

**SUPPLEMENTARY SUBMISSION TO
PARLIAMENTARY INQUIRY ON PARENTING AFTER
SEPARATION**

Prof. Patrick Parkinson
Faculty of Law
University of Sydney

During the course of my evidence to the Inquiry on October 13th 2003 (together with Dr Judy Cashmore), I was asked to provide further information about the structures in place for resolving contact disputes in Denmark.

County Governors' Offices

In Denmark and Norway, certain functions have traditionally been exercised by the County Governors' Offices.¹ These are city/county administrative authorities.² Their role in relation to family law is a historical one, which dates back hundreds of years to a time when the monarch was able to grant divorces as a matter of executive decision. That continued in Denmark and Norway into the modern age of divorce, so that the courts and the administrative authorities have a parallel jurisdiction in relation to divorce, and certain ancillary matters, eg. child support.

In Denmark, the County Governors' Offices are given a lot of responsibility for resolving disputes and making orders. Consensual divorces are almost always

¹ In Danish, *statsamtmand*; In Norwegian, *fylkesmann*.

² There are thirteen such offices in Denmark.

handed by the County Governors' Offices. They also deal with spousal maintenance, child support, contact arrangements and adoption. The courts resolve the major issue of who should have custodial responsibility, but cannot make contact orders. If there is a dispute about contact, it is left to the County Governors' offices to deal with.

Contact disputes

The role of the County Governor's Office in resolving contact disputes must be understood against the background that the Danish government promotes a standard package of contact arrangements. A leaflet put out by the Ministry of Justice, Department of Private Law,³ provides that normal contact arrangements are every second weekend, one day in the other week, alternate Christmas and Easter days, and 1-2 weeks in the summer holidays. These create normal expectations about contact which can obviously be altered by agreement.

These norms are well understood, but there may be a dispute because a non-resident parent wants more than this amount of time and the other parent is resisting this, or because they cannot agree about the arrangements for picking up and returning the child, or for other such reasons. There may also be situations where the custodial parent seeks an order denying contact.

The procedure for initiating the involvement of the County Governors' office about a contact problem is simple. If a father is having problems seeing his children, or is otherwise unhappy with the arrangements, he can write to the County Governor's office asking for it to get involved. There are no forms to fill in or applications to file and there is no fee payable.

³ *Med Barnet I Centrum*, (Copenhagen, Civilretsdirektoratet, 1999).

The matter will be dealt with initially by a lawyer in the County Governors' office. He or she will contact the mother and seek her response. There will then be a meeting. The couple can be referred to counselling, paid for by the County Governors' office, or to mediation. It used to be the case that counselling was only offered if both parties were willing to participate. Recent changes mean that counselling may be offered to one party even if the other is not willing to join in.

If the problems cannot be resolved by counselling or informally, then the lawyer in the County Governors' office will proceed to make a determination. That takes effect as an order, which is enforceable in the courts. Normally, matters are resolved within 6 weeks.

Appeals

There is a right of appeal to the Ministry of Justice, Department of Private Law in Copenhagen.⁴ Normally these are dealt with on the papers, but a parent will never be denied a personal meeting if that is requested. Between 1997 and 2000, appeals were lodged in about 17% of cases.⁵

Figures reported by the Ministry of Justice in Copenhagen for the resolution of such appeals indicate that contact orders mirror the standard patterns of contact to a great extent. These decisions therefore reinforce established norms. In 6% of cases dealt with by the Ministry of Justice in 2001, contact was refused.⁶ Where there was contact, the non-resident parent had contact every weekend in 4% of cases, every second weekend in 86% of cases, and every third weekend in 9% of

⁴ CivilRetsDirektoratet.

⁵ *Samvaer Bornesagkyndig radgivning Konfliktmaegling, Statistik 2001*, (Copenhagen: CivilRetsDirektoratet, June 2002) p.8.

⁶ *Ibid* p.10. In 14% of cases, the applicant sought to deny contact: p.11.

cases.⁷ Where contact was every other weekend, in 8% cases, the child stayed overnight for 1 night, in 55% for 2 nights, in 17% for three nights and in 10% for four or more nights. In 11% of cases the non-resident parent had day only contact.⁸

Enforcement of contact orders

The decisions of County Governors' Offices are enforceable, and that enforcement occurs through the court system. The Danish have a special enforcement court for all kinds of court orders, including contact orders. It can be translated as either the Bailiff's Court or the Sheriff's Court.⁹

Where the County Governor's Office has made an order, and a parent wants to complain of a breach of the order, he or she may do so by filling in a one page form at the Court. This lists the children and the address of the other parent. The Court then calls the parents in for a meeting which normally takes place within about two weeks. Lawyers may be present. The court system is somewhat different to that in Australia. The judge will meet the parties in a room set up like an office, interview the parties about what has happened and make a decision accordingly. The experience of the relevant judge in Copenhagen, with whom I spoke,¹⁰ is that the great majority of these enforcement issues are resolved at the first meeting. They find that often orders have not been properly understood, particularly by members of their immigrant communities, or that the problems arise from the inability of the parents to communicate with one another. While most problems are dealt with informally in this way, there is the threat of a penalty if the order is again breached. The parents can also be offered mediation.

⁷ *Ibid* p.20.

⁸ *Ibid*, p.20, Table 2.14.

⁹ Danish: *Byret*.

If they do impose a penalty, then the first option is a fine. The normal fine is 1000 kroner (about \$300Aus) but it can be higher. That fine will be imposed every time there is a breach subsequently, so it is a deterrent. In rare cases, they have actually sent officials to the house to remove a child in order to enforce contact, but they are naturally most reluctant to do this.

Advantages of the system

The system has many advantages over the current court-based approach in Australia. First of all, initiating action to resolve a contact problem is simple, and does not involve any need for legal representation. Because there are no forms to fill in, there are no procedural hurdles to overcome, and nor are there impediments for people for whom English is not the first language or who have literacy problems.

Secondly, the system is not adversarial. Whereas courts in Australia operate as neutral adjudicators of a contest, in which each party advances its case by leading evidence in the formal setting of the courtroom, the Danish system is inquisitorial. The role of the lawyer in the County Governor's Office, and indeed the role of the judge in an enforcement process, is to work out what the dispute is all about and to reach a decision, if the parties cannot reach their own agreement after counselling. The environment of an office is much more conducive to non-adversarial processes than the courtroom.

Thirdly, the system is quick. Contact disputes have to be resolved speedily. This system allows for a decision to be reached within a few weeks, if the matter cannot be resolved beforehand.

¹⁰ Deputy Judge Margrethe Nisser.

Fourthly, it is cheap. The system is free to users, so there is not a financial impediment to its use by the community. From a governmental perspective, the system is not very expensive, because there is not a great deal of infrastructure required to support the decision-making processes in the County Governors' Offices.

Disadvantages of the system

There are some disadvantages of this system. One issue, which need not be an issue in Australia, is that currently judges in the court system in Denmark are not allowed to make contact orders at the same time as making custody orders. This is an unnecessary limitation, and Judge Svend Danielsen, a former judge and leading expert on Danish family law, properly argues that if a dispute is before the court on custody, it ought to be able to make contact orders as well.¹¹

Secondly, the system, because it is cheap and accessible, it is also more likely to be accessed. This may or may not be a disadvantage, depending on one's perspective. It is not seen to be a disadvantage of Medicare, for example, that people go to doctors. It is likely nonetheless that creating a system which is easy to access and inexpensive to use, will increase the demand for this service.

The proportion of contact applications made in Denmark exceeds the per capita level in Australia by a considerable margin on 2000 figures.¹² In 2000, there were

¹¹ S Danielsen, "The Scandinavian Approach: Administrative and Judicial Resolutions of Family Conflicts" in MT Meulders-Klein (ed), *Familles et Justice* (Bruylant, Brussels, 1997) 139 at 152-154.

¹² In Denmark, as in Australia, any parent may apply for contact. It used to be the case that contact rights would only arise if the parents had lived together for most of the first year of the child's life, usually at least 8 months in practice. This restriction was removed in 1995.

11,560 contact applications. Denmark's population in 2000 was 5,360,000. In Australia in 2000, there were about 27,300 applications in the Family Court of Australia (excluding WA) in a population of under 19 million (again excluding WA). While one cannot necessarily extrapolate from the experience of one country to another, it is possible that if Australia adopts a system for resolving contact disputes which is cheaper, quicker and easier to access than the present one, that there could be some further growth in demand for contact dispute resolution services and contact enforcement processes.

The Danish model is not replicable in Australia for constitutional reasons. Nonetheless, it shows how a different way of dealing with contact problems can work, and it may be that there could be adaptations of the concepts to the Australian context.

P Parkinson

10 November 2003.