

## FAMILY

# You are not allowed to see your children – so what now?



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For the sake of convenience, I am going to assign gender roles along the lines of the more common scenario, being the woman as the custodial parent (the one with whom the children live) and the man as the parent who is being denied access, wants more access or access to his children on more accommodating and fruitful terms.

Bear in mind, however, that the law that will be discussed below will be no different if the genders were reversed, or if it involves a same-sex couple, or a couple that never married but co-habited, or if it were a child conceived out of a brief liaison or a child living with extended family such as a grandparent. In short, no matter with whom children live (even if it is the grandparents), the law as discussed below will be applicable.

## What does the law say, in broad strokes?

There is a central theme running through the Constitution, the Children's Act (No 38 of 2005), and certain conventions regarding children to which South Africa is a signatory (the Geneva Declaration on the Rights of a Child; the United Nations Declaration on the Rights of a Child; the African Charter on the Rights and Welfare of a Child; the Universal Declaration of Human Rights).

It is simply this: "the best interests of the child". This yardstick (and what that means to a specific child in his or her specific situation) is not only the central theme of this article, but of the law applicable to children, and represents the crux of what needs to be proved in any matter, in any court, in this country when it comes to children, their rights and, specifically, when it comes to the contestation of child custody, care and contact (access) disputes.

So what does "the best interests of the child" mean?

There are past court cases that deal with it pretty extensively, but these days the best source is section 7 of the Children's Act. In broad strokes, it looks at the following:

- The relationship between the parent/caregiver and the child, the person wanting access, and if it is beneficial to the child as is, or if it needs to be amended.
- The attitude of the parent/caregiver, and the person seeking contact, towards the exercise of their parental rights and responsibilities in respect of the child: do they take it seriously, are they committed and is it done consistently? (This includes the regular payment of maintenance by the parent seeking access to the child.)

If this has not been done or the parent seeking contact has been absent, the court will want to know why this was the case and why, now, the parent desires to exercise his parental rights and responsibilities and play an active role in the child's life. (There are many good reasons, ranging from the parent not knowing he had a child, to overcoming addiction and the end of a jail term. Here, more than



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ever, you will need a competent attorney to fully explain your side of the story to the court, including the fact that it would now be to your child's benefit – "in the best interests of the child" – that you play an active role in the life of the child.)

- In totality, what would be to the benefit of the child and his or her protection, growth and development to have you in their life? That is the yardstick – not what is good for you – and represents what must be proved or disproved to the court, depending which way you are arguing.

In short, there has been a role reversal, a movement away from the rights of the adult and the parent ("I have the right to see my child") to the rights of the child ("the child has the right to have a father (or a mother) that plays an active and positive role in their life") (A Barratt, *The child's right to be heard in custody access determination*, page 557). This has been a development seen in most Western countries, recognising that children are the most vulnerable segment of society and deserve protection.

## Misconceptions

There are misconceptions about when access can be denied, and if unjust, what can be done about it.

Before we can deal with the correct position, let's get the common misconceptions out of the way:

1. *If he does not pay maintenance, he does not get to see his children.*

In terms of the Maintenance Act (No 99 of 1998), parents have a common-law and statutory duty to support their children, *vis à vis* their reasonable living, education, food, clothing, medical care and accommodation needs.

The misconception arises from the belief that access to children and maintenance are interlinked, in that if a person (usually the father), for whatever reason, fails to meet his maintenance obligations, the opposing parent or caregiver (usu-

ally the mother or grandparent) now has the right to refuse the father access.

This is not so, and although the father is probably in contempt of an order of court regarding the payment of maintenance, the mother now also is falling foul of the law. When a father does not pay maintenance (due to a lack of means or for another reason), he cannot be refused access to his children. Moreover, the children cannot be denied their right to see their father.

The converse is also true: even if a parent wants nothing to do with his children, he still has a statutory and a common-law duty to pay maintenance for them.

2. *I cannot take the pain and the frustration, so I have "signed-away" the kids.*
- “The best interests of the child’ represents the crux of what needs to be proved in any matter, in any court, in this country

frustration, so I have "signed-away" the kids.

Apart from agreeing that the children be adopted by another parent (and there is a recent exception to this, in that a step-parent can now adopt a child and the biological parent still has parental rights and responsibilities to that child), there is no legal way and no legal document that you can sign or draft to extinguish your statutory obligation to your child, including paying maintenance.

Let's clear up this misconception once and for all: you cannot, at a stroke of a pen, in a document or letter authored by you, extinguish your child's rights. Remember, it's not about you, your feelings and your rights (or even the attitude of the child towards you, as they are chil-

dren and can easily be manipulated and poisoned by the custodial parent or simply be re-hashing what they hear), but about the rights of the child – "the child's best interests". The only way for this to be done is via a legal adoption or by an order of court.

3. *I can come and go, unannounced, as I please, and act as if the mother and I are still married (or in a relationship), and they (the children and mother) should be thankful that I come around at all.*

If this is your attitude, for the sake of the children, it may be better if you stayed away. (Should you choose to do so, remember that it does not extinguish the children's right to be maintained by you.)

Unfortunately, there is an all-too-pervasive attitude in our society that women and children are property, for personal pleasure and edification, and any attention, or little money, that you, as the father, give them should be welcomed with open arms, and that your praises should be sung for it.

Statistics will tell us that what children need is regular, stable parental contact. The child must know that his father will come to collect him on Friday at 17h30, will be at his soccer/rugby/cricket game, his birthday, as this always happens, without exception. Sweet words over the phone, followed by broken promises, creates a child that is mistrusting, insecure and one who will struggle later in life to form lasting relationships, out of fear of rejection and disappointment.

It is irrelevant how you or I were raised; what is expected of us (you and I) as men and fathers is to be the father we always wanted and deserved. The rewards are lifelong and greater than you can ever imagine.

4. *Misconceptions about a remedy if you are denied access to your child.*

There exists a general misconception that when you are denied access, rightly or wrongly (and valid reasons do exist), if there is an existing court order, "I am going to go to the police station; the police will arrive with me (armed and with handcuffs at the ready), and we will take the child by force and arrest the mother if she does not cooperate".

Time for a reality check: custody disputes generally erupt on a Friday afternoon or during the course of a weekend, as that is when the non-custodial parent, in terms of an existing parenting plan, settlement agreement or order of court, has the right to collect the children.

As you may or may not know, this is also the time when the police are at their busiest and their resources are stretched. They will not drop what they are doing or stop responding to incidents of murder and violence to come to your aid because you are being denied access to your child, for whatever reason (there are exceptions to this, such as when the custodial parent is suffering from mental illness, is sexually abusing the child or the child is in mortal danger – and even then it's difficult to have the police intervene).

## If there is a court order, what is the correct remedy?

Section 35 of the Children's Act states that any person (usually the custodial parent) who prevents a person who holds parental responsibilities and rights in terms of an order of court (parenting plan, settlement agreement or the like) from exercising those rights is guilty of an offence and liable to a fine or a period of imprisonment not exceeding a year.

The correct way is for you to approach the court, with your attorney, on an urgent basis, to have the parent or caregiver who is refusing you such access hauled in front of court to explain exactly why they are doing so.

Unless they have good reasons ("the best interests of the child"), such as you arrived drunk, aggressive, your vehicle does not have a baby or child seat, that during the week you threatened to kidnap the children, and so on, the court will issue a warrant of arrest and hold it over.

If the offending parent again does not comply, that warrant can (with the authorisation of the court) be executed upon.

## If there is no order of court:

As a matter of urgency, you need to visit a specialist family and matrimonial law attorney and have a parenting plan drawn up. This is done not only to safeguard your rights, but the rights of the child to have you in their life.

It is also important to keep in mind that during divorce proceedings, access and contact are often denied in an attempt to gain an advantage in other areas. There are remedies (Rule 43 in the High Court and Rule 58 in the Regional Court) to gain interim access.

In short, see a specialist family and matrimonial attorney so that a parenting plan can be drawn up that reflects the unique challenges of your specific situation and that is in the best interests of your children.

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