

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

Let's set the scene:

For sake of convenience I am going to assign gender roles along the more common situation, being that the woman is the custodial parent (the one with whom the children live) and the man is the parent that 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 is a same sex couple, or a couple that never married but co-habited together or if it was a child conceived out of a brief liaison or a child living with extended family such as a grandparent, and are now, for whatever reason denying or limiting the father's contact (access) with his child. In short, no matter with whom children live with (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 Constitution¹, the Children's Act², and certain conventions regarding children that South Africa is a signatory too³.

¹ The Constitution of The Republic of South Africa Act no 108 of 1996, section 28(2);

² The Children's Act 38 of 2005, section 7 and 9;

³ The Geneva Declaration on the Rights of a Child, The United nations Declaration on the Rights of a Child in the Convention 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 the following, “*The best interest of the Child*”. Whether you are black, white or Indian, this is a shift for us as it represents the opposite of how we were raised with, “*Children should be seen and not heard*”, and it’s for the better, as they do represent the most vulnerable sector of our society and deserve special protection.⁴

“*The best interest of the child*” 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 so when it comes to the contestation of child custody, care and contact (access) disputes.

What does the best interest of the child mean?

There are past court cases that deal with it pretty extensively⁵ but these days the best source is section 7 of the Children’s Act⁶. In section 7 the list is quite extensive but in broad strokes the following is paid attention to:

1. It looks at the relationship between the parent / care giver and the child , the person wanting access, and if it is beneficial to the child as is, or if it needs to be amended;

⁴ Fn 2 above, the preamble to the Act and section 2, the Object of the Act;

⁵ McCall v McCall 1994 (3) SA 201 (C) Judge King a 204J – 205G;

⁶ Fn 2 above

2. 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, does the parent desire to exercise their 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 they had a child to overcoming addiction and the end of a jail term, here more than 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, *the best interest of the child*, that you now play an active role in the life of the child).

3. In totality, what would be good and to the benefit for the child and his or her protection, growth and development, in the context of this article, would it be "*in the best interest of the child*", to have you in their life or to not? – 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 reversal⁷, and a movement away from the rights of the adult and the parent from, "*I have the right to see my child*" to the rights of the

⁷ JM Kruger, - part of LLD Thesis, Unisa 2003, '*The protection of Children's Rights in the South African constitution: reflection on the First Decade*'

child in that, “*the child has the right to have a father (or a mother) that plays an active and positive role in their life*”.⁸ This development has been a world-wide development and seen in most Western countries, recognizing that children are the most vulnerable segment of society and deserve protection.⁹

Misconceptions about instances when access can be denied:

There are misconceptions about when access can be denied, and if done unjustly, 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. Misconception from the mother or caregiver / grandparents:

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

In terms of the Maintenance Act¹⁰, parents have a common law and statutory duty to support their children *vis a vi* the child(s) reasonable living, education, food clothing, medical care and accommodation needs¹¹.

The misconception arises from the fact 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 that the opposing

⁸ A Barratt, “*The child’s right to be heard in custody access determination*” page 557

⁹ See fn 3 above

¹⁰ Act 99 of 1998, the preamble to said act and Section 15

¹¹ See fn 4, Section 15(2)

parent or caregiver (usually 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 is also falling foul of the law. When a father cannot pay maintenance (due to a lack of means or for another reason) he cannot be refused access to his children, conversely, 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 children they still have a statutory and a common law duty to pay maintenance for their children¹².

2. **Misconception No 1, from the fathers:**

I cannot take the pain and the frustration, so I have “signed-away” the kids:

This is something that I have heard to often, besides 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 parents still has parental rights *and responsibilities* to that child¹³), 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.

¹² See fn 4 *ibid*.

¹³ *Centre for Child Law v Minister of Social Development*, 2014 (1) (NG) ALL SA, page 468

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 that it's not about you, your feelings and your rights (or even the attitude of the child towards you as, they are children and can easily be manipulated and poisoned by the custodial parent or simply be rehashing what they hear) but about the rights of the child, *the child's best interest*. The only way for this to be done is via a legal adoption¹⁴ or by an order of court.

3. **Misconception No 2, from the fathers:**

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

If this is your attitude, then for the sake of the children (*in their best interest*), 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).

I hope the frustration that I feel with such "men" is translated to the reader. Unfortunately, there is an all too pervasive attitude in our society that woman and children are property¹⁵ for personal pleasure and edification and any attention, or little money, that you as the father gives them should be welcomed with open arms, and that your praises should be sung for it.

¹⁴ See fn 13 above

¹⁵ See fn 8 above and see also fn 9 on page 557, Barratt.

Statistics¹⁶ will tell us what children need is regular, stable parental contact.

The child must know that my father will come and collect me on Friday at 17h30, will be at my soccer / rugby / cricket game, my birthday, as this always happens, without exception. Sweet words over the phone followed by broken promises creates a child that is mistrusting, insecure and that 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, this is 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 life long and greater than you can ever imagine.

Misconception 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 that *“I am going to go to the Police Station to tell the police, the Police will arrive with me (armed and with handcuffs at the ready) at the home of the mother 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.

¹⁶ Noel Zaal, Avoiding the Best Interest of the Child, race –Matching and the Child Care Act 74 of 183, see fn 38 on page 384

As you may or may not know, this is also the time that the police are at their busiest and their resources are stretched, they will not drop or stop responding to incidents of murder and violence to come to your aid because you are being denied access for whatever reason, to your child (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, *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, "*Refusal of access or refusal of exercise parental responsibilities and rights*", states that any person (usually the custodial parent) whom refuses a person whom holds parental responsibilities and rights in terms of an order of court (Parenting Plan, Settlement Agreement or the like) to exercise those rights, is guilty of an offence and liable to a fine or a period of imprisonment not exceeding a year.

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

Unless they have good reasons, "*the best interest of the child*", such as you arrived drunk, aggressive, your vehicle does not have a baby or child seat, that you during the week threatened to kidnap the children and so on, the court will issue a warrant of arrest and hold it over. If the offending parent does again not comply, then that warrant can (with the authorisation of the court), be executed upon.

If there is no order of court:

Then, as matter of urgency, you need to visit a specialist family and matrimonial law attorney and have a parenting plan drawn up, (in the next article I will deal with the content of a parenting plan and the procedure to be followed to have it enforceable in terms of section 35 above).¹⁷

This is not only done to safeguard your rights but the rights of the child to have you in their life, i.e. *“in their best interest”*.

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 he can draw up a Parenting Plan that reflects the unique challenges of your specific situation and that is, *in the best interest of your children*.

FIN

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¹⁷ Fn 2 above