

Custody of Children in Sweden

Recent Developments

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Abstract

New legislation on Custody, Residence and Access came into force on 1st October 1998. The most important changes include the courts' power to issue a joint custody order, including joint physical custody, against the wishes of one of the parents, to decide on the child's place of residence and visitation under joint custody, the Social Welfare Board's authority to accept the parents' agreement on custody, residence and terms of access to the child. In Sweden there is very little room to question the benefits of joint custody. Nevertheless some concerns are raised.

Introduction

Law cannot put an end to family conflicts, unfortunately. Irrespective of the form of the law, some family relationships are greatly affected by family disputes. Both children and adults will fare badly. However, the law may help to reduce the effects of a destructive family situation by providing more or less sophisticated forms of dispute settlement within the family.

One way of reducing family conflicts is by accepting the existence of separation and divorce. Statistics show that the Swedish population has to a large extent accepted this as a way of resolving family conflicts. For example, Sweden tops the EU's divorce statistics.¹ If, however, children are involved, the picture is more complex. The easier it is to get out of a relationship which involves only a partner, the harder it is to get rid of a fellow parent. It is not that there are any harsh restrictions on the right to divorce for couples with children. But after a divorce or a break up, parents are strongly recommended to continue co-

¹ Approximately 21 000 women were divorced in 1996 (33 500 were married).

operation in raising their children within the framework of joint custody.² The possibilities of obtaining sole custody are, for better or for worse, increasingly restricted. This has been made apparent by the new legislation on custody which came into force on 1st October 1998.

The new legislation is comprehensive, the most important changes including the courts' power to issue a joint custody order against the wishes of one of the parents, to decide on the child's place of residence - including joint physical custody against the will of one of the parents - and contact under joint custody and the Social Welfare Board's authority to accept the parents' agreement on custody, residence and terms of access to the children.³

In Sweden the benefits of joint custody are generally taken for granted. I will nevertheless venture to raise some objections. I start by outlining the law in relation to conflicts on custody between parents (part I). I then discuss the distribution of rights and duties when the parents have joint custody but do not live together (part II).

PART I

Transfer of Custody

An explicit objective of Swedish custody legislation is to influence the exercise of parenthood regardless of whether any risk of a custody litigation exists or not. There are many reasons as to why legislation on custody has come to be dominated by provisions with a normative objective. One reason is the belief that the use of legislation as a pedagogical tool reduces the need of legislation for solving conflicts. Instead of turning to the court for settling custody disputes, parents are expected to solve their conflicts themselves, perhaps with the help of the social services. To a certain extent this is a reasonable expectation, but it cannot be expected to be met in each and every case. In relation to the number of separations and unmarried parents in Sweden, disputes on custody have decreased dramatically, but they are not going to disappear completely.

A striking feature regarding custody issues are thus the efforts made to keep disputes on custody away from the courts. This goal is clearly expressed in the *travaux préparatoires* for the 1998 legislation. The new law aims at relieving the pressure on the courts and creating better conditions for voluntary agreements. This is done by highlighting the possibilities of solving custody-related conflicts through co-operation talks (Ch. 6, s. 18 of the Code on Parenthood). The possibility of register binding agreements on custody with only the consent of the social services (Ch. 6, s. 17 a CP) as well as the courts' ability to issue a joint

² Parents have joint custody for children born in wedlock. Unmarried parents are encouraged to obtain joint custody by registering an agreement. Joint custody is registered by more than 90 % of unmarried cohabiting parents. In cases where the parents do not cohabit or the paternity is contested joint custody is registered for 45 % of the children. All in, all 20-25 % of children in Sweden have parents who do not live together. Parents share legal custody for about 40 % of these children. See Statistik - Socialtjänst 1996:2.

³ Official Statutes Publication 1998:319. A proposal on automatic joint custody for unmarried parents is due in October 1999.

custody order against the wishes of a parent (Ch. 6, s. 5 CP), are also seen as important tools for creating better conditions for voluntary agreements. The ambition to keep custody issues out of court is based on the premises that mediation is cheaper than court proceedings, and out of court mediation is considered to give better results than dispute settlement before the court. In contrast to court proceedings, mediation is believed not to increase the hostility between the parents. In other words, out of court mediation is perceived as being more consistent with the child's best interests.

The financial argument is consistent with budget tightening in Swedish society as a whole, including the judicial system. The recent legal aid legislation is intended to reduce legal action before the courts and the state's expenditure on legal aid.⁴ This is achieved by making general legal aid secondary to the legal protection of private home insurance. This means that a parent relying on legal aid, who in an earlier custody dispute would have paid a means tested fee, now pays a non-means tested fee (normally 20% of the actual cost). Consequently, economically weaker groups are more vulnerable. In custody litigation the economic vulnerability increases as the winning party does not get compensation for legal costs and there is a far-reaching possibility to have the case re-examined. Doubts have even been expressed regarding the new legislation on grounds of sexual equality, insofar as women as a group have smaller financial resources than men.⁵ Such apprehensions are especially prevalent as regards custody conflicts, since the parties are typically a man and a woman.

The second goal of the new legislation was to create improved conditions for safeguarding the child's interests in custody disputes. It is strongly felt that this is best done by promoting joint custody. Joint custody is believed to safeguard the child's contact with both parents.⁶

The Child's Best Interests in Relation to the Transfer of Custody

In Sweden, as in most other Western countries, custody disputes are settled by a discretionary judgement of the child's best interests. Despite the fact that in each case an individual judgement is made, certain interpretations of the child's best interests are included in the legislation. The most important of these is the presumption for joint custody. The importance of the presumption for joint custody is as we have seen emphasised by the fact that the court may issue a joint custody order against the wishes of one of the parents.

With reference to the rules of evidence, it can be observed that the burden of proof falls on the party that has claimed a result contrary to the existing presumptions. A parent who claims sole custody has to show why sole custody would be more compatible with the individual child's best interests than joint

⁴ Official Statutes Publication 1996:1619.

⁵ Bill 1996/97:9 p. 96.

⁶ A child typically has more contact with the non-residential parent under joint custody than under sole custody. However, during the 1990s the differences have been reduced. Still, only 13 % of the children with joint custodians have contact less than once a month, compared to 25 % of the children under sole custody. SCB Rapport 89 p. 24. SCB 1995:1 92 f.

custody, in accordance with the main presumption. What will then a parent claiming sole custody have to come up with?

Since little case law has yet been accumulated related to the new legislation, this is difficult to know. According to the *travaux préparatoires* joint custody against the wishes of one parent should be ordered only "with great care and consideration".⁷ It is expressly stated that it must not be ordered against the wishes of a parent in two situations. The first is if the other parent is considered unsuitable as a custodian. This may be the case if the parent has been guilty of assault against the child or the other parent. The second reason is if the conflict between the parents is so severe that it is impossible for them to co-operate.⁸ Neither the legislation nor the *travaux préparatoires* gives any further guidelines as to what proof is expected if a parents denies charges of assault or co-operation difficulties. According to what published case law there is, it takes a lot. Joint legal custody is ordered against the wishes of mothers claiming severe co-operation difficulties at least partly due to domestic violence.⁹ At this stage, the conclusion must be that the parent claiming sole custody or refusing joint custody has reason to doubt the success of such a claim.¹⁰

If, however, litigation has been initiated and the court finds that joint custody is not desirable, or if under the new law the court is to decide with whom the child should live, certain other criteria are used for the interpretation of the child's best interests.

In such cases, the child's need for *stability* and *contact* are considered important. Contact with the biological parent with whom the child does not live with is encouraged (Ch. 6, s. 2 a PC). In the *travaux préparatoires*, the importance of contact is emphasised and the unwillingness of a custodian to contribute to the child's meeting with the other parent can result in the lost of custody. This may occur even if the child is very young and no substantial criticism can be directed towards the parent who has custody, other than that he or she has not contributed towards the establishment of contact.¹¹ Contact orders are imposed without much hesitation.¹²

Along with these presumptions, great importance is now to be attached to the child's wishes in the event of the transfer of custody. This is the case even when the parents agree on joint custody.¹³ Unfortunately, the emphasis on the child's wishes does not mean that the fundamental difficulties in interpreting a child's

⁷ Bill 1996/97:9 p. 50.

⁸ Ibid. p. 49.

⁹ Svea Court of Appeal T84-98, Övre Norrland Court of Appeal T87-90.

¹⁰ According to statistics from 1992 the outcome of *retrials* on custody between parents previously married before the civil courts of first instance, was the following: In 35 % of the cases the parents reconciled on joint custody, in 46 % of the cases the mother obtain sole custody, and in 19 % the father. In litigation between parents who had never been married, joint custody was agreed on in 41 % of the cases, the mother obtained sole custody in 37 % of the cases, and the unmarried fathers in 22 % of the cases.

¹¹ See for example Göta Court of Appeal 970710 t161/97.

¹² The emphasis on the child's right to contact with both parents (Ch.6, s.15 PC) does not prevent access from being a right for the parent in proceedings on enforcement (Ch. 21 PC).

¹³ Bill 1994/95:224 p. 35. Svea Court of Appeal T749-98.

wishes has been solved. One such difficulty is the fact that evaluation of the child's wishes is dependent on its age and maturity. Yet more troublesome is the evaluation of the child's wishes when the child has been more or less openly pressured into choosing one of the parents. According to the *travaux préparatoires* the child should not have to take a stand in the parents' conflicts. However, the Supreme Court has used the wishes of the child as ground for deciding custody cases even when it appears that the child has been pressured to take a stand for one of the parents.¹⁴

The increased legal significance of the child's wishes is seen as a further means of making parents mediate.¹⁵ It should remind parents that custody disputes concern children and their needs. Parents are hoped to understand that a continued conflict is not in the child's interests and they should therefore reach an agreement on joint legal custody. However, if the parents do not reconcile, the child's wishes provide one of the two prerequisites as defined by legislation in the settlement of custody disputes when joint legal custody is no longer an alternative, or when the question of the child's residence has to be settled.

To sum up, the development over the last decades can be described figuratively in terms of the legal system's abdication. Until 1977, when joint custody was made possible for unmarried couples, it was up to the courts, in each divorce case involving children, to settle the parents' dispute and award one of them sole custody. With time, the court's task as regards custody disputes has become to ensure that joint custody is not manifestly incompatible with the child's best interests. From being cases to be settled by the court, custody conflicts have become the subject of the parents' own conflict-solving abilities. Presently, we are faced with an increasing tendency to rely on the capacity of the child to solve the conflict by taking sides with one of its parents.

Part II

The Scope of Custody

Since the mid-1970s, the law regarding transfer of custody and custody disputes has been ahead of the social development. Instead of responding to the existing needs, the law aims to lead the way. An outspoken ambition behind the legislation is to influence the behaviour of parents. Parents should be "raised" to be "better" parents, capable of solving their own custody disputes.

In other areas, however, the development does not keep up with the changes promoted by the family legislation. One such area is the division of rights and duties between the parents who have joint legal custody, but do not live together. This division has remained basically unchanged since the 1920s when joint custody was introduced. In those days it included only married parents and did not cover guardianship. It is evident that the current situation with a growing group of unmarried or divorced parents having joint legal custody but not living together was not in the mind's of the legislators in the late 1910s.

¹⁴ Nytt Juridiskt Arkiv 1995 p. 398 see also Nytt Juridiskt Arkiv 1992 p. 93.

¹⁵ SOU 1987:7 p. 85.

When joint legal custody for unmarried or divorced parents was amended in the 1970s and further promoted in the 1980s and 1990s the legislator neglected the division of parental rights and duties. Instead, it was stressed that the best interests of the child demanded that joint custody should be ordered only when the parents were in sincere agreement. It was argued that, provided they had reached such an agreement, unmarried and divorced parents were able to solve custody-related problems equally well as married parents. Thus it was not found necessary to introduce new legislation concerning the extent of joint custody.¹⁶

Joint Legal Custody

Under Swedish law parents' legal rights and duties are constructed as an "either or". If a parent does not have a share in the legal custody, his or hers rights and obligations towards the child are limited to the right to visitation, a right to information, and a duty to contribute to the support of the child. The custodian has a duty to facilitate visitation.¹⁷

If a parent shares legal custody, he or she participates in all the rights and obligations of a custodian, regardless of the actual contact with the child. Consequently parents with joint legal custody are obliged to exercise their rights and duties together. All decisions regarding the custody should be taken jointly. Only if it is manifestly important in terms of the best interests of the child that a decision is not delayed, may one of the custodians decide on her or his own (Ch. 6, s. 13 CP). The parent with whom the child lives has a right to make what has been labelled as "everyday decisions". There is no definition of what constitutes such an everyday decision.¹⁸

A suggestion to clarify responsibilities when the custodians do not live together was turned down during the enactment of the 1998. The reasons that were given are slightly contradictory. Firstly, it was postulated that there was no need for further clarification. Secondly, it was held that it was difficult to clarify the issue and that there was a risk of further aggravating the parental conflict.¹⁹

¹⁶ An exception is child support, which must be paid by a custodian not living with the child.

¹⁷ The impact that the child's wishes have on custodial conflicts is not reflected on the exercise of custody. The custodian's legal rights in relation to the child are only marginally restricted by the child's own right to self- and co-determination. The rights of a child pursuant to the Code on Parenthood are the rights to care, security and a good upbringing, as well as the right to be treated with respect for its person and individuality. The child also has the right not to be subjected to physical punishment and other degrading treatment. If the custodian's responsibility demands it, the custodian has a duty to limit the child's freedom of movement. The custodian may not exercise custody in such a way that the child's physical or mental health or development is endangered. If this occurs, the custodian's authority may be greatly restricted by the child's placement under compulsory care in accordance with the Special Provisions for Care of Young Persons Act (1990:52). In cases of severe maltreatment or if the child is well-established in the foster home, custody could be transferred to the foster parents (Ch.6, ss. 7,8 PC). See further notes 25, 26.

¹⁸ Bill 1997/98:9 p. 55.

¹⁹ Bill 1997/98:9 p. 55.

The first argument, that there is no need for clarification, is easy to contradict – it has actually been done in the very same Bill.²⁰

One example of the need to clarify the division of rights and duties between joint custodians is child support for children of single parents.²¹ For a custodian to be able to obtain maintenance support, the child must be registered at the custodian's nationally registered address. It is not sufficient that the child actually lives with the custodian. If custody is held jointly, both custodians have to agree to a change in the child's nationally registered address. If they cannot reach an agreement the child is deprived of child support, at least until the authorities have investigated the case and if necessary, changed the address on its own initiative. Thus regarding the division of power between the parents, the decision of the non-residential custodian is given more importance than that of the parent living with the child.

Yet, in other situations it is quite the opposite. A custodian not living with the child may have limited possibilities to influence the upbringing of the child against the will of the custodian with whom the child lives. Some of these difficulties have been tackled in an Appeal Court's decision.²²

A divorced couple had joint custody of their daughters, aged 13 and 14. The children lived with their father. The mother was concerned about the way the father was raising the children. Among other things she was worried about the girls' drinking habits. On New Years' Eve, knowing that the father had left town, the mother called on her daughters. They refused to let her in. The mother saw bottles of liquor on the table. She then broke a window and climbed in. The girls and their friends escaped through the backdoor. In court, accused of unlawful entering inflicting damage, the mother justified her actions by her responsibilities as a custodian. It was judged that her actions were within the responsibilities of a custodian. Since the father was not present, she had the right to take action alone. But her parental responsibilities were not sufficient to make her behaviour constitute necessity in the sense of criminal law, why she was found guilty. However, she was granted total remission of sanction.

According to the sentence a custodian not living with the child is restricted in his or her ability to protect the child if the child exposes itself to dangers in the other custodian's home. The value of a parent's share in legal custody may thus be questioned. But the situation is unsatisfactory also from the perspective of the residential custodian. Since total remission from sanction was granted, the case indicates that a residential custodian is only protected to a limited extent against violations of the domestic peace by the co-custodian.

Under joint custody the custodian living with the child is thus dependent on the co-custodian's approval for the exercise of the actual custody. The co-custodian may exercise such influence on the *de facto* custody, and the life of the residential custodian, that it may be hard to justify it by his actual contact with the child. Apart from the situations indicated above, the custodians must both

²⁰ Bill 1997/98:9 pp. 57.

²¹ Official Statutes Publication 1996:1030.

²² RH 1996:144.

give their consent to, for example, health care of the child,²³ to dispositions of savings for the child, issuing the child's passport, school matters and religious matters.²⁴

As mentioned above, the suggestion to clarify the division of rights and duties between the residential and the non-residential custodians was turned down, partly because such an undertaking would be difficult. Nevertheless, with the limited possibilities of obtaining sole custody under Swedish law, I believe it is worth taking the trouble.

Concluding Remarks

As with all custodial arrangements, joint custody has its advantages and disadvantages. The advantages include the fact that it encourages contact between parent and child. The respect for the parental autonomy it indicates may be considered as another advantage. Yet, in situations of grave conflict this might be seen as a disadvantage. The presumption for joint custody in all cases except in cases of abuse or real animosity certainly discourages litigation. Instead, parents are encouraged to seek co-operation talks and to reach agreements with the assistance and approval of the Social Welfare Board.

The obvious disadvantage of the Swedish model of joint custody is the risk of continued conflict because of the demands of close co-operation. Another difficulty not mentioned in this paper previously, is the financial aspect. Joint custody has been identified as a middle-class arrangement. If nothing else, it assumes certain financial circumstances. If these are not met, the child will experience a lower standard compared with what would have been the case had the family lived together or, in certain instances, had one of the parents had sole custody. The latter is especially true if the child has dual residence – a custodial arrangement highly approved of. Irrespectively of the parents' financial circumstances, child support is not to be ordered in such cases.

²³ The position of the mature child is blurred. In some regards Sweden has clearly reached "the post-Gillick era". Children have the right to be granted contraceptives - and abortions - without the knowledge or consent of their custodians. (The Yearbook of the Parliamentary Ombudsmen 1992/93 pp. 439.) In other areas children are normally not given treatment without consent of the custodians. One such area is psychiatric care.

²⁴ Children may not enter or leave the Swedish Church or registered religious communities without the consent of the custodians.