RIGHT TO ACCESS TO ONE’S CHILD – OR – THE CHILD’S RIGHT NOT TO SEE ONE OF ITS PARENTS

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1. Introduction

The balancing of interest in family law and pursuing the “right” priorities can be very difficult when considering the right of a parent’s access to his or her child. Focus in this paper is on the problems concerning the conflict between on one the hand the interest of the child and on the other hand the interest of the parent not living with the child.

When married and non-married couples separate or divorce, it must be decided who gets custody of the children, if any, in the family: the mother, the father or both – depending on the domestic legal regulation – and who gets access to the children. It is commonly accepted that continued contact in the form of especially access to the child is generally the best thing for all parties – the child as well as both of the parents – in order to continue the family life after the parents have split up.

The case applied in this paper is probably the most common situation: Some time after the parents having split up the family, the two children no longer want to continue the arrangement of staying access. The children have a permanent place of residence at their mother’s house and the father has for some time had access to his children. Notwithstanding the statements of the children, the father still wants the access to the children to continue regularly. The children can for instance claim that the farther has used violence, the father has often shouted and frightened them, the father has not paid attention or played with them during their stay at his place, or the father lives with a new woman (and perhaps her children) whom the children do not like at all.

This presentation/paper has to be seen in a Danish context. The ways in which this problem is dealt with in different countries of course differ. Focus in this paper is on Danish law and how the problem is dealt with in Denmark. Nonetheless, the problem can also be considered in a human rights context. The State has an obligation to safeguard the
father’s right to respect for his family life, cf. e.g. article 8 of the European Convention on Human Rights. The State also has an obligation to respect the children’s right to a private life and a family life – as they choose. I shall not deal with this interesting topic as Mr. Anton van der Linde is to speak on this topic after me.

2. Custody and access – the Danish system

In the Danish legal system custody of and access to the children are separate issues. Often the parents will agree on joint custody, but sole custody to one of the parents can be agreed upon by the parents, or it can be decided by judgment, cf. Act No. 387 of July 14 1995 on Custody and Access which has been amended in 1997, 2001, 2004 and in June this year. This means that parents can have joint custody, but one of them – in our example the father – has access to the children, typically every second weekend (and sometimes one afternoon in the following week), one or two weeks for a summer holiday, and some days in connection with Christmas and Easter. Furthermore, the father can have joint custody, but without any right to access to the children.

3. The legal regulation on access

The starting point of the Danish legal regulation on access to one’s children is that the tie – between the child and the parent whose children do not have permanent residence at his place – should be maintained, cf. Section 16 of the Act on Custody and Access.

In case the child does not reside with the father, he can either make an agreement with the mother or apply the Regional Government Department for access, cf. Section 17 § 1. For the topic of this paper it does not matter whether the access came about as a result of an agreement by the parents or a decision made by the Regional Government Department.

In Section 17 of the Act on Custody and Access it is furthermore stated that the decision by the Regional Government Department on access to the children must be based

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on what is in best interest of the child. An administrative decision which changes an
agreement made by the parents or an administrative decision on access, can be taken if is in
the best interest of the child – primarily because the conditions have changed substantially.

In special cases it is possible, for example if access is annulled,\(^2\) to make a
decision on other types of contact than access to the children, for instance telephone
conversations, correspondence etc., cf. Section 18 of the Act on Custody and Access.

4. Administrative practice
4.1. The procedure
The decision on a father’s request of access to his children is taken by an administrative
authority – the Regional Government Department, cf. Section 17.\(^3\) This decision can be
brought before the Minister of Family and Consumer Affairs, cf. Section 31.\(^4\) Concerning the
dispute of access to one’s children the court can only decide whether the administrative
authority has exceeded the boundary of its statutory discretion. This may become a human
rights problem – the right to access to court – cf. Article 6 of the European Convention on
Human Rights.

Before the Regional Government Department takes a decision the parents are
normally called in for a meeting. The purpose of the meeting is to try to make a settlement
between the parents. Further, the Regional Government Department shall offer both parents
and children expert advice, cf. Section 28. The purpose of the expert advice on children is to
make the parents understand that they have a common responsibility and to help them solve
their own problem – in the best interest of the children. Mediation is also offered to the
parents.

\(^3\) Contrary to the solutions on custody of the children, which is a matter of the court, if the parents do not agree, cf.
Section 9 § 2 of the Act on Custody and Access.
\(^4\) Cf. Peer Lorenzen in Den Europæiske Menneskeretskonvention - Kommenteret [Commentary on The Human Rights
Convention], 2003, Jurist- og Økonomforbundets Forlag [DJOEF Publishing], pp. 284-285. By January 1 it will be
possible to bring the dispute before a court, but only if the court is also dealing with the custody of the children, cf.
Section 30 a § 2.
Moreover, the children shall be called for an interview when having completed their twelfth year. Younger children than twelve – but mature – shall also be called for an interview if the circumstances of the case dictate it, cf. sections 29.

4.2. Best for the child

The relevant criteria for the decision is as mentioned what is in the best interest of the child, cf. Section 17. In other words, the deciding authority has a wide margin of discretion.

If the parents previously have made an agreement on access to the children, this agreement will be the starting point of the decision; correspondingly, if there has been made a decision at an earlier point. In order to change a decision or an agreement towards lesser access, the change shall be in the best interest of the child – especially because circumstances have altered, cf. Section 17 § 2. The decision to annul the father’s access to his children is it to be made out of regard for the necessity of the interest of the child, cf. Section 17 § 3. An alternative to annulment is to decide supervised access, for example in order to get an expert opinion of the behaviour of the child while he is with his father. The aim is to get a better impression of whether the objections from the child and mother are legitimate, cf. Section 17 § 4.5

There are two possibilities: either the children’s allegations are true, or they are not. If they are considered to be true, it must be decided whether the children’s reasons for not wanting to continue access should be accepted and followed by a decision to refuse the father’s request of access to his children.

The first step is to consider if the allegations of the children are true. How does a mother – on behalf of her children – prove that it is not in the interest of her children to visit their father any longer? As the mother in such a situation must be the primary person to take care of her children, she will often be the one to bring the information and allegations of the children to a public authority. Thereafter a case will start – a case between the mother and father, but not a case between the father and his children.

When a public authority is collecting information in order to take a decision on the father’s right to have access to his children, proof can be difficult to find – especially if

the children are very young. The mother can inform about the children’s behaviour and their information to her. The father can give his version as well. Furthermore, then the children can be heard if they have the maturity to speak, cf. Section 29.

A case initiated by the mother, who requires either none or lesser access of the father to the children, will often turn out to be a test of the mother’s information of facts which she has not herself experienced. As these are very sensitive and difficult issues, the level of conflict between the parents may evolve to a highly explosive one – sometimes almost to the heights of cases of child abduction; Linda Shay Gardner will speak on child abduction just after me. Therefore the father may put forward allegations about the mother’s unfriendly intentions, which place the public authority in a very difficult situation. The risk of the mother’s manipulation of the children in a kind of harassment does of course exist.

The next step is to consider the reasons given by the children. The mother as well as the children can invoke several weighty reasons of changed circumstances, primarily use of violence or sexual abuse, the fact that one of the parents has moved far away, an extremely tense relationship between the parents, negative characteristics of the father which go beyond the normal range of variation, the passivity of the father, an older brother or sister no longer participating when visiting the father, and the risk of abduction. The administrative decisions on access have to state the reasons for e.g. a refusal and include the concrete circumstances of the case.

If the decision is that the father can continue his access to the children, he can request the bailiff’s court to execute the decision. Nevertheless, the bailiff has the competence to decide not to execute the decision if he finds that the mental or physical health of the child could be in serious danger, cf. the Danish Administration of Justice Act Section 536.

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6 The father can choose to institute legal proceedings against the mother to get (sole) custody. A legal factor in these cases is in Denmark whether the mother cooperate about the exercise of the father’s right to access, cf. section 13.

7 The time of transportation can be too long for the child.

8 I.e. if the father often has not used his right to access to the children.
Conclusion

It seems fair to ask if the interest of the parent overrule the interest of the child when a public authority decide on access – as the starting point is that the father has a right to access to his children. On the one hand it is clear that previous possibilities of access – by agreement or decision – will as a starting point not be changed unless there are overmastering reasons. On the other hand it is obvious that the interest of the children may call for a change. Nevertheless, it can be extremely difficult to prove the allegations of the mother or/and children.⁹

It is much easier to imagine that a mother of an older child will succeed in requiring access to cease. A clear and determined statement of a child at twelve or more will be considered very important and will often be followed. On the other hand, it can be very difficult if the children are younger – as the starting point is access. When the parents disagree on access to the children, the statements of children at the age of 8 or older statistically are followed in approximately 75% of the cases.¹⁰ However, even though it is the attitude – also on case of younger children – that statements of the children shall be taken into consideration,¹¹ legally there has to be an evaluation of the reasoning of the children and an assessment of whether the children’s statements are trustworthy or not, etc.

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⁹ See for example Section 9 and 11 in Direction on the processing in cases of access, November 1999.
¹¹ This is also stated in administrative rules of procedure.