

# VOICE OF THE CHILD AND FAMILY JUSTICE IN FRANCE AND RUSSIA

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## FRANCE

## RUSSIA

### What legal texts govern the words/views of the child before the judge dealing with family matters?

- Article 12.1 of the Convention on the Rights of the Child
- Articles 23 and 41 of the Brussels II bis Regulation of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility
- European Convention on the Exercise of Children's Rights of 25 January 1996 ratified by France on 1 August 2007
- Article 388-1 of the Civil Code
- Articles 338-1 through 338-12 of the Code of Civil Procedure (ordinance of 20 May 2009)
- Circular of the Keeper of the Seals of 3 July 2009

- Article 12 of the Convention on the Rights of the Child
- Article 57 of the Family Code of the Russian Federation:  
The child has a right to express his views in family decision making on any matter affecting his interests and to be heard in any judicial or administrative proceedings. The views of the child who has reached the age of ten must be taken into account except when this is contrary to his interests.  
In the cases stipulated by the Family Code of the Russian Federation (articles 59, 72, 132, 134, 136, 143, 145) the trusteeship and guardianship bodies or the court may take their decisions only with the consent of the child having reached the age of ten.
- article 179 of the Civil Procedure Code of the Russian Federation

### Have the courts and lawyers drawn up good practice guidelines for conducting a child's hearing by the judge?

- In 2008 the Commission on the Rights of Minor Children of the Conference of Bailiffs (Lawyers) adopted the "National Charter on Defense of Minor Children"
- Was also adopted the "Charter of Good Practice for Lawyers" elaborated by the Juvenile Division of Paris Bar Association.
- About twenty French courts have elaborated an agreement for conducting a child's hearing on the basis of their judicial practice.

No, the Russian courts and lawyers have not drawn up good practice guidelines for conducting a child's hearing so far.

<b>Under what circumstances can a child be heard by a family court judge?</b>	
<ul style="list-style-type: none"> <li>- Social and/or psychological investigation</li> <li>- Special investigation measure</li> <li>- Request for hearing made by the parents who are parties to the litigation</li> <li>- Request for hearing ordered by the judge</li> <li>- Request for hearing made by the child himself</li> </ul>	<p>A child can be heard in the course of an investigation requested by the parents, the judge or the trusteeship and guardianship body.</p> <p>A child is also heard as a party to a litigation when he is over the age of 14 years and takes legal action himself.</p>
<b>What are the legal grounds for hearing a child in court?</b>	
<ul style="list-style-type: none"> <li>- A child shall intervene in judicial proceedings relating to him and</li> <li>- Be “capable of discernment”.</li> </ul>	<ul style="list-style-type: none"> <li>- A child can be heard in any judicial proceedings relating to him and to which he is not a party as well as in any judicial proceedings instituted on his own initiative after he has reached the age of fourteen (see below)</li> <li>- in the presence of an educational worker</li> <li>- if the child is under the age of 10, the court shall determine whether or not the child has reached a degree of maturity at which the court may take account of his views.</li> </ul>
<b>What are judicial proceedings relating to the child?</b>	
<ul style="list-style-type: none"> <li>- Any proceedings (divorce or other) concerning the parental authority between the parents (award, withdrawal, terms of the exercise, determination of residence, visitation rights, child support ...)</li> <li>- Parental authority involving a third party (great parents)</li> <li>- International abduction or removal of a child</li> <li>- Filiation</li> <li>- Adoption</li> <li>- Changing the child’s first name</li> <li>- Trusteeship, guardianship</li> <li>- Inheritance to which the child has a right</li> <li>- Reparation of damage that might be caused to the child</li> <li>- Alteration of the parents’ matrimonial property regime (because of judicial homologation in the presence of minor children opposing the modification). As to the last point, the child can be heard in the course of proceedings concerning the financial relations of his parents, which is regrettable ...</li> </ul>	<ul style="list-style-type: none"> <li>- Any family disputes concerning the child (determination of his place of residence, visitation rights of a non-custodial parent, etc.)</li> <li>- Changing the child’s name and surname;</li> <li>- Termination of the parental rights of the child’s parents;</li> <li>- Reinstatement of the parental rights of the child’s parents;</li> <li>- Adoption of the child and selection of a new name and surname by the adopted child;</li> <li>- Registration of adoptive parents as the parents of the adopted child in the Birth Record Book;</li> <li>- trusteeship and guardianship over the child;</li> <li>- return of the child to his country of habitual residence in case of his abduction/retention by one of the parents (under the Hague Convention 1980)</li> </ul>

Can a minor child ask to be heard by a civil judge under all circumstances?	
<p>With the exception of matters related to minor children guardianship and the particular case of French divorce by mutual consent without judge (see the following question), a minor child cannot be heard by the family court judge if there are no pending proceedings.</p> <p>On the contrary, he can approach the juvenile court judge in order to warn him of a dangerous situation without any pending proceedings.</p>	<p>Pursuant to article 56 of the Family Code of the Russian Federation, the child has a right to the protection of his rights and legal interests. The child's rights and legal interests shall be protected by his <u>parents</u> (persons substituting for parents) and, in the cases stipulated by this Code, by <u>the trusteeship and guardianship body, the prosecutor and the court</u>. Therefore, a child cannot have recourse to the judge if there is no ongoing court proceedings with the exception of two cases:</p> <ul style="list-style-type: none"> <li>. A minor child recognized in conformity with law as having full legal capacity before reaching the age of majority has a right to exercise his rights and duties independently, including the right to protection.</li> <li>. In the event of the child's rights and legal interests being violated, in particular, if the parents (or one of them) fail to fulfil or properly fulfil their duties related to the child's education and upbringing or if they abuse their parental rights, the child may on his own seek protection at the trusteeship and guardianship body and, <u>upon reaching the age of fourteen, in court</u>.</li> </ul>
Shall the child be informed of his right to be heard by the judge in case of divorce without judge /administrative divorce?	
<p>Yes, the child shall be informed by his parents of his right to be heard by the judge. And pursuant to article 229-2 1° of the Civil Code, if a minor child asks to be heard by the judge in case of divorce by mutual consent in which in principle no judge is involved, the spouses must have recourse to the judge.</p>	<p>In Russia couples with minor children are divorced only in court. No administrative proceedings are possible in this case.</p>
What does “the child’s discernment” mean?	
<p>The discernment is not a legal concept but it may be defined as a possibility to understand the presented information, to be able to analyze it and perceive its consequences. It is assessed on a case-by-case basis.</p> <p>In the English version of the International Convention on the Rights of the Child the translation is less vague than the term “discernment” since it makes reference to “the child who is capable of forming his or her own views”.</p> <p>The notion of discernment has existed in the French law since the law of 8 January 1993 generalizing a child's hearing in civil proceedings and replacing the reference to the age (13 years) took effect.</p>	<p>The Russian law provides no definition and contains no special articles referring to “a degree of maturity at which it is appropriate to take account of the child's views”.</p> <p>The degree of maturity and the capacity to give objective assessment to current events are mentioned in article 13, paragraph two of the Hague Convention on the Civil Aspects of International Child Abduction (1980) to which Russia acceded in October 2011. The article states that the child's return to his country of habitual residence may be denied if the child objects to being returned <u>provided that he has attained an age and degree of</u></p>

<p>The discernment criterion is subjective, technical and brings divergence into the French judicial practice. Furthermore, it may seem strange to ask a judge to assess the discernment of a child (which is a precondition for his hearing) whom he has never met.</p>	<p><u>maturity at which it is appropriate to take account of its views.</u> The court determines in each particular case whether or not the child has attained an age and degree of maturity at which his views shall be taken into account.</p>
<p><b>What are the criteria for determining whether or not a child is capable of discernment?</b></p>	
<ul style="list-style-type: none"> <li>- age (but not exclusively),</li> <li>- educational level,</li> <li>- presence of siblings,</li> <li>- mental deficiency or disability,</li> <li>- psychological troubles,</li> <li>- presence of a real loyalty conflict (domination of one of the parents),</li> <li>- ability to understand a problem,</li> <li>- ability to free himself from his parents' views,</li> <li>- capacity to give reasons and arguments for his wishes,</li> <li>- formulation of the request for hearing by the child (written, oral...),</li> <li>- and finally, the nature of litigation (patrimonial or not).</li> </ul>	<ul style="list-style-type: none"> <li>- age and degree of maturity,</li> <li>- academic progress at school or a preschool institution,</li> <li>- capacity to objectively and rationally assess the current events;</li> <li>- the child's psycho-emotional state;</li> <li>- influence that one or the other parent or another family member has on the child;</li> <li>- capacity to form his views and wishes</li> </ul>
<p><b>Is there a minimum age under which a child cannot be heard in court?</b></p>	
<p>No, the French law does not set any minimum age, it's on the basis of the judge's assessment. If the judge finds that the child is not capable of discernment, he will not be heard. The judge shall motivate his decision and not base himself only on the child's age. In practice, it is the age that the majority of the French judges dealing with family matters take into account in the first place (children heard are in the 7 – 12 age range depending on the court, hence the legal uncertainty associated with disparate practices) The French doctrine in family matters considers that "the discernment of the child shall be presumed from the age of 10" (in criminal cases, a minor child under the age of 13 is fully responsible for his actions).</p>	<p>The Russian law does not contain an explicit reference to the minimum age at which a child can be heard in court; however, article 57 of the Family Code of the Russian Federation provides that "the views of the child who has reached the age of ten must be taken into account". In view of the above provision, the age of 10 years is considered in the Russian judicial practice as the minimum age at which a child can be heard in court.</p>

<b>Can the judge deny the request for hearing made by a child if he believes that such hearing is contrary to the child's interest?</b>	
It is no longer possible in accordance with the French legislative texts applicable since 2007. The judge shall respond to the child's right. The judge can refuse to hear the child only if he finds that the child is not capable of discernment or if the proceedings do not concern him. On the other hand, the judge can refuse to hear the child if the request for hearing is made by one of the parties to the litigation (parent).	Yes, while taking a decision on any matter relating to the child, the judge does not take into account the child's opinion only if it runs contrary to the child's interests (article 57 of the Family Code).
<b>Can the judge decide ex officio to hear a child?</b>	
Yes, the judge can decide ex officio to hear a child capable of discernment or to cause him to be heard on the basis of his own assessment.	Yes, he can.
<b>What is the procedural status of the child heard in court? Is the transcript of the hearing transmitted to the parties?</b>	
"The hearing of a child does not confer on him the status of a party to the proceedings" (article 388-1 paragraph 3 of the Civil Code). In compliance with the principle of adversary proceedings, the transcript of the child's hearing is transmitted to the parties. However, in order to protect the child's interests no form is required (oral, written, directly to the parents or to the parents' counsels...)	The procedural status of a child interrogated in court equates with the status of a witness (article 179 of the Civil Procedure Code). In the event of the parties to the case being removed from the courtroom for the duration of a child witness interrogation, they shall be informed of the content of the testimony given by the minor witness after they return to the courtroom. Upon reaching the age of 14, the child is a party to the judicial proceedings that he initiates himself.
<b>What are the material grounds for a child to be heard in court?</b>	
<ul style="list-style-type: none"> <li>- the child shall be informed of his right to be heard (since the Law of 5 March 2007)</li> <li>- the child shall make a request to exercise his right to be heard</li> </ul> <p>Though simple at first glance, these two requirements are difficult to comply with and clearly demonstrate that the hearing of a child in the family court proceedings is far from being automatic or systematic in France.</p>	A child will be heard in court if his parents or guardians file a corresponding request and in the event of such request being granted by the court, ensure that the child appear in court together with an educational worker who will assist at the child's interrogation; or if the judge determines himself whether or not the child's opinion shall be heard in court and asks the parents or guardians to ensure that the child appear in court together with an educational worker who will assist at the child's interrogation. Before the age of 14, the child cannot make a request for hearing himself.

<b>In what way the child is informed of his right to be heard?</b>	
<p>The French law does not say that the judge shall directly inform the child by mail. This is regrettable. The petition or subpoena are simply accompanied by a notice requiring the parents to inform their child of his right to be heard.</p> <p>Nevertheless, the parents shall only do it if they believe that their child is capable of discernment and there are no legal consequences if the parents do not inform or the judge does not check. If the child capable of discernment finds out that a judgment has been made in the proceedings relating to him but he has not been heard, he will not be able to do anything since he does not have full legal capacity and cannot take legal action.</p>	<p>The Russian law does not provide for a procedure of informing/notifying the child of his right to be heard in court either.</p> <p>The parents or guardians of the child who will be heard by the judge shall ensure his appearance in court.</p>
<b>How can the child make a request to exercise his right to be heard?</b>	
<p>The French law does not impose any precise form: provided that a child is capable of discernment and asks to be heard in the course of proceedings relating to him, the judge cannot refuse to hear him, he has no power of assessment (which is different when the request for hearing comes from the parents).</p> <p>The request can be made in writing or orally at any moment of the proceedings. However, the court practices vary from court to court: certain courts insist on a written document, other – on a document written by the child himself and not by his counsel...</p>	<p>Before the age of 14, everything goes through the parents or the trusteeship and guardianship body. No direct right for the child to be heard.</p> <p>If the child who has reached the age of 14 initiates court proceeding on his own in pursuance of article 56, part 2 of the Family Code, he shall be do it by filing a petition to court.</p>
<b>If the parents come to an agreement, can the hearing of the child be cancelled?</b>	
<p>In practice yes, since the parents are the only persons who are required to inform the child of his right to be heard.</p>	<p>Yes, the parents as the child's legal guardians may raise objections to the child being heard by court.</p>
<b>Can the child appeal the denial of the request for hearing?</b>	
No	No

<b>Is the child's hearing conducted directly by the judge or through a third party?</b>	
<p>In accordance with the legal texts the principle is that of the child's direct hearing conducted by the judge in court (article 388-1 of the Civil Code), however, it is possible to appoint a third person to conduct the hearing "when the child's interests so require".</p> <p>The third person shall be a qualified specialist and work in the social, psychological or medico-psychological sphere.</p> <p>Although, according to the legal texts the child's counsel shall content himself with relaying to the judge the child's request for hearing, the Court of Cassation acknowledges that the child may be heard through the voice of his counsel.</p> <p>Since the judge is not obliged to motivate his decision to delegate authority, many French courts reverse the principle and the exception and practise systematic delegation of authority to a third person due to the lack of time, know-how, competence or when the child is too young, or content themselves with taking down the words said by the child during a more comprehensive social investigation.</p>	<p>In accordance with article 179 of the Civil Procedure Code the examination of a child witness under the age of fourteen and, at the discretion of the court, the examination of a child witness under the age of sixteen shall be conducted <u>with the participation of an educational worker who is summoned to court.</u></p> <p>If necessary, the minor witness's parents, trustee or guardian shall be also summoned to court. The said persons may, with the permission of the presiding judge, ask the child questions and express their views as regards the personality of the child and the content of the testimony given by him.</p> <p>In exceptional cases, if this is necessary for establishing the circumstances of the matter, any of the persons participating in the case or present in the courtroom may be removed from it for the duration of the child's interrogation on the basis of the judge's ruling.</p>
<b>Can the child be heard in the presence of a counsel or any third person?</b>	
<p>The French law provides that a child may be heard with "a person of his choice" (choice that may be disregarded by the judge) or with a counsel, and if he does not choose his counsel himself, the judge asks that such counsel be appointed by the bailiff.</p> <p>The child is entitled to legal aid to pay his counsel's fee.</p> <p>The cases where a child actually chooses his counsel himself are rare. The parents' influence may be very strong here. The appointment of a counsel by the bailiff seems particularly advantageous for protecting the child's interests.</p> <p>The possibility for the child to be heard in the presence of a person of his choice is open to criticism, so is the judge's right not to take into account that choice.</p>	<p>The child shall be heard only in the presence of an educational worker who is invited to court for this particular purpose.</p>

## **FRENCH CIVIL CODE**

### **TITLE X. MINORITY AND EMANCIPATION Chapter I. Minority**

#### **Article 388-1**

*In all proceedings relating to him, a minor capable of discernment may, without prejudice to the provisions contemplating his intervention or consent, be heard by the judge or, when his interest acquires it, the person appointed by the judge for that purpose. This hearing is of right when the minor demands it. When the minor refuses to be heard, the judge weighs the justification for this refusal. He may be heard alone, with a counsel or a person of his choice. Where that choice does not appear to be consonant with the interest of the child, the judge may appoint another person. The hearing of the minor does not confer on him the status of a party to the proceedings. The judge makes sure that the minor has been informed of his rights to be heard and to be assisted by a counsel.*

## **FRENCH CODE OF CIVIL PROCEDURE**

### **TITLE IX bis HEARING OF A CHILD IN COURT**

#### **Article 338-1**

*The minor child capable of discernment shall be informed by the person or persons exercising parental authority, the guardian or, where appropriate, the person or the institution to whose care he has been entrusted, of his right to be heard and to be assisted by a counsel in all the proceedings relating to him. When the proceedings are instituted by petition, the writ of summons shall be accompanied by a notice containing the provisions of article 388-1 of the Civil Code and those of the first paragraph of this article. When the proceedings are instituted by a bailiff's act, the notice mentioned in the previous paragraph shall be attached thereto. Any agreement submitted for homologation to the family court judge in accordance with the procedure established by article 1143 or by articles 1565 et seq. shall mention that the minor child capable of discernment has been informed of his right to be heard and to be assisted by a counsel and, where appropriate, that he does not wish to exercise that right.*

#### **Article 338-2**

*A request for hearing shall be presented without any formality to the judge by the minor child himself or by the parties. It may be made at any stage of the proceedings and even for the first time on appeal.*

#### **Article 338-3**

*The decision ordering a hearing may take the form of a simple reference recorded in the file or in the transcript of the court hearing.*



**Article 338-4**

*When the request is made by the minor child, the denial of hearing may be only based on his lack of discernment or on the fact that the proceedings do not concern him.*

*When the request is made by the parties, the hearing may also be denied if the judge concludes that it is not necessary for the dispute resolution or believes that it runs contrary to the minor child's interests.*

*The minor child and the parties shall be informed of the denial by any means. In each case the reasons for denial shall be stated in the decision on the merits.*

**Article 338-5**

*The decision taken on the request for hearing made by the minor child shall be not subject to appeal.*

*The decision taken on the request for hearing made by the parties shall comply with the provisions of articles 150 and 152.*

**Article 338-6**

*The Office of the Court Clerk or, where appropriate, the person appointed by the judge to hear the minor child shall send him by ordinary mail a subpoena to appear for a hearing.*

*The subpoena shall inform him of his right to be heard alone, with a counsel or with a person of his choice.*

*On the same day, the defense counsels of the parties and, in their absence, the parties themselves shall be informed of the hearing procedure.*

**Article 338-7**

*If the minor child asks to be heard with a counsel but does not choose him himself, the judge shall by any means cause such counsel to be appointed by the bailiff.*

**Article 338-8**

*When the hearing is ordered by a panel of judges, they can hear the minor child themselves or appoint one of their members to proceed with the hearing and report it to them.*

**Article 338-9**

*If the judge believes that the child's interests so require, he shall appoint a person who must maintain no relations either with the minor child or with a party for the purpose of conducting the hearing.*

*Such person shall work or have worked in the social, psychological or medico-psychological sphere.*

*He shall be informed of his appointment without delay and by any means by the Office of the Court Clerk.*

**Article 338-10**

*If the person who has been appointed to hear the minor child face any difficulties, he shall immediately refer him back to the judge.*

**Article 338-11**

*The hearing procedure may be modified if there is a serious reason preventing the minor child from being heard under the initially envisaged conditions.*

**Article 338-12**

*A transcript of such hearing shall be made with due regard to the child's interest. The transcript shall comply with the principle of adversary proceedings.*