

## Access to the Child: Right or Responsibility?

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**Abstract:** Many a times, a custody proceeding will usually follow a divorce proceeding. If the custody of a child is given to one party, the other party will usually be given access or the opportunity to see or visit the child. A question arises as to whether this access is solely a right or at the same time a responsibility on the part of the parents. If it is a right, whether it is an absolute or limited right? Are there situations or circumstances where a parent might not be allowed to exercise his or her right? What if the children themselves refuse to see their parent? This paper will examine the above issues from both the civil and Islamic law perspectives. The emphasis will be on Malaysian law but comparison will be made to other jurisdictions such as English and Scottish.

**Key words:** Custody, Guardianship, Parental responsibility, Parental rights, Access.

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### INTRODUCTION

The law regarding access to the child pertaining to non-Muslims is governed by the Law Reform (Marriage and Divorce) Act 1976 (LRA). With regard to Muslims, besides Islamic law in general, various states enactments are applicable. For the purpose of this discussion, Islamic Family Law (Federal Territories) Act 1984 (IFLA) will be used. This paper attempts to highlight these two laws governing the law of access to the child in Malaysia. The paper also attempts to answer the question as to whether access is regarded more as a right rather than a responsibility or otherwise.

#### *Discussions:*

##### *Is Access A Right?*

In most situations, access is considered as a right. Section 89(2) of the LRA provides that an order for custody may (d) give a parent deprived of custody or any member of the family of a parent who is dead or has been deprived of custody the **right of access** to the child at such times and with such frequency as the court may consider reasonable (See also Children's Rights Development Unit, n.d).  
[Emphasis added]

The above section provides that a non-custodial parent or his family is given the right of access. Many cases establish that the one who is not given custody will be given the right of access. In the case of *Foo Kok Soon v Leony Rosalina*, the court mentioned that access is a parental right and this right is essential to both the parent deprived of custody as well as the children.

##### *Is access an absolute or limited right?*

Generally, access is considered as an important right of both parents and children and this right will be upheld and promoted in most of the situations. In *T v. T*, the court said:

The question of the access to children whose parents have parted is always a matter which causes the courts a great deal of anxiety. The cardinal rule is that, except in very exceptional cases, it would not be right from the point of view of the child, to cut him or her off from all access to either of the parents ... The object of allowing access to the father is to see that the child grows up knowing and loving him and not to allow him to share in the custody, care and control which must necessarily remain with the mother.

Again in *Re Sim and Chia*, the court, in dealing with a petition for divorce by mutual consent, said:

When considering visitation rights there should not be any prohibitions against any spouse from visiting the children unless there is evidence to show that the spouse is a danger to the children ... It is possible to lessen the children's sense of loss if the party not given custody is allowed to visit and take the children out as often as possible. That is why there must not be any provision that prohibits one party from visiting the children. In fact, the Court should encourage as many visits as possible so that the children can feel that they still have their father and mother... The children, with frequent visits from the parent who does not have custody, would definitely be happier than if they were to see the parent not given custody, say, once a month.

In *Re H (Minors) (Access)*, the English Court of Appeal said that no court should deprive a child of access to either parent unless it was wholly satisfied that it was in the interests of the child that access should stop and this conclusion might only be made very cautiously. The court also deliberated that access might upset the child

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but this short term difficulties is negligible if compared with the long term interests that would benefit the child. In *Re W*, the Court of Appeal further said that 'contact with a parent was a fundamental right of a child, save in wholly exceptional circumstances'.

Nevertheless, in the case where the right of access is proved to be contrary to the interests of the child, this right might be curtailed or lessened. In *T v. O*, the court held that the putative father had no right of access to the child. Mahadev Shankar J (as he then was) said:

These orders were made with the court's approval because it was manifestly obvious from the evidence before the court that access and custody had become traumatic problems for ORD [the infant]. He is still a child of very tender years and the occasions when O [the father] tried, quite legitimately to exercise these rights, were not happy ones for ORD. Things could change when the boy grows older and wishes to see his father.

In *T v T*, the facts were that the petitioner mother had been given custody of the child while the respondent father had access to the child twice a week. The petitioner later alleged that the respondent had used the visits to the child 'to undermine her authority over the child and make the child disobedient to and resentful of her' and therefore the respondent should be denied access to the child. The court held that access should be reduced to only once a month 'with a view to avoiding any emotional conflict of loyalties and affection in the mind the child'. Similar decision was made in the Scottish case of *K v K*, where the mother was suffering from depression and was also involved with drugs and alcohol abuses. In this case, restricted contact order was made for it to be carried out at a contact centre.

Medical evidence seems to be important in order to prove that access might prejudice the interests of the child. In *T v T*, the evidence of Dr H.K.Virik, who was the consultant paediatrician, was referred by the court and seemed to become a very important piece of evidence in order to help the court coming to a decision. Similarly, in the case of *Ananda Dharmalingam v Chantella Honeybee Sargon*, the expert opinion given by a child psychiatrist was acknowledged by the court. In the Scottish case of *Kennedy v Kennedy*, the evidence tendered by a health visitor was accepted by the court in denying contact to the father.

Another issue is whether the implacable hostility of a parent having custody can become a factor to deny access? In the English case of *Re D*, the mother strongly opposed contact because of the father's violent and undesirable character. Evidence showed that the father had, on several occasions, intimidated the mother and her family. Balcombe LJ, refusing contact order held:

There is absolutely no evidence at all that [the father] has treated his children badly but, what is said here by [the mother], ..., is that because of the implacable hostility of the family towards [the father] if, from time to time, he [the child] has to see his father, that is going to cause unsettlement, unhappiness in the household and that is bound to be transmitted to the child and he will become upset by the difficult atmosphere in the house, and he won't benefit whatever.

However, in *Re J*, the court held that if the child's welfare requires that a contact order be made, the implacable hostility of one parent may not deter it from making the order. Thus, we may say that the most important thing is the welfare of the child; i.e whether access will promote his interests or otherwise.

Alternatively, instead of direct access, the court may order indirect access or contact in cases such as above. This means that instead of physical meeting, the parent may be allowed to send letters or presents to the children. In *Re O*, the English Court of Appeal states:

... in cases in which, for whatever reason, direct contact cannot for the time being be ordered, it is ordinarily highly desirable that there should be indirect contact so that the child grows up knowing of the love and interest of the absent parent with whom, in due course, direct contact should be established.

#### ***What if the child refuses to see the parent?***

In *Foo Kok Soon v Leony Rosalina*, the court held that even though the children are reluctant to meet the defendant, they ought to have been explained the order of the court. The court mentioned that the views of the children as an important factor, but they do not regard it to be conclusive. This is due to the fact that a child may not want to offend the parent they are living with and sometimes their views are not independent as they were instilled into the child. Thus, the views of the child will not necessarily be followed if they are contrary to the child's long term interest. In this case, even the children expressed their views that they did not want to see their mother, the court still ordered them to do so minimally taking into account the long term effect the contact would give to them. Similarly, in the Scottish case of *Cosh v Cosh*, the court rejected the application made by the mother that access should not be allowed to the father as it was upsetting the children. In this case, the court found that the wishes expressed by the children not to see their father might not be genuine, but were influenced by the mother.

In *Ananda Dharmalingam v Chantella Honeybee Sargon*, the court referred to the wishes of the child and took into consideration the factors as to how a court should sensitively handle a situation when children rebelled against a parent and refused to see that parent. In this case, the court was of the view that access was not practicable at that point of time as the children had not yet recovered from the trauma of past events. The fighting over custody and access had caused great physiological disturbances to the children. This case referred

to *Churchar v Churchar*, where the children aged 10 and 8 years respectively, consistently refused to see the father. On appeal, the Court of Appeal said:

So far as access is concerned, the time has come, the judge thought and I think rightly, to say 'enough is enough'. Enough attempts and struggles have been gone through in the last 18 months or so and the only way of dealing with the case is to accept the situation as it is for whatever reasons. It does not matter what the reason for their behaviour is. It cannot be in their interest that all this cumbersome machinery of the law should be put into operation in order to make boys of 10 and 8 do what they refused to do. It can only be slightly ridiculous.

Based on a similar case (*Churchar v Churchar*), the court also accepted the wishes of the child not to go out with his father alone in the case of *Jayakumar a/l Karuppanan & Anor v Jeyakumar Krishnan*. In this case, the child was not used to his father as, after the death of the mother, he was living with the maternal grandparents together with the maternal aunt. During his stay with them, the father seems not to have much interest in him.

Contact order was also refused in the English case of *Re F*. In this case, the children refused to have contact with the father because of his strange behaviour. In this case, the father felt that he was a woman and not a man. He wore women's clothes and changed his name to a female one. There was also possibility that the father might have undergone an operation in his endeavour to be a woman. A mother's application for a contact order was also rejected due to the refusal of the children to visit their mother in *Re M*. On appeal, counsel for the mother asked for the evidence which justified such a denial. In this case, the court referred to both written and oral evidence given by the welfare officer who suggested that because the level of short term distress was likely to be too much for the children if contact were made, this would also distress them in the long term. The court observed:

In the end I have been persuaded that there was material upon which the judge could reasonably come to the conclusion that the risk of harm to the children attendant upon an order for contact outweighed the well-recognised benefits.

Thus, it is observed that whether the wishes of the children will be followed or not by the court is based on the overall interests of the child. In some cases, long-term interests that will benefit the child can outweigh short-term difficulties and in such cases access order will be made. In some other cases, the harm might outweigh the overall interests of the child and thus order for access might not be granted. Nevertheless, it should be remembered that the order for access can always be applied for in the future; when circumstances show that such an application is appropriate.

#### ***What is the mode of access?***

The attitude of the courts varies as to how access should be exercised. In some cases, the court specifies the way in which access should be exercised while in some others, the court let the parties themselves determine the manner in which access may be carried out. This attitude seems to depend on the situations of the parties. In cases where the parties seem to be able to communicate and discuss with each other, they can be expected to determine on their own how access should be conducted; while in cases where parties are not in communicable terms, what more if violence is involved, usually the court will specify the mode of access.

There are many cases which illustrate where reasonable access was given to the parties including *Lim Fang Keng v Toh Kim Choo*, *Wong Kim Foong (f) v Teau Ah Kau @ Chong Kwong Fatt*, *M Saraswathi Devi v Monteiro and Re KO(an infant)*. More interestingly, in *Gan Koon Kea v Gan Shiow Lih (f)*, the court granted liberal access where the wife and the members of her family should provide every facility, convenience and co-operation to the husband in ensuring the success of the arrangement.

In case of difficulty, the parties may apply to the court to specify the order as highlighted in *S. Thaiyalnayagam v. Kodaguda* where the court said:

I trust that they will continue to make their own arrangements. In case there should be some difficulty, I give liberty to the parties to apply to the court regarding access.

In some other cases, the court specify the terms of access; especially in cases where the court anticipated difficulty might occur without such specific terms. In *Re A and B (Minors)*, the respondent mother was allowed access every weekend starting at 3pm and up to 8 pm the next day and for every vacation, half of the vacation is given to her. In *Sivajothi a/p K Suppiah v Kunathasan a/l Chelliah*, the father was granted with weekly access from 3.00 pm on Saturday to 10.00 pm on Sunday. And as for the holidays, the father is to be granted 2/3 of the short school term holidays. The father and mother shall have half of the December school term holidays of access to their said daughters. The father and mother is to alternate each year to access their daughters for Deepavali from 6.00 pm on the eve of Deepavali to 8.00 am the day after Deepavali.

In *Diana Clarice Chan Chiing Hwa v Tiong Chiong Hoo*, the mother was given access to the three children during the weekends from 5.00 pm on Friday until 8.00 pm on Sunday while in *Tang Kong Meng v. Zainon bte Md.Zain & Anor*, access was granted to the natural father and mother once a month on weekend commencing Saturday at 10am and returning the child before 7 pm on Sunday. In some other situation, the court may also fix the place of access as can seen in *Savinder Kaur v. Tharma Singh*, where Shankar J (as he then was) said:

‘... the respondent shall have access to the children on two Saturdays in every month. Such access will be at the office of the Petitioner’s Solicitor Mr. S.S. Gill at Suite 4, 20<sup>th</sup> Floor, Tun Abdul Razak Complex, Johore Bahru for 3 hours provided the respondent first gives advance notice to Mr.Gill or his staff on or before the Wednesday immediately preceeding.

If it can be proved that there is a change in circumstances or the party not given custody is not satisfied with the present access order, he can apply to the court for variation (see LRA, section 96). In *Chang Ah May @ Chong Chow Peng v. Francis The Thian Sar*, the plaintiff was awarded custody of the infant while the defendant was granted weekly access on Sundays for four hours. A few months later, the defendant applied for a review of the access order and he was granted more liberal access.

### ***Is access also a responsibility?***

The court in the case of *Foo Kok Soon v Leony Rosalina*, basing its decision on section 89(2)(d) of the LRA as quoted above, mentioned that access is the parental right of the parent who is not given custody. A question, however, arises whether it can also be regarded as an obligation on the part of non-custodial parent. In the English case of *M v M (child: access)*, the court mentioned:

...the companionship of a parent is in any ordinary circumstances of such immense value to the child that there is a basic right in him to such companionship. I for my part would prefer to call it basic right in the child rather than basic right in the parent.

The words ‘access is the basic right of the child, rather than the parent’ above, have been echoed by the court in Malaysia in the case of *Leong Sam Moy v Low Chee Thiam*. It may be argued that usually, if it is a right of one person, it can become an obligation on the other person. Thus, if access can be considered as a basic right of a child, it can also be considered as an obligation on the part of the parent. Section 1(1) of Children (Scotland) Act 1995 further provides:

... a parent has in relation to his child the responsibility –

(c) if the child is not living with the parent, to maintain personal relations and direct contact with the child on a regular basis;

The Scottish Law’s view that maintaining personal relations and direct contact with the child should be considered as a responsibility rather than merely right is due to its importance in the development of the child (Scottish Law Commission No.135, op. cit., para 2.5.), provided that it is in the best interests of the child (Children (Scotland) Act, 1995, s. 1(1) and Scottish Law Com No. 135, op. cit., para 2.5). Section 3(1) of the English Children Act 1989 also provides:

In this Act ‘parental responsibility’ means all the rights, duties, powers, responsibilities and authority, which by law a parent of a child has in relation to the child and his property

English law introduced new concept of parental responsibility in 1989 in order to emphasise on the concept of parental responsibilities rather than parental rights (Law Commission, 1988). Lord Mackay LC in a parliamentary debate observed:

The overwhelming purpose of parenthood is the responsibility for caring for and raising the child to be a properly developed adult both physically and morally (Parliamentary Debate, 1988).

The Law Commission emphasized that a parent whose child is not staying with him or her should retain his or her responsibility and thus has equal opportunity of being given information relating to, for example, the child’s education and medical treatment (Law Commission, 1988). This means that even though one parent does not have the actual care of the child, his or her responsibility for the child including access, will not end.

Thus, we may conclude that access can be both; responsibility and right. It can be a right from the view point of a parent who wants to exercise his right to see and visit the child. On the other hand, it can be considered as an obligation on the part of the parent to see and visit the child in order to ensure the development of the child. This sense of responsibility is especially important in the case of some parents who seem to forget the fact that they have a child or children who is or are living with other person who also need their attention. This is in line with Article 9(3) of the United Nation Convention on the Rights of the Child, which provides:

States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests.

### ***Access Under Islamic Law:***

Classical Islamic jurists have discussed in detail pertaining to right of access. According to the *Hanbalis* (Ibn Qudamah, n.d.) and the *Shafi’is* (Al-Nawawi, n.d.), if a boy chooses to stay with his father, he will be with the father for the whole day and night but he will not be prevented from visiting his mother whenever he wants to because to do so would tempt him to ingratitude and might sever the relationship with the mother which is a great sin in Islam. In one *hadith*, the Prophet (peace be upon him) was reported as saying that:

‘Al-Qati’ (the person who severs the bond of kinship) will not enter Paradise.’ (Bukhari, no.2009).

If the boy chooses to stay with his mother, he will usually stay with the father during the day where the father will send him to the school, form his character and make him learn a profession or a trade. Al-Mughni also emphasizes that all these arrangements are made with the consideration that these are in the interests of the child.

In the case of a girl, when she is staying with the mother, the father will have the right to visit her regularly. Similarly, if the girl is staying with the father, the same right is given to the mother (Al-Nawawi, n.d.). However, if the girl is staying with the father, it is preferable that the mother comes to visit her daughter rather than vice versa. This is because a girl needs more protection than the mother who is more mature and knows better how to protect herself (Ibn Qudamah, n.d.). This right of access also applies to small children who have not attained the age of *mumayyiz* and who are usually staying with the mother. In this case, the father has the right to visit his child during this time (Al-Khatib, n.d.).

With regard to the frequency of access, the jurists provide that it depends on the local custom (Al-Nawawi, n.d., Ibn Qudamah, n.d., and Al-Khatib, n.d.). Some of the Shafi'is suggest that the visit should not be made every day (Al-Khatib, n.d.). Al-Mawardi, however, was of the opinion that if the houses of the separated parents are close to each other, such a practice is allowed. Thus it seems that the jurists do not provide a strict rule regarding the frequency of access. The basic principle here is again the interests of the child. Access should be permitted as long as it does not contravene the interests of the child.

Section 87 (2) of the IFLA states that a custody order may-

‘(c) provide for the child to visit a parent deprived of custody or any member of the family of a parent who is dead or has been deprived of custody at such times and for such periods as the Court considers reasonable;

(d) give a parent deprived of custody or any member of the family of a parent who is dead or has been deprived of custody the right of access to the child at such times and with such frequency as the Court considers reasonable... ‘.

The above provisions seems to be in accordance with classical law as the child has the right to visit the other parent and his family and that parent and his family also have the right of access to the child. In *Zahrah Binti Omar v Saidon Bin Itam*, the court, while ruling that custody is given to the mother, gave the right of access to the father. The court left it to the parties to decide the terms of access depending on what was reasonable for both parties (see also *Kamaruddin v Rosnah*). In *Awatif Ibrahim v Haji Salleh*, the judge ruled that the child should be allowed to stay overnight with the mother once a week during the weekend. In *Nooranita bte Kamaruddin v Faiez bin Yeop Ahmad*, the court held that the child should be allowed to visit and stay with the mother once in two weeks. In addition to this, the child should stay with the mother during the school holiday after the first and second terms.

The court also seems to consider the interests of the child as important consideration in determining the right of access. In *Norani bt Abd Rahman v Md Taib bin Hanapi* the court ruled that the father may visit the four children who were living with the mother at reasonable times provided that those visits should not cause harm to the physical and mental of the children. Similarly, in the case of *Maimunah bte Hamzah v Mohammad bin Embong*, the court emphasized that the father may visit the children provided it would not bring harm to the physical, mental and education of the children.

It seems here that the court may or may not set out the terms of access depending on whether it would help to promote the interests of the child. This is again in line with classical law which provides that the terms of access depend on local custom and the interests of the child.

### ***Is access an obligation under Islamic Law?***

To answer this question, an explanation with regard to the concept of *hadanah* and *wilayah* according to Islamic Law is needed. *Hadanah* basically means the right to have the physical possession and to take care of the child; while *wilayah* is basically, the right to determine matters such as marriage, education, discipline, medical care, career prospects and the like (Al-Zuhayli, 1989). According to Islamic Law, even though *hadanah* is given to the mother, for example, the right and responsibility of the father to make sure that the child would be brought up as a good and successful person in this world and the hereafter are never extinguished. This is based on the concept that the father, as the guardian, should protect the interests of his wards as mentions by Al-Quran:

O you who believe! Save yourselves and your families from a fire whose fuel is men and stones, over which are (appointed) angels stern (and) severe, who flinch not (from executing) the commands they receive from Allah, but do (precisely) what they are commanded. (Qur'an, 66:6).

Generally, it is expected that the one who is given the right of *hadanah* is living not far away from the father who is the guardian of the child. If the parties are living far away from each other, this will cause difficulty for the father to carry out his duty as a guardian as mentioned above. Thus, if a mother who is given *hadanah* wants to move to a place which is far away from the place where the father lives, her right to *hadanah* might be affected. The important reason why she might lose her right is to ensure that the right and responsibility of the father to carry out his duty as a guardian is well protected. According to the *Malikis* (Al-

Asbahi, 1324H), *Hanbalis* (Ibn Qudamah, n.d.), and *Shafiis* (Al-Nawawi, n.d. and Al-Khatib, n.d.), if one of the parents wishes to travel to a far safe place, the child stays with the father whether he is the one who is moving or not unless he is moving to or staying in an unsafe place or travelling to a place that is not safe. However, if travelling is for a short time or for a short distance, within which the father is still capable of seeing the child everyday, or if news about the child can still reach the father, the child may remain with the mother. Thus, the important principle here is that the father, in his capacity as the guardian, is able to see, control, discipline and have general supervision over the child.

From this context, it is understood that it is an obligation on the part of the father especially, to have an access to the child. This can be seen clearly from the above discussion that, especially in the case of a boy (if he chooses to stay with the mother), during the day, the father will bring him to the school, form his character and make him learn a profession. In fact, the jurists do not expressly discuss whether access is an obligation, as it is clearly understood from the concept of *wilayah*, that the separation of the parents does not extinguish the right and responsibility of the father as the guardian of the child. The right and responsibility of the father are not only concern with regard to access but more than that, to ensure that the upbringing of the child in every aspect runs smoothly as what a usual father would do.

Unfortunately, the provision with regard to access in IFLA, similar to its counterpart LRA, does not provide that access should also be regarded as an obligation rather than merely a right.

### **Conclusion:**

It seems that the legal provisions in Malaysia with regard to access are focusing more on its 'right' perspective rather than 'obligation' perspective. Nevertheless, from the discussion, it can be seen that other jurisdictions, such as English and Scottish, consider access not only as a right but more importantly also as an obligation on the part of the parent. This is important in order to ensure the fact that the child's need to be cherished regardless of whether their parents are living together or separately, is not taken lightly by the parents. This is especially true in the case of some parents who seem to forget the fact that they actually have children who are living with other person and these children are waiting and longing for their attention, supervision and love. Thus, it is suggested that, the fact that access should also be considered as obligation and not merely right should be embodied in the current legislations for both Muslims and non-Muslims.

From the Islamic perspective, we may conclude that access is a right as well as an obligation on the part of the parent. It is considered as a right in the sense that the one who is not given custody will have the opportunity to see and visit the child as a way to release his or her longing to the child. It is considered as an obligation in the sense that, especially in the case of a father, it is his responsibility to make sure that the child is brought up as a good person. Thus, his responsibility towards the child in terms of general upbringing, education, discipline, future career etc will never diminish even though the child is living with the other parent.

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