effects on a child who is to give evidence in a family law case. Such a child may already be struggling to cope with their parents' separation, and may feel caught in between and under severe pressure to have to choose between their parents. Given these factors, although a child may be called as a witness in a family court case, it should be avoided if at all possible.