Comparative study on enforcement procedures of family rights
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Annex 9 National Report Denmark

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Introduction
A distinctive characteristic of Danish family law is that competence is often split between an administrative authority and the ordinary courts. The general principle is that non-conflict cases are dealt with by the administration and conflict cases by the courts. Administrative treatment of family law issues is not new in Denmark. Administrative divorce has been possible since the 18th century.

The trend today is that cases should begin with the administrative authorities and only reach the courts if a consensus solution is not found. In this process the administration investigates the case, offers parents counselling and mediation, makes use of psychological expertise and in cases concerning parentage it makes use of DNA evidence. In this process parents are expected to take responsibility for their own family conflicts. Court-based solutions are reserved for those who cannot live up to that responsibility. An exception is decisions on visitation which are made administratively.

At present law reform is pending. A Commission established in March 2005 was to consider the need for reform concerning, amongst others, a stronger child centered perspective in decisions on parental authority and contact, the possibility of enforcing joint parental authority against the wish of one parent, the possibility of establishing shared residence against the wish of one parent and a right for non-parents, for example, grandparents to request contact.

The Commission published its report in May 2006 (Betænkning no. 1475) containing a draft proposal for a revised act on parental authority and contact. At present it is known that this draft act will not be officially presented to the Danish parliament, because there is political consensus to the point that the proposal does not go far enough.

The Danish Minister of Family and Consumer affairs has released a press statement in December 2006 stating that political agreement has been reached on drafting a new proposal, which should contain the principle that joint parental authority is the general rule and that
shared residence orders should be possible. This new proposal for an act on parental responsibility was published 31 January 2007 (Nr. 133 - Forslag til lov omfærældreansvar)¹.

1 Enforcement in domestic cases

1.A Procedures and practices for enforcement in domestic cases

Decisions

According to Danish family law there exist 2 different types of decisions: custody and visitation. According to the proposal (January 2007), a new type of decision is proposed – orders of residence – which in relation to enforcement should be treated as a decision on custody.

The public administrator or judge does not have the competence to make other kinds of decisions, such as concerned with education and medical treatment. This raises the question, who will have competence to issue orders on these issues when the parents have joint custody and disagree. This question is not answered in the new proposal and is not regulated by law.

The legal foundation for immediate enforcement follows from article 478, section 1, number 3, of the Administration of Justice Act (AJA, in Danish: Retsplejeloven - see the provision in the annex). This makes it possible to enforce on the following basis: Judgements and administrative decisions on custody and visitation.

Agreements are made by the parents, not necessarily with the involvement of the court or the administration. If an agreement is made by the parents in private it is a condition that it specifically states, that the agreement should form the base for enforcement. “Immediate enforcement” means that the bailiff has the competence to decide on enforcement if the conditions (as described later) are fulfilled.

It follows from the law that an unmarried mother has the sole custody if nothing else is decided. The enforcement of her custody right follows from AJA article 536, section 2.

¹ New legislation has come into force in Denmark subsequent to the conclusion of the present report. With effect of 1 October 2007 new rules apply to specific issues such as for example holidays abroad for children and the hearing of children.
The AJA is arranged with a chapter describing what foundations (court decisions, agreements etc.) can be enforced, which includes all kind of requests other than family issues. The chapter also deals with time limits as described later in the report (AJA chapter 45, articles 478 - 486). The procedure and the legal effects of the enforcement is described in the following chapters AJA chapters 46 - 48 with a chapter that specifically deals with the enforcements of other requests then pecuniary claims which include custody and visitation (AJA chapter 48, articles 528 - 537).

This arrangement of the act is criticized in the proposal from January 2007 as being disrespectful to the child and it is suggested to gather the different provisions in a single chapter and strengthen the involvement of the child in the decision on enforcement and child experts in the practical arrangement of the enforcement, see below under section 2 and 3.

**Enforceable rights**

If you have an enforceable right (on the basis of a judgment or administrative decision or party agreement) one has to go to the bailiff’s court in order to request that this right is actually enforced. The bailiff is always a judge from the ordinary court system. The decision on enforcement is in every case decided by the bailiff on the basis on the specific circumstances.

It is not possible to draw any general conclusions from case law. In 2002 there were 1422 enforcement cases on custody and visitation in the bailiff’s courts, which have exclusive competence. The cases have been analysed in a research-project on the practice of the Bailiff’s courts in cases on parental custody and visitation rights (Fogedretternes praksis i samvær- og forældremyndighedssager), for which a report has been published in May 2004 website of the Danish Ministry of Justice (http://www.jm.dk).

It follows from the report that the request was made by the father of the child in 80 % of the cases. 72.5 % of the cases were about visitation. The average age of the child was 6.9 years old. In 2/3 of the cases it was possible to uncover the primary caretaker’s reason for not handing over the child. In 28.7 % of the cases the child did not want to be handed over.
In 20.2% of the cases the primary caretaker did not feel that it was safe to hand over the child. In 15.7% the parents disagreed on the interpretation of the decision or agreement on visitation. 61.5% of the 1224 cases were solved at a meeting in the bailiff’s court.

There is an appeal system. The judge is not obliged to give a reason for his decisions during the enforcement procedure, but his decisions can be appealed to the higher ordinary court (there are two appeal courts, covering respectively the East and the West of Denmark). The time limit for appeal is 2 weeks (as an exception 6 months, AJA article 394). Appeal does not stay the decision unless the judge so decides (AJA article 395).

As a main rule the decision of the appeal court can not be appealed. Only if it involves a legal question of general or principal character which may clarify the interpretation of the law. Whether this is the question or not is decided – on request from a party of the case - by an independent authority (Bevillingsnævnet) under the Ministry of Justice. The time limit for an application is 2 weeks (as an exception 6 months, AJA article 392). As an example of a decision which in practice is appealed is the question whether or not the child’s living conditions should be further looked into or not.

When the bailiff receives a request of handing over a child he arranges a meeting in his court with the parties. During this meeting the parties will put forward their views on the matter. The bailiff tries to reconcile the parties, but the general public offer of mediation is organized by the administrative authorities. The effort of the bailiff is limited to his own personal abilities to reconcile the parties and there is no regulation of his efforts.

The mediation of the administrative authorities is arranged by educated mediators and is regulated in the Act of parental responsibility. The bailiff does not have the competence to ask these mediators – or other mediators - into his court. If the bailiff does not succeed in reconciling the parties the bailiff has to consider whether enforcement should take place at once. In case of doubt the court may grant a stay of enforcement pending the procuring of a child welfare report or a talk with the child. The bailiff is not subjugated to the claims of the parties but has to consider the welfare of the child.

The reports by child experts are made by experts from outside the court system. There are no child experts employed within the court-system.
**Supporting orders**

There are supporting orders on the visitation arrangements and supporting orders of the enforcement of custody and the visitation arrangements. There are no supporting orders related to decisions on custody in Danish law.

The first mentioned supporting orders are of limited importance to the bailiff because these in principle should be decided as part of the visitation case. The administrative authorities decide on the amount of contact and how this should be exercised. Consequently, contact may be limited or subjected to conditions such as supervised contact. Supervised contact may only be ordered where unsupervised contact is not possible, and should only be used where it is necessary in the interest of the child. The administrative authorities may also impose other conditions for the exercise of contact, such as conditions concerning the costs and the manner of transportation of the child. If there is a serious risk of abduction, contact may be denied or conditions such as supervised contact or the depositing of a passport may be imposed.

The amount of contact is decided on a case-by-case basis. If there are no special circumstances it is normal to have contact every other weekend from Friday evening to Sunday evening, for 1-2 weeks in the summer, some days at Christmas and Easter holidays and, where possible, 1 weekday in the week where there is no weekend contact. More extended periods of contact are possible, but the administrative authorities cannot decide that the child should spend half of its time with each parent (shared residence).

The proposal from January 2007 introduces a visitation arrangement called “7 days 7 days” which is close to being the same arrangement as shared residence. The only difference is that the parent of residence has competence to decide on more issues concerning the child than the parent with visitation rights, such as the child’s spare time activities e.g. football or piano lessons.

Anyway, supporting orders are in practice made by the bailiff. There is a practice of depositing of passports and a rare practice of supervised visitation. According to case law the judge does not have the competence to decide on a substitution of a period of visitation if the child was not handed over to the parent for visitation according to the legal arrangement. The judge may only make small adjustments to the visitations arrangements. The new proposal
(January 2007) introduces the option of a substitution of visitation. The reason is that the bailiffs have experienced that this may increase the chances of reconciling the parties and may be used as an effective legal response to obstruction of visitation rights.

The second mentioned kind of supporting orders – related to the enforcement of custody and visitation rights (the fine system) is described under section 1B.3.

1B Specific issues relating to the enforcement of family law judgments in domestic cases

Jurisdiction

In Denmark there is no specialized court for family matters. The enforcement of family decisions is made by the bailiff’s court, which is composed as a court with a single-sitting judge. The bailiff has the sole competence in Denmark to enforce decisions on custody and visitation. The appeal system is part of the ordinary system. In general the court system is regulated in the AJA, which in total has 1043 provisions. According to the resent proposal (January 2007), un-experienced judges should not handle the visitation or custody cases alone. There should be an experienced judge on visitation and custody issues on the bench.

According to AJA article 536, enforcement cannot be levied if it would expose the child to serious physical or psychological harm. The resent proposal (January 2007) aims at strengthening the child perspective in different ways. According to the proposal direct use of force is traumatic to children. Therefore, this should not be used without the presence of a child expert. If it is necessary to hand over the child without delay (otherwise it may not be possible) it is acceptable to leave out a child expert.

Today, the judge may call in for assistant from the local public child authorities to protect the child during the direct use of force – or the case in general - but he is not obliged to do so. The parents’ lawyers may also be present in the bailiff’s court. There is no regulation of the lawyers present when direct force is used but it happens in practice. In case of enforcement by physical force the police will take part.

According to the present proposal (January 2007), direct force involves the presence of the bailiff, the police, a representative from the local public child authorities and a child expert.
**Time limits**

A court decision on custody is enforceable after 14 days, unless the decision before that is appealed (AJA article 480, section 1). In case of appeal with in 14 days it may be decided by the judge in the civil/normal court that enforcement should be allowed with no regards to the appeal (AJA article 480, section 2). The time limit of appeal is 8 weeks (AJA article 454). An appeal later than 8 weeks can be under no circumstances accepted by the court. This is different from other civil matters. Generally in civil matters the time limit is 4 weeks with the possibility of appeal after the time limit (with in a year) under exceptional circumstances.

The main rule is that the decision of the appeal court cannot be appealed. Only if it involves a legal question of general or principal character which may clarify the interpretation of the law appeal is allowed. Whether appeal should be allowed or not is decided from an independent authority (Bevillingsnævnet) under the Ministry of Justice. The time limit for an application is 8 weeks (as an exception 1 year, AJA article 371).

Other decisions on custody and visitation are enforceable immediately (AJA article 483). Decisions on visitations always include a certain date and a certain hour and an explicit decision on transportation of the child. Decisions are not enforceable before this moment.

**Coercive measures**

According to AJA article 536, enforcement may be done by use of default fines or by direct use of force. Usually, when the judge in the bailiff’s court receives the case he calls the parents for a meeting and tries to reconcile the parents. The effort of the judge to reconcile the parents is not regulated by law but it is the general practice.

This may be explained from the fact that the parents often are more open for co-operation when the alternative is use of direct force. The judge may postpone the case for a short period to reconcile the parents. A large share of the cases is reconciled. If not, the treatment of the case depends on whether it is enforcement of custody or visitation.

Enforcement of custody rights is often considered as a one-off affair and the judge will not hesitate much with direct use of force. It is different with visitation because the need for enforcement may return every second week or when ever there is decided a period of visitation. First the judge will decide on default fines e.g. 25 euro daily.
Fines may be daily fines or a lump sum (AJA § 536, sec. 3). If the fines do not motivate the parents to hand over the child voluntarily the judge will decide on direct use of force. According to the penal code Article 55 the fines may be transformed into imprisonment and Act of distress (Udpantningsloven) article 1, section 1, no. 11.

There is no legal connection between child support and obstruction of custody/visitation.

The recent proposal introduces visitation with other people than the parents. According to the proposal it is not possible to enforce these decisions by use of direct force. The judge may decide on fines.

Hearing

According to Act on custody and visitation article 29 there is a guiding age-limit – 12 years old - to whether or not a child should be heard. It depends on the specific circumstances involved in the case. It is the same principle as in other family law matters. According to the resent proposal (January 2007) there is no guiding age-limit.

This is in accordance with the spirit of the UN child-convention. In practice, it means an increase in the involvement of the child either through the reports of the child experts or through a conversation with the bailiff with or without a child expert as the bailiff decides.

Transferring parental authority to the other parent

If sole parental authority has been vested in the father or the mother by agreement or a court ruling, then a transfer of parental authority to the other parent in the case of disagreement is only possible when conditions have changed substantially and this is deemed to be best for the child. Although the criterion has been eased, it is still administered with care to prevent the child from being shuttled backwards and forwards between the parents.

In 1996 the obstruction of contact was inserted in the provision concerning the transfer of parental authority as the only mentioned consideration next to the general criterion of what is best for the child. A number of cases concerning the transfer of parental authority have since 1996 dealt with the obstruction of contact, but in none of the cases has parental authority been transferred on the basis of obstruction alone.
A parent who has sole parental authority may choose to relocate within the country or to move to another country. Court approval is not necessary. If the parent shares parental authority the parents have to agree on the relocation. It is not possible to obtain court approval for the relocation instead of agreeing with the other parent.

If the parents cannot agree on the matter, either of the parents can apply for sole parental authority. According to the resent proposal (January 2007), the judge may decide on joint custody and the residence of the child. Thus, indirectly the judge may decide whether or not the primary caretaker is able to relocate without the child’s residence being transferred to the other parent.

2 Enforcement in cross-border cases


1980 Hague Convention

There is a Danish report on the questionnaire from 2004 on Hague Conference’s website. In Denmark the same court decides and the same rules apply in national and international cases concerning the enforcement of custody and visitation. Official figures on child abduction cases in Denmark are established made by the Family-department (see the website www.famstyr.dk, and more specifically www.boernebortfoerelser.dk).

As set out in the report, the legal basis for return orders in Denmark is Act No. 793 of 27 November 1990 on International Enforcement of Decisions, which serves to implement not only the 1980 Hague Convention, but also the 1980 European Convention. No specific measures have been taken in relation to article 20 of the Hague Convention.

For application, Act No. 793 refers to the procedural rules of the AJA, as described above in section 1 of the present report. Since 2003, legal aid has been available also for recovery cases in foreign countries, including non-convention states. Different from ordinary legal aid, the coverage is not related to income situation of the party concerned.

The general conditions of enforcement thus apply, as do the rules on appeal, including the access to extraordinary appeal in principal cases. The point of departure is for the abducting
parent to return the child, but in cases of non-performance the usual remedies for enforcement are available also in return order cases. The enforcement is not subject to separate costs.

The issue of criminal charges raise a difficulty for the performance of return orders. Thus, the fear of liability for criminal charges or sanctions have in some cases prevented Danish abducting parents from participating in the performance of return orders abroad, and subsequently from participation in further proceedings in the country concerned. In order to prevent the reverse, the Danish public prosecutor has in some cases agreed to drop charges against foreign abduction parents coming to Denmark in order to perform a return order.

During the period 2001-2003 a total of 28 cases were dealt with and out of these 17 were forwarded to the courts. Return orders were established in 9 cases, whereas the remaining cases were settled or withdrawn.

Denmark has joined the 1996 Hague Convention on the protection of children, as implemented by Act No. 434 of 8 May 2006, but Danish law does not have any legal basis for safe harbour or mirror orders. The Danish authorities and courts are thus limited to deciding on whether to order enforcement. Presently, there are no examples of enforcement being refused due to risk of domestic violence or other abuse.

Contact orders from other convention countries do not have direct effect in Denmark, but are forwarded by the central authority to the relevant administrative authorities, who may issue a contact order. This decision will be subject to administrative review at the central authority.

The Danish administration relies in general on inter-ministerial working groups for coordination, and such working groups may also include other public and private parties. In the case of the 1980 Hague convention, the working group includes the central authority, the Police, the Ministry of Social Affairs, as well as the Ministry of Foreign Affairs.

One outcome of the working group has been a proposal that administrative mediation should be offered not only in national cases, but also in cross-border cases under the 1980 Hague convention. This does not relate to the possible mediation efforts of a judge hearing a case as set out above in section 1 of the present report.
Furthermore, the website referred to above (www.boerneborfoerelse.dk) has been established in cooperation between the central authority, the police and the Ministry of Foreign Affairs. In connection with the website, which was established in 2004, a hotline has also been established. In addition, Danish representations in other states will refer interested parties to the central authority.

At the regional level, a meeting was held in 2005 for the Nordic countries, including Denmark, Sweden, Norway, Finland and Iceland. Subsequently, a follow-up meeting was held in 2006.

In communicating with other central authorities, as well as with local administrative authorities, the Danish central authority will use both telephone and fax, as well as email. In general, communication functions well, but in some contracting states response appears to be somewhat slow in relation to the commencement of proceedings. However, major problems have not been encountered.

*Regulation 2201/2003*

As a consequence of the negative Danish referendum in 1992 on the Maastricht treaty, a national compromise was established that allowed for a subsequent Danish ratification following a new positive referendum in 1993.

The national compromise established the exercise of several options open to the member states under the Maastricht treaty. One of these options concerned the possible transfer of civil procedure law issues from EU to EC legislative competence. The impact of the national compromise was that Denmark could not participate in any such transfer, but would not obstruct the other member states from carrying out such a transfer of competence.

Subsequently, Denmark has come to an agreement with the EU concerning the establishment of parallel conventions, which at the level of public international law puts into effect some of the new civil procedure regulations in Denmark. This includes the general regulation on jurisdiction and enforcement in civil and commercial cases.

However, no such parallel convention has been established in relation to Regulation 2201/2003 on family matters. This reflects both Danish concerns with the sovereignty issues
related to family matters, as well as reluctance at the EU level to allow for an unlimited ad hoc access for Denmark to such parallel conventions.

2.B Law and practice with regard to enforcement of family law judgements other than return orders

Membership
Denmark is a member of:
- The Nordic Convention on Marriage (1931) and a Nordic Act on recognition of Nordic judgements (1932) The Hague cooperation seems to have a greater success than the older Nordic cooperation. It could be because the Hague cooperation includes central authorities.

Other legal regimes and case law
As set out above, Denmark is prevented by the national compromise in undertaking direct participation in the Community instruments on civil procedure, including Regulation No. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.

There are no other relevant provisions or case law relevant for enforcement in cross-border cases. It is not clear whether or not a foreign legal custody right based on the law should be recognized with out any formal procedures in Danish law. If the court would recognize such a right, it becomes enforceable according to AJA article 596, section 2.

2.C Specific issues relating to the cross-border enforcement of family law judgments
The difficulty in applying both parental and children rights in specific cases have been illustrated by a case concerning agreements between parents concerning the stay of a child in a specific country.
In the case concerned, where the parents had joint custody, they had agreed that the mother and child would move to and stay for 1 year in Denmark, while the father remained abroad. After 6 months, the mother decided to apply for sole custody. In response the father requested return of the child under the 1980 Hague convention.

The issue of custody was suspended in accordance with article 16 of the convention until the issue of possible return could be decided. In dealing with this issue, the Danish courts based themselves on the fact that the presence of the child in Denmark was not illegal under article 3 of the convention, as it was still within the 1 year agreed between the parents.

In addressing the substance of the custody issue, the Danish courts found that the mother should be rendered the sole custodian as requested by her. At the end of the agreed 1 year period, the father, although now deprived of custody, applied for the return of the child, but his request was not accommodated.

In hearing the case on the return, the Danish courts found that the agreement between the parents could not be given substantial consideration. Instead the decisive element should be the actual circumstances of the present habitual residence of the child.

In reviewing these circumstances, the Danish courts paid due notice to the efforts of the father in trying to maintain relations with the child during the agreed stay in Denmark. However, the courts found that under article 12 of the convention, return should be denied. The courts found that the habitual residence of the child was now firmly established in Denmark after having staid legally for one year.

There is little doubt that this result must have appeared unfair to the father, having agreed originally to the stay limited to a 1 year period. The convention does not explicitly point to whether the decision of the Danish courts was the correct decision in the circumstances. Nor does it seem clear that the decision, viewed in a longer perspective, will have a possible negative impact on the amicable management of joint custody cases. Subsequently, the case was decided on appeal in favour of the father.
Annex

The two articles set out below are most important articles of the AJA (Retsplejeloven). They are not available in an official English translation, and the following text should be considered only as an indicative translation.

AJA (Retsplejeloven) Article 478

Sec. 1 Enforcement may be carried out on the basis of

1) judgements and orders rendered by courts or by other authorities, where the decisions of such authorities may be enforced, as well as countersigned claims for payment according to Article 477 e, section 2, and decisions on costs made by authorities mentioned above,

2) settlements agreed before the authorities referred to in subsection no. 1, as well as settlements agreed during the negotiation of conditions according to the Act on the entering into and dissolution of marriage,

3) agreements on custody according to the Act on parental custody and visitation, decisions on custody and visitation made by the administrative authorities, as well as court settlements on visitation when an agreement explicitly indicates that it may serve as the basis for enforcement,

4) settlements outside of court concerning due debts, when a settlement explicitly indicates that it may serve as the basis for enforcement,

5) letters of debt, not covered by sub-section no. 4, when a letter of debt explicitly indicates that it may serve as the basis for enforcement,

6) letters of mortgage; however for letters of own debt and letters of guarantee, only when the amount of debt and the due date has been agreed to by the debtor, or may clearly be deduced from the circumstances,

7) letters of exchange as far as claims related to exchange claims are concerned, and checks as far as reclaim issues are concerned.

Sec. 2 Attachment may furthermore take place in relation to claims for which the legislation affords a right of attachment.

Sec. 3 The right to enforcement is also afforded any person with a right of immediate security on a claim.

Sec. 4 In cases mentioned in sub-sections no. 4-7, enforcement may take place against any party who by signing the document have recognised the obligations as debtor,
personal guarantor, or grantor of security.

AJA (Retsplejeloven) Article 536

Sec. 1 Decisions on parental custody and the exercise of visitation rights may be enforced by use of persuasive fines or by direct force. In choosing the method of enforcement, the Bailiff's court is not bound by the request of the applicant. Enforcement may not take place, if this will lead to substantial danger for the mental or physical well being of the child. In case of doubt, the Bailiff's court may stay the enforcement in order for an expert opinion to be procured.

Stk. 2 The Bailiff's court may call on an independent person, possibly a representative of the local authorities, to represent the interests of the child during the case. The Bailiff's court may grant a shorter stay to the proceedings in order for a surrender of the child to take place or for visitation rights to be exercised.

Stk. 3 In case of the use of persuasive fines, the Bailiff's court will set daily or weekly fines that will apply until the child is surrendered. In case of the enforcement of visitation rights, a single fine may be set, which will become due when a decision on visitation rights is not respected at an indicated moment in time.